U.S. Department of Commerce

Legal Conference
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Welcome and Introduction
Lily Fu Claffee

Good morning. I'm glad you all could make it. It's great to see this group all collected in one room. We have planned today what we expect to be an excellent program, which will get started in just a few minutes. But before we do, I just wanted to say a few words about the conference. As Ryan says, we've entitled the conference, *Legal Leadership*: *2008 and Beyond*. And we did that in order to capture two important themes. The first theme is the most obvious one; it's right in the title – *Legal Leadership*.

But what do we mean by "legal leadership"? Do we mean Supreme Court's and above, or do we mean 15's and above? No. By 'legal leadership," we mean, the ways in which lawyers, because of their training and their temperament, are naturally suited to be, and oftentimes naturally thought of as, leaders in their respective organizations.

And I know that we've all seen this happen in our own organizations, organizations naturally gravitate toward their smartest, their most objective, their toughest, most ethical, most broadly educated members for leadership and guidance. And as lawyers, we are trained especially to collect and weigh facts, to discern the rule of law, to apply that rule of law to the facts, and to render independent and objective judgments on the matters that are brought before us.

These core legal competencies that we got when we got our J.D.'s and that many of us have honed over our years of practice are exactly the kinds of things that suit us well for being leaders in our organizations for assuming roles of responsibility, for assuming roles of accountability, and for decision-making. So that's what we mean by legal leadership.

The second theme of the conference today is the importance of leadership in general in times of change and transition. Harvard Business School Professor John P. Cotter, in his famous 1990 article, *What Leaders Really Do*, described the contrast between management and leadership in the following way. He said, "Leadership is different from management, but not for the reasons that most people think. Management is about coping with complexity. But leadership, by contrast, is coping with change."

Modern, complex organizations like the Commerce Department face new challenges every day due to fast-shifting conditions in the world, especially recently – fast-shifting conditions in our economy, in our laws, and even in our leaders. Some have dubbed these types of challenges 'adaptive challenges,' because they require large organizations like this one to mobilize many, many people quickly, to grasp change conditions, to

internalize them, but also to draw on their institutional values to come up with new strategies and new ways of operating.

There's a natural disinclination of people to change. So strong leaders are the ones who are able to motivate their organizations and the collective intelligence of their organizations to deal with these adaptive changes. And the best leaders are ones that actually help their organizations more than survive, but thrive, in new business environments.

So how does this apply to all of us? So, you know, we're just lawyers, right? Well, I've had an opportunity to meet a great many of you in this room now. I've been trying to go around to all of your offices and attend your staff meetings. I have a few offices yet to go, and I hope to do that before the end of the year. But I also asked the senior legal managers in all of your offices to sit down with their attorneys and talk to them about their views on their careers, their work, their clients, the work of this agency, and then to summarize what they heard for me and for each other so that we can get at sort of a snapshot of who we are as a legal organization.

And I can't pretend, having been here six months, that I have a complete grasp of who we are as an organization of lawyers, but even with the small amount of information I do have right now, I can make a few observations. This agency is large and it's extraordinarily complex, and the functions that you all in this room serve is similarly large and complex. Second, I have seen deep stores of talent and commitment throughout our attorney ranks here at Commerce. To a person, I have perceived that our lawyers are serious, they are substantive. They work under a lot of time pressure oftentimes, and they work under resource constraints, but they do it with accuracy and speed and grace

Third thing I've noticed is, Commerce lawyers are actually very strongly aligned with their clients. They have a great deal of common with them. And clients have told me that they see you as leaders in their organization. And fourth, while Commerce attorneys tend to have probably their strongest affiliations with their clients, there is also a very healthy amount of interaction between lawyers across offices in Commerce, and it's the type of interaction that can be fairly said to constitute a distinct legal culture that belongs uniquely to the lawyers here at this agency.

And having this type of distinct legal culture that belongs to the lawyers specifically and that recognizes the importance of legal leadership would be a lot less critical if we were in an organization that does not go through as many changes as Commerce does, or if it didn't have to meet as many adaptive challenges. But the fact is – and I don't need to tell this group that this is true – even in times when there is not a change in presidential administration on the horizon, is one of the most dynamic in the federal government, and it must adapt to fast-moving changes on a daily basis.

Even in my short time here, I've now, countless times, sat across lawyers from NOAA, from NTIA, from NIST, from ESA, just to name a few, and have been told that the rules of the game that we previously understood have suddenly changed, and now the attorneys

are being called on to rapidly help their clients reengineer, reorganize, redesign or just plain-out rethink some major part of their program.

Because I believe that there is a value in having Commerce attorneys self-identify as members of a cohesive legal organization, and because there is strength to be drawn from being a member of a group that is charge specially with providing objective, independent advice to clients, we wanted to have a conference that would specifically reinforce our identity as lawyers, and to spotlight our roles as leaders in our organizations.

As we head into transition, we wanted to set aside a day when Commerce attorneys could spend time together as members of a group, and to take time out to recognize the commonalities of our profession, to reflect on past successes, and to take stock of the challenges that are ahead. To help us do that, we will hear from a number of distinguished attorneys today who have themselves exhibited legal leadership in a variety of public and private careers. These people are legal leaders who have helped their organizations and their country meet adaptive challenges through the decades. I hope that you'll be inspired by their remarks, and I hope that as they recount their experiences, you will see in them aspects that are similar to your own.

With that, I'd like to thank you. Please enjoy the conference. And if Jane Luxton would come and introduce our first speaker, we can get started. Thanks a lot.

The Work of the Office of the Solicitor General

Jane Luxton, General Counsel, NOAA

Good morning. I'm Jane Luxton. I have the honor of introducing Paul Clement, our first speaker. Paul, as I think most of you must know, was the 43rd Solicitor General of the United States serving from June, 2005 to June, 2008. During that time, Paul was distinguished many seasoned court observers as not only for the quality of his arguments and his consummate skills, but for what seems to be a fairly unique ability to have delivered entire complex arguments without notes. And quite a few people were incredibly impressed in a Bar that is impressive, to say the least.

Before Paul's confirmation as Solicitor General, he was acting SG for nearly a year – Principal Deputy SG. He has argued 49 cases before the Supreme Court, including *McConnell v. FEC, Rumsfeld v. Padilla*, *United States v. Booker*, and perhaps of particular interest to us here at Commerce, the *Grokster* case. He also filed petitions in two other cases of particular interest to us, the *Navy Sonar* case, and *Eurodif*.

Paul received his bachelor's degree summa from Georgetown, where he is now a Visiting Professor of Law. He also has a Master's degree in Economics from Cambridge University, and graduated Cum Laude from Harvard Law School, where he was the Supreme Court Editor of the law review.

Following graduation, Paul clerked for Judge Silverman on the Court of Appeals for the D.C. Circuit, and for Justice Scalia. After his clerkships, he was an associate at Kirkland & Ellis, went on to serve as Chief Counsel of the Senate Subcommittee on the Constitution: Federalism and Property Rights, and the place where I first knew Paul, he then became a partner at King & Spaulding. We started as new partners together, and went through new partner training. He headed the appellate practice at K&S.

So without further words, it's my privilege to welcome Paul Clement, and I think we're all interested in what he has to say. Thank you. [*Applause.*]

Paul Clement, Former Solicitor General
Visiting Professor of Law, Georgetown University Law Center

Well, thank you, Jane. It's very good to be here. Sometimes I worry – I get introduced as having done Supreme Court arguments without notes, and then I go to the podium with a bunch of notes. But today, actually, I don't need notes, and that's because what I'm going to try to talk to you about a little bit is an institution that I've grown very nostalgic for over the last couple of months since I've left the Office of the Solicitor General.

And that IS the Solicitor General's Office. So what I wanted to do this morning, and what Lily asked me to do – more to the point – is to share a few thoughts about kind of the work of the Office, and a few thoughts about how the lawyers at the Commerce Department can sort of help us, or help the Office, do the job that I think is an important job for the Office of the Solicitor General even better. So those are the simple thoughts I will share. I hope if this works out, that we can have a little time for questions, as well, if there are questions that folks have.

But let me start off by saying, this is a sophisticated audience, so you're going to have a good sense of what the Solicitor General's Office does, what the SG does. In most audiences, if you ask people what the SG does, you're likely to get a response like, "Well, isn't that the person who puts warning labels on cigarettes?" And then I have to explain, "No, that's the other SG – that's the Surgeon General."

And if you've got people, though, to the point where they could actually identify the correct SG, and ask them, "Well, what does the SG do?" the most I think you would get from most people is, "Well, that's the person who represents the United States, and principally, the Executive Branch of the United States, before the Supreme Court of the United States." And that is, of course, true. I think if you talk to people in the office, that's the opportunity to argue cases in the Supreme Court of the United States. It's generally what draws lawyers to the Office in the first instance.

I think it's also the highest professional honor for all of us who have ever been in that Office, because it is a remarkable achievement to go to the Supreme Court and argue a case. It's an even more remarkable achievement to do it when your client is the United States of America. And so I think for every lawyer who has ever served in the Office and

had that opportunity, arguing cases in front of the Supreme Court is really a very big professional deal.

But I guess if I leave you with no other thought this morning, it's simply that that opportunity to argue cases before the Supreme Court is just the tip of the iceberg. And it's the rest of the iceberg, the day-to-day work of the Office of the Solicitor General, that is, if anything, more important – and I think also, probably, the kind of work that you are more likely to interact with the Office on. I mean, it is possible that lawyers at the Commerce Department may get involved in a case that goes all the way to the Supreme Court, and the lawyers will be involved in the moot court process and the process of briefing the case. But that's a little bit like lightning striking. That doesn't happen to everyone.

But interacting with the Office on some of the other day-to-day work of the Office is something that probably is much more common experience, so let me talk a little bit about what the rest of that iceberg looks like. And I'll also make specific reference to a couple of cases where I've gotten the opportunity to work with the Commerce Department over the last couple of years.

One big part of the rest of the work of the Office is the process of *getting* cases to the Supreme Court for argument; deciding which cases in which the United States has suffered a loss in the court of appeals we should take up to the Supreme Court of the United States. Now, I always find it kind of helpful to contrast the process here in the private sector, to which I'll be soon returning, and the process in the public sector, where I've spent the better part of the last seven years.

In the private sector, what typically happens is, the phone rings and there's a general counsel from some corporation or some organization, and the general counsel says something like, "Paul, we've just gotten this horrible result from the court of appeals. It's a disaster. We have to take it up to the Supreme Court of the United States." And in my private sector role, as Jane could attest, my answer almost all the time – maybe not uniformly all the time, but certainly more often than not – was, "You're absolutely right. This decision's a disaster. We have to take it up to the Supreme Court of the United States."

Now, why is that? It's not because I thought, "Well, definitely, this is a case that the Supreme Court will take, because I'm familiar enough with the basic numbers. The Court is asked to take cases a little over 7,000 times a year. The last couple of years, they've been taking seventy or eighty cases. So that works out to about a one percent chance that any petition is going to be granted by the Supreme Court.

A big part of my motivation for responding that way is, of course, I know full well that if I try to be the voice of reason here and talk the client out of filing a *cert* petition in the Supreme Court of the United States, that general counsel has other numbers on his or her speed dial. I ran into Andy Pincus as we were walking in. He's lurking in the back. *He's* on that speed dial. So by trying to talk the general counsel out of it would be good for Andy's business, but not so hot for my own.

So that's the way that the process tends to work in the private sector. Now, in the public sector, interestingly, it starts exactly the same way. So I will often get a call from somebody in Lily's position at one of the agencies, and they will say, "Look, Paul, we just got this terrible result. We have to go up to the Supreme Court of the United States."

That's really where the similarity ends, though, because at that point, the onus is on the general counsel and the legal office to prepare a memorandum that explains why *was* this decision so disastrous? Why was it wrong in the first place? What are the consequences for the agency? Are there ways that the agency could fix it without going to the Supreme Court? If it's a regulation, would it be possible to promulgate a new regulation or to amend the regulation or to clarify the regulation? Those are the kinds of considerations that we're looking for in deciding whether to take the case up.

Once we get that memo, we would, of course, notify other potentially affected agencies. So if you had a case that hypothetically involved a patent issue, you might also make sure that the Copyright Office was notified to see whether or not they had a view of related issues, of potentially affected issues. Then the memorandum will most principally go to the Justice Department in the Litigating Division of the Justice Department most directly responsible for that matter.

So on most of the Commerce Department materials, a lot of that would go to the Civil Division; for some of Jane's work, it would go to the Environmental and Natural Resources Division. And the Division would work up its own independent analysis – again, really going, without a thumb on the scale, to try to figure out the best view of whether the decision below is incorrect, whether it's *cert*-worthy, whether it's something that we can fix without getting the Supreme Court involved in it.

Those materials will go to an Assistant to the Solicitor General. He or she will do their own independent analysis of *cert*-worthiness, correctness, and all these other various factors. It'll then go to a Deputy Solicitor General, who will either do an independent analysis, or at least annotate the memos. And at that point, it comes across the desk of the Solicitor General.

Now, I don't have the direct statistics at hand, the specific statistics, what I can tell you, though, is contrary to the private sector, the overwhelming majority of the time, when the initial recommendation is, we take a case up to the Supreme Court, we end up deciding not to take the case up to the Supreme Court. We end up saying no. How can we do that?

Well, of course, it goes back to what I said about the speed dial. It's good, old-fashioned monopoly power. The Solicitor General's Office is the monopoly supplier of legal services to the federal government. You can try to appeal a decision of the Solicitor General; you can try to enlist the support of the Attorney General or somebody else. But at the end of the day, it's not as simple as calling Andy on the speed dial. Basically, the

decision by Solicitor General not to take a case up will end the matter as far as that particular case is concerned.

Now, you could sort of ask the question, and I'm sure many people have over time, why – why do we go about doing this? Why do we not have a position more like the private sector, where if it's important to the general counsel of the expert agency, why not go ahead and take it up? I think the answer to that is really reflected in the way that the Court responds to the petitions we DO file. The Supreme Court of the United States well understands that the Solicitor General's Office does its own internal screening mechanism to determine whether or not cases merit one of those relatively scarce positions on the Supreme Court's docket.

And so, in some sense, the proof here is in the pudding; as I noted, in general, the Court takes a little less than one percent of its petitions. In the case of the Solicitor General's Office, year over year, administration over administration, the Supreme Court takes about seventy percent of the petitions we file. They don't always take it, but well, more often than not, they take the case if we ask them to take it. It's not because they like us better; it's not because they're particularly fond of a petition filed with a grey brief rather than a white cover. It is really just a reflection, I think, of the fact that we are able to, and do, perform our own screening, and so the cases that we get before the Supreme Court are the ones that are... I think they understand that we wouldn't be asking for the Court to take the case unless it were very important to the federal government.

Interestingly, I think that this way of approaching it, of doing our own very selective process of deciding whether to file petitions, bears the greatest fruits in a couple of cases that the Commerce Department cared very deeply about. I think both the *Eurodif* case and the *Navy Sonar* case are perfect examples of where this policy pays its dividends. Because neither of those cases, as we evaluated them in the Office, were obvious dead-bang winners for *cert*. The *Eurodif* case was a perfect example, because that case went through the federal circuit, and all issues like it go through the federal circuit, we *cert*ainly weren't going to be able to identify a circuit split for the Supreme Court of the United States, which, of course, is the thing that they are generally looking for in federal cases.

Now, they do take cases from the federal circuit, so it's not unheard of to take a case within the exclusive jurisdiction of the federal circuit. Any patent lawyer will tell you that's been quite common lately. But what I would say, though, is those are cases where it's a lot harder to get the Court's attention, it's a lot harder to convince them to take the case, because you don't have the objective benchmark of a circuit split to point to.

The other thing with the *Navy Sonar* case – obviously it's an important case from the perspective of its impact on the Navy. But from all other perspectives, it's a case about preliminary injunction standards largely, which is not usually the stuff of successful Supreme Court petitions. In both those cases, though, the Court DID take the case when the United States asked them to take the case. And I do think that is really a reflection of the fact that they knew, in reviewing those cases.

Again, take the *Eurodif* as an example. It's basically the first trade case that we had asked them to take of that particular type, and even ever, and we rarely ask them to take those cases. And so in that cases, when we took the case up, highlighted some of the national security implications in that case, I think the Court was much more receptive than they ever would've been if we'd take the posture more like the private sector model of just filing petitions if we thought that they were valid petitions and there wasn't any sort of Rule 11 consideration, but we're just going to sort of file it because, gosh, we think the decision below is wrong. I think this is a case where those dividends really paid off.

Another big part of the work of the Office of the Solicitor General, another part of this submerged iceberg, is the very similar process we go through whenever there is an adverse decision in the lower courts – district court, typically – and we want to take that decision up to the circuit court; or if there's an adverse circuit court decision, and we want to take it *en banc*. Whenever that happens in a case in which the Justice Department represents the government in the lower courts, in order for that appeal to be taken, it's necessary to get the authorization of the Solicitor General.

So even for these...you know, not Supreme Court but district cases, before that case can be taken up, we kick off a very similar, and very similarly exhaustive to decide whether or not to take the case up. So we'll get a memo from the affected agency or the U.S. Attorney's Office in a particular case in which there has been an adverse decision; we'll have the Litigating Division do their own memorandum, their own analysis of the case; we'll notify other interested agencies within the government in order to get their view; an assistant will do an independent analysis; a deputy will either do an independent analysis or at least annotate the assistant' memo; and that entire packet will go to the Solicitor General.

It's a tremendous amount of work. It works out to basically a little over 2,000 of these packets every year that the Office does, which works out, in practical terms, for the Solicitor General, to five or six of these packets coming across the desk every day, including weekends. It makes it very hazardous to take any vacation, because you know what's going to be waiting for you – stacks and stacks of appeal recommendations.

So why is this process worth it? I know I ask myself that from time to time. I think the process is worth it on a couple of different levels. One is, I think that it is very important that we have, as the federal government, relatively uniform litigation positions throughout the United States and throughout the various departments. As I eluded to earlier, the easiest way to get the Supreme Court to take a case is to point to a circuit split.

We don't think it's a good practice, though, for the United States government to create its own circuit splits by having the U.S. Attorney in Maine argue something radically different than the U.S. Attorney in California, or to have the Commerce Department argue something on an administrative law interpretive question that's radically different from the way the EPA may be approaching a similar issue under the Administrative

Procedures Act. So we really try to make sure that we are having uniform positions that are being advanced on behalf of the United States.

I think a second virtue of this process is we are trying to weed positions that might be kind of penny-wise but pound-foolish. You can have situations in administrative law where what makes sense for a particular case because of the oddity of the posture of that case might not make sense in terms of the broader interests of the United States. Every once in a while, there's an agency that for policy reasons, is looking for, perhaps, not to be on the deference team in that particular case. Well, that ill-serves the long-term interests of the executive branch, and that's a case where I think you might have trouble getting that case authorized by the Office of the Solicitor General.

Likewise, a situation that arises in a number of cases, is that the district court has ruled against the United States. There is a great argument as to why the district court got it wrong. There's only one problem with this great argument. It wasn't made to the district court in the first instance. It was thought up after the fact. Well, we generally think that it doesn't serve the federal government's long-term interests to have the federal courts of appeals be very permissive about plain error review.

We miss a few issues from time to time. We like to think we catch more than we miss. We like to think it's in our long-term interest to have the courts generally be restricted to the arguments that are made in the district courts. And so that's another example where we would likely, because of the longer-term interests of the federal government, tell a particular U.S. Attorney's Office or a particular department that that's not an appeal that we're going to authorize.

The last advantage, and I think the one that explains why this important responsibility is located within the Solicitor General's Office, is the fact that we are trying to make sure, as best we can, that we are taking positions in the lower federal courts, particularly the courts of appeals, that we would feel comfortable defending in the Supreme Court of the United States.

Oftentimes, if there is a memorandum, say, from an assistant to the Solicitor General that's circulated to the U.S. Attorney or the client general counsel, and indicates a *cert*ain unwillingness to take a case up to the court of appeals. I'll get a call, say, from a U.S. Attorney, that goes something like this: "Paul, look – I read the memo and I understand why you all have some concerns about this legal argument. But you've gotta trust me on this one. I really know the regional court of appeals in which we practice, and if you let me take this case up, we're going to win this one."

And as often as not, my response to the U.S. Attorney in that circumstance is to say, "That's exactly what I'm worried about. If you take this case up and lose – I mean, that's sort of bad, but I at least get to decide whether or not we're going to take this case up to the Supreme Court of the United States. But if you take this case up and win, then the decision whether to file a *cert* petition is out of my hands and in the hands of the other side."

And particularly, if one of the reasons I don't want to make this argument is, we already tried it in a different circuit and things didn't go so well, in that context, not only would the other side be able to file a *cert* petition, but they'd have a pretty good case for *cert* in that the favorable decision there would create a circuit split. And so if I'm uncomfortable with that positions in the lower courts, the last thing I want to do is be in a position of defending that judgment in the Supreme Court. There is such a thing as confessing error in the Supreme Court. At least in the SG's Office, we like to reserve that, if at all, for those situations where a case managed to make its way up to the Supreme Court without the SG's Office authorizing an appeal.

Sometimes – you know, I've had at least one case I can think of where we had to confess error on a legal theory that at no stage did the United States ever advantage; it was a creation of the court of appeals. But when you confess error, you're essentially telling the lower courts that the decision that was favorable to the United States, that the United States procured, is not only wrong, but essentially indefensible. And that doesn't make us real popular with the court of appeals judges over time, so that's something you don't want to get in the habit of. So we really do try to make sure that the positions we're taking in the lower courts are positions that we would feel very comfortable defending in the Supreme Court of the United States.

Now, I don't want to leave people with the impression that the federal government only loses cases. I've been talking a lot about the process of appealing or seeking *cert*. The good news is, we win an awful lot of cases. What that means for the Office of the Solicitor General, though, is there's another important chunk work we do, which is responding to petitions for *certiorari* filed in cases where the United States has prevailed in the court of appeals.

If you go back to that roughly 7,000 petitions that the Supreme Court hears every year, fully half of those are cases in which the United States has prevailed in the lower court. Now, fortunately for us, there is a process which is well understood, where the United States, and any litigant, can waive its opportunity to file a brief in opposition to a *cert* petition. So if we take a quick look at the petition and decide that there's no circuit split, there's really nothing here, we can simply waive our opportunity to file a brief in opposition.

The United States is the respondent in about 3,500 cases – petitions – every year. The good news is, from our perspective, from the perspective of the workload of our Office, the good news is, we waive our opportunity to file a brief in opposition in about 90% of those cases. But that still leaves 350 briefs in opposition to prepare and file with the Supreme Court, which is, after all, about a brief a day, so that does keep us very busy and is an important part of the work of the Office.

We also do something a couple of times a year that virtually no other litigant does, and that is, we file what we call an acquiescence with the Court. We basically, in response to a *cert* petition, says, "All right, this is an important issue. The circuits are split and the

decision below is incorrect." The United States files a brief that basically says, “They've got two out of three right. The issue is important, the circuits are split. We think that the decision that we helped procured is perfectly correct, but we're happy to defend it in the Supreme Court. This meets your criteria for *certiorari*. You should go ahead and take this case, and we'll try to win this on the national level." As I say, that's not something that one would lightly do for a client in private practice, having just paid your bill to procure a favorable court of appeals decision. I think for a lot of clients, it would be difficult to give that case up, that precedent up, voluntarily.

Why does the United States do it? I think the simple answer, at some level, is that it's a reflection of the fact that we are the ultimate repeat player in the Supreme Court of the United States. We are filing somewhere like 40, roughly – between 25 and 50 petitions for *cert* every year. In each one of those, we point the basic factors for why the Court should take a case: a split in the circuits, an important issue, constitutionality – whatever it might be. We can't very well, then, when there's a petition filed against us that points to those very same factors accurately, we can't simply say, "Nothing to see here. Move along." I think it's in our long-term interest to say, "They've correctly identified a *cert*-worthy case. We'll take it up. We're happy to do it."

As I alluded to, the Office does something about one time year, maybe, on average, that nobody else, I think, would do, and that is confess error in a case. Often, it's a situation where the United States has prevailed in the lower courts, so our Office did not get a chance to look at the case. Sometimes it's a situation where, as I mentioned, the court of appeals has injected an issue that the United States did not brief, and indeed, had good reasons not to brief, and we're sort of stuck with the decision.

But nonetheless, there will be an occasion about once a term where we will basically say that the petition says the issue's important, the petition says the circuits are split, the petition says the decision is wrong. This time they're right on three out of three, so you should go ahead and remand this case to the lower court. And again, I think that it's something that helps point out the kind of special relationship that the Solicitor General’s Office has with the Supreme Court.

Another thing that I think ultimately points to that special relationship, and is something that we've worked quite a bit on with folks from the Commerce Department, particularly, the Patent and Trademark Office, is the prospect that the Supreme Court does, about twenty times a year, which is at the *cert* stage in a case in which it has not involved the United States of America, the Court will invite the views of the Solicitor General in the case. This is the proverbial invitation one can't refuse. So whenever the Court invites our views, we provide them.

What we aim to do in these cases is to tell the Court both whether or not we think the decision below is correct – so to take a position on the merits – and also, to tell the Court whether or not it meets the Court's criteria for *certiorari*. Generally, the Court will ask for our views in cases in which there is an important federal issue in the case that looks complicated, but there is no authoritative statement of views from the executive branch in

the case, because we either haven't participated at all in the case or perhaps there is some confusion based on what was said in the lower courts in those cases.

Another area where the Court has been particularly interested in the views of the United States, as I mentioned, is in the patent area. Most of these patent cases that the Court has looked at recently has been cases involving private patent litigation. The United States has not been a party in the federal circuit. Generally, it has not filed an *amicus* brief in the federal circuit.

I worked on some of these cases both as the Acting Deputy for the Patent Docket for a little while, as Acting Solicitor General, and as Solicitor General. I would say that my impression at sort of a 30,000-foot level, is that in the patent area, the average *certiorari* petition reads something like this: "The federal circuit in the decision has deviated from long-settled law, has created an anomalous rule that will cause commerce as we know it to come to a crashing halt."

The general brief in opposition in these cases reads something like, "The federal circuit has applied settled practice, and there's nothing to see here. Move right along." I think with those kind of diametric views in a very complicated and specialized area, it is perhaps not shocking that the Supreme Court is looking for something of an honest broker, something of an alternative view, to give them some insight as to whether this is really the huge deal that the petition makes it out to be or whether this is really business as usual, as the brief in opposition suggests.

We, in this area, have gotten involved in a number of these cases. The Court doesn't always take our advice, but they are very receptive, I think, to what we have to say in these cases about the importance of the case. Obviously, anybody who has paid any attention to the Patent Docket knows that the Court has been increasingly interested in this area of law. They've certainly taken the cases when we have told them to take the cases, but they've taken some cases where they did not "CVSG," as we call it – call for the views of the Solicitor General – or they had taken cases where we told them, as I say, not to take the case, and they took it anyways. And in at least one of those cases, the case washed out anyways, so we sort of felt we had the better view of that, ultimately. But in any event, it's been a very active of the practice for the Office.

When we get those cases coming in, the first thing we do – usually it's a case that we really don't know very much about. We notify the affected Divisions. In a patent case, we'd make sure that the Commerce Department, the PTO, knew about the case. We'd also probably alert the Copyright Office and others who might be interested in the case. A lot of times, those patent issues have antitrust overlays as well, so the Antitrust Division would get involved. We would solicit views from all of the affected agencies about what the position of the United States should be.

Sometimes that process goes very well and it's relatively straightforward to put a position together for the United States. In some cases, however, there are very disparate views within the executive branch. And indeed, as I alluded to, I think usually, these are cases

that we didn't know much about before the Court invited our views. Occasionally, there are cases we've been following very closely, we know all too much about, and we are hoping like heck not to have our views solicited by the Supreme Court because we knew full well that it was not going to be easy to get the United States' position encapsulated in a single brief taking a single position.

The most obvious example of that from my time in the Office was a case called *Credit Suisse v. Billing*, where, by virtue of the SEC's independent litigating authority in the lower courts and very disparate, long-held views, in the 2nd Circuit Court of Appeals, the SEC filed a brief in support of the defendants in the Antitrust Division of the Justice Department – filed an *amicus* brief in support of the plaintiffs. When that case went up to the Supreme Court, we were very much hoping the Court would simply deny *cert* in the first instance. Instead, they called for the views of the Solicitor General, and it was our charge to try to get both the SEC and the Antitrust Division to agree on a single position for the United States.

My undergraduate degree at Georgetown was in the School of Foreign Service, and sometimes people say, "Well, it's sort of odd – you've kind of wasted all that diplomatic training." *Au contraire*. The diplomacy of trying to get everybody to agree on a single position for the United States, I'd like to say it rivals some of the talks that we've had in international areas as well. It's a difficult process but I think it is possible. In that case, I think it really was quite an accomplishment to get both the Antitrust Division and the SEC to agree to a single position. We presented that to the Supreme Court. At the end of the day, I think they were a little more in the SEC's camp than in the Antitrust Division's camp, but in all events, it was, I think, an exercise that everybody in both the Antitrust Division and the SEC felt good about.

I should say, just by way of explanation, that is a prospect that can happen because some of these so-called independent agencies – the SEC, the FEC, the FTC – have independent litigating authority in the lower courts, but not in the Supreme Court of the United. So they don't need the authorization of our Office to take their position and stake out their position in the courts of appeals, but if it gets to the Supreme Court, then they do need the authorization of the Solicitor General. So that can add complexity to the process as well.

As I say, the Supreme Court asks for our views in these cases about twenty times a year, on average. They do it without deadline, which is something we are careful to not abuse. But it does sometimes take us a while to get the position of the United States together in these cases.

Another thing we do spend a great deal of time on, and the last thing I'll mention, is the process of deciding whether to file an *amicus* brief on the merits where the Court has granted *certiorari* in a private party case that we're not a party to. There, we kick off a similar process to the one that we do with the invitation stage. The Supreme Court grants *cert* in a case. There, we have, very quickly, a process of letting the affected agencies know, soliciting the various views of the affected agencies, getting people together, if

there is division, within a room and sorting out the position that the United States will ultimately take.

As I say, in some cases, it's very straightforward. Maybe obvious that this is a case that doesn't affect the federal government. Sometimes it is a case where it's very obvious that it affects the federal government, and very obvious how we should come out. I mean, you can have a litigation that doesn't involve the United States, but the net effect of the lower court decision is to invalidate a regulation of a federal agency. In a case like that, it's pretty obvious we're going to file a brief in support of the federal agency and the validity of the regulation, if that's possible.

The hardest cases, I think, for the Office are the ones where it is clear there is an interest of the United States; just not so clear which way it cuts. A good example are the employment discrimination cases. Under all the various federal antidiscrimination statutes, whether it's Title 7, the ADA, the ADDA – in those cases, what generally happens is, it's private litigation; the Supreme Court takes it to resolve a circuit split.

My friends from the Civil Division, who are responsible for defending the United States of America, the nation's largest employer, in their own claims under the public sector provisions of those antidiscrimination statutes, will come in and they will say, "Oh, this is an important case. The United States has a clear interest. We should file a brief supporting the employer." The only difficulty is, my friends from the Civil Rights Division will walk down the hall and say, "Oh, yeah, this is an important case, and we're the enforcement agency for some of the public sector provisions of this, and have a longstanding interest in this. We should definitely file a brief here, and it should be in support of the employee."

In the process of figuring out employee, employer – what are going to do here in this particular case – is, again, one of the more difficult aspects of the job. But we generally sort it out, not based on who we like better but based on factors like, is this position encapsulated in a regulation so we can argue for deference; is this a position that the affected division has taken consistently over a pattern of years; or is this sort of a new-fangled idea prompted simply by the *cert* grant in this particular case. We resolve those disputes as best we can, and file a brief on behalf of the United States.

What I'd just finish with is, that is the process that we go through in the Office. That really shows you where a lot of the lion's share of the work of the Office is. I think that as you can see, as wonderful as it is to argue Supreme Court cases, it is not just the tip of the iceberg, but in some ways, some of the hardest work of the Office is the work that people on the outside would never see. In some ways, the most difficult decisions are whether to take a case up in the first instance, or are decisions about whether or not to take a position in a case where the interests of the United States point in different directions.

I certainly think our client agencies, like the Commerce Department, in these kinds of cases, can be very, very helpful to us, and in particular, I think, in sort of educating us

both on the details of the regulatory regime, and also, the real importance of a case to an overall regulatory regime in a way that might not be obvious to the generalists. And that's what we are in the SG's Office: we're generalists. We think it makes sense to have the generalists presenting the argument to the Supreme Court at the end of day, because after all, the nine Justices are all generalists, too. But we can't do it without the help of the lawyers in the agencies.

And you can see that. I think the *Eurodif* case was a very good example of this, where at first blush, that was not a case that looked obviously *cert*-worthy even to the lawyers in the Office of the Solicitor General. And we've kind of had a process of the Commerce Department both coordinating with the State Department and the Defense Department sort of underscore the importance of the case, but also helping to educate the lawyers in our Office about the importance of the case in a way that I think ultimately produced a very strong petition that ultimately got the Supreme Court to take the case. So I think that's just an example of where the process can work very, very well.

The last thing I'll say about this whole thing is, one way in which a lot of these different roles come together is in the moot courts that we have in our Office in trying to get a lawyer ready to argue a case before the Supreme Court. I always think that the moot courts are in some ways an example of the SG's Office at its best, because what typically happens in those moot courts is that you have two groups that are interacting in real time in a way that is incredibly helpful for the advocate who will ultimately represent the United States before the Supreme Court.

The two groups are, one, the lawyers from the Office of the Solicitor General, who are used to giving arguments in front of the Supreme Court. They are used to providing and asking the kind of nettlesome questions that the Justices themselves ask. They are great at probing weaknesses in the case, exposing weaknesses. But the other groups of lawyers, which is every bit as critical in those moot courts, are the lawyers from the agency who have been living with the relevant regime year in, year out, day in day out, and really know the details of how the scheme works.

I think two examples come to my mind. Very early in my time in the Office of the Solicitor General, we had some cases arising out of the 2000 census. The census, at least for us generalists, is complicated stuff – you know, the difference between – I forget now, extrapolation and estimation or whatever it was was befuddling. It was incredibly helpful to have that dynamic where the lawyers in our Office would kind of expose the weaknesses in at least our understanding of our position, and the specialists were there to fill in the gaps – to explain why the system actually does make sense, why the system actually works, in a way that was very, very helpful.

The other example, from a different agency, but one that kind of leaps to my mind, is the process of getting myself ready to argue the *Rapanos* case about the jurisdictional reach of the Clean Water Act. This was one of these cases where the moot court was critical, because by virtue of the way the other side in that case had briefed the case, they'd sort of swung for the fences. They took a position that the jurisdictional reach of the Clean

Water Act is limited to the navigable waterways and nothing else. Given that the statute itself said that it covered the navigable waterways and their tributaries, the position that it only covered the navigable waterways was, let's just say, an aggressive litigation position.

The briefing, therefore, was able to stay at this kind of relatively 30,000-foot level. It was everybody's view in the Office that the Supreme Court would not tarry long over the question whether or not tributaries were covered, and most of the action would be over, where is the end of the tributary system; how far does this go. And the moot court was incredibly helpful in sort of unearthing some of these questions that really hadn't been the focus of the briefing – what's a tributary, what's the difference between a river and a ditch – all of these kinds of questions.

And there was Lance Wood, from the Army Corps of Engineers, who had been really living with this regulatory regime for a good twenty years; had kind of personally authored most of the NPRM's for this particular area. And he was able to tell me exactly where the tributary system ended. You've got to look for the ordinary high water mark. That's great. What's an ordinary high water mark? And he could tell me that, too. And he could tell me, "Don't worry about ditches. The Erie Canal's a ditch. They're clearly part of the navigable waterway system."

And within about the first ten minutes of my argument before the Supreme Court, all of that stuff came out – the tributary system, ordinary high water marks, and the Erie Canal being a ditch. And it just shows that great process of interacting between the lawyers from the SG's Office and from the agencies.

Well, I think I've left at least a little bit of time for questions. I'm told there's fifteen minutes left. I guess the last thing I'll do before I take questions is to say, one of the great things about being in the Office of the Solicitor General is that you do very much feel that you have this special relationship with the Supreme Court of the United States. It's manifested in things like the process of inviting the views of the views of the Solicitor General in a case. The Court typically does not invite the views of anyone else. So there is a very special relationship.

It's such a special relationship that some people have referred to the Solicitor General as the tenth Justice. I'm always quick to remind people that I've never heard any of the nine real Justices say that, and one of my illustrious predecessors, Drew [Days], said, "35th law clerk might be more like it." But whatever the relationship, it is a very close relationship. I think it's a big part of why the lawyers in the Office have a certain *esprit de corps* and really do enjoy practicing before the Supreme Court.

And I think, as I say, the other big treat for the Office is the opportunity to work with people at the agencies who really know the regulatory regime. In some ways, what we provide to the Supreme Court is something of a translation service. They're generalists, we're generalists. We want to get them information that's very accurate, but also in a way that they can understand. And that *is* how we view some of our responsibilities.

Let me take questions, if there are some.

Audience Question

How many attorneys are there in the Office?

Paul Clement

Well, that's a great question. And I once heard Ted Olson give a similar explanation of all – shorter – but similar explanation of all the work that the Office does, as a way of kind of explaining our Office to the Attorney General of Ireland. And the Attorney General of Ireland looked at him and said, "So, with all that work, how many attorneys do you have? Like 500?" And of course the answer is, we have about 25 attorneys. So it is an incredibly small Office. And it's 25 attorneys, and four of those are one-year fellows. So it's really 21 lawyers in the Office who are doing this work.

I guess the two things that are particularly distinctive about that are, one, every one of those 21 lawyers will argue cases in the Supreme Court – at least two or three arguments a term. So it's not a matter of where the opportunity to argue is limited for the Solicitor General or the Deputies. Every one of the lawyers in the Office will get that opportunity.

I think in some respects, that is the answer to why we have resisted the temptation to expand the size of the Office. There's *cert*ainly enough work to justify doubling the size of the Office, literally. But if we did that, I think we would basically be leaving our assistants with only one Supreme Court argument a year. One of the reasons that we can attract incredibly talented lawyers to the Office of the Solicitor General is that we can offer them two or three Supreme Court arguments a year, which is something that basically no law firm can offer them. We've given up competing with law firms on price, so opportunity seems to be the way to go. So I think that's the key to why our Office has stayed small.

The other thing that I would say, which I think is particularly relevant in this particular season in Washington – and I don't mean the fall – is that of those 25 lawyers in the Office, there are only two political appointees. So you have the Solicitor General and you have the Principal Deputy Solicitor General, who are political appointees, who will change with the administration. But everybody else in the Office will stay there, administration in, administration out. Some of them, like, for example, Ed [Needler], the senior career deputy, has seen an awful lot of administrations change at this point.

And I think that's an important to emphasize at this time, because I really think that that sort of ratio of political folks to career folks is both a strength of the Office, but also really reflects the mission of the Office. With the change of administration, there may be one or two changes of position in high-profile cases, but what you won't see, I would predict, are substantial changes in position across the board. Because as evidenced by the

fact that the Office is career-heavy, we are really, I think, in the Office, looking to the long-term interests of the United States government. And those kinds of positions tend not to change based on which party is in control of the White House or who is the Attorney General or the Secretary of Commerce, for that matter.

Deference to administrative agencies is a pretty good idea, no matter who the President is. Qualified immunity for federal officers is a pretty good idea no matter who the President is. And god knows, most political people don't care about ERISA preemption. So a lot of the work that we're doing on a day-to-day basis is just not going to change. Now, like I said, there may be one or two high profile cases where it changes, but elections have consequences, and that's fine – especially if it's done in the appropriate way. I mean, if people don't like a regulation promulgated by the last administration, the way to solve that, in my view, is to withdraw the regulation, not to stop defending it in Court just because you're just kind of half-hearted about it.

But those are the kinds of things that I think, again, are a real strength of the Office. And so the size of the Office, but the composition of the Office, really reflect what I think almost everybody in the Office views as the Office's basic mission.

Audience Question

Hi. I wondered if the SG's Office ever provides its views to the Supreme Court in private litigation without being invited?

Paul Clement

The answer is yes. We never get invited after the Court has granted *cert*. So if you're talking about what we would refer to as a merits case or a case in the Court's plenary docket for plenary review, at that stage, we never get invited. So that process of deciding whether to file the brief is always volitional. At the *cert* stage, we do have the possibility of what we refer to as an uninvited *amicus* brief at the *cert* stage. I think we filed something on the order of two of those during my tenure as Solicitor General, and maybe three or four during Ted Olson's time. So in my seven years in the Office, I think there were less than seven of those. So they're a pretty rare event.

You know, I thought long and hard – and part of the reason they're a rare event is that...at least my own view was, because the Court has this process of inviting the views of the Solicitor General, they know how to reach us. If they're interested in our views, there's a process for that. So you have to ask yourself, all right, given that that process exists, why should we file an uninvited brief? It seems to me that there's a kind of heavy burden in those cases to figure that out.

I think there *can* be reasons. One reason can be in terms of the timeliness of a situation. If it's going to delay the decision of a case by a full term, if the Court invites our views

and we file an invitation brief at that time, and we can get the Court to decide an important case that term by providing our views without invitation, that's a consideration.

Another thing that can be a consideration is where there's a federal interest, but it's basically a submerged federal interest. So it's not one where the Supreme Court is likely to even know that there's a federal interest to ask us about that we can vindicate. We had a case when Ted was the Solicitor General involving a challenge to Meagan's Laws – about notification of sexual offenders.

That was kind of a big, high-profile case. No one at any of the briefings made any note of the fact that there was actually a federal law, the constitutionality of which would probably stand or fall with some of these state schemes. So we thought it was important in that case to let the Court know that that was out there in that case so the Court would at least understand that there was a federal interest where it might not look, like there was an obvious federal interest.

Another case where we filed uninvited, in my time, was in one of these alien tort statute cases involving the apartheid case out of the 2nd Circuit. That was really a situation where it had a lot to do with the timing of the case and the importance of the issues. And that's a case where, ultimately, the Supreme Court denied *cert* because it couldn't get a quorum together, which is an unusual situation.

Audience Question

I have a question regarding a case to be argued this term regarding joint and several liability under CERCLA. And the question that I have is, if the Court finds that CERCLA does not impose joint and several liability, would the ruling be likely to impact other federal statutory enforcement regimes or is it likely to be limited to the specifics of CERCLA?

Paul Clement

And I think that case is... I mean, obviously, the Supreme Court – it's a dangerous prediction deciding how the Court will decide a case – just yay or nay. And then it's even more treacherous to try to figure out, well, how would they write the opinion and what would it say. So it could have a broader impact. That said, I think that as with a lot of these statutory construction cases, the Court is going to be very focused on the text and the structure of the particular statute, and so I would say that that's unlikely – it's going to have some atmospheric carryover to other statutes, but I think that ultimately, those decisions are going to kind of stand or fall on the text or the legislative history of the particular case.

One thing I think is true about the current Court is that it is, at least by historical standards, a pretty textualist Court. There's obviously a healthy debate about how

textualist they should be, the role of legislative history. I mean, Justice Breyer obviously has quite a different approach to legislative interpretation, statutory construction, than Justice Scalia. But I do think the gap, actually, if you look at it from a more historical standpoint, has narrowed quite a bit.

I had an experience in preparing for a case to go back and read a number of statutory construction cases from the 1960s, 1950s. And in that era, you could literally see, in the same substantive area, one case where the Supreme Court's decision looked like a Scalia opinion – it was just all about the text, and nothing else seemed to matter. And then a year later, you could find a decision where – and this is the kind of thing I just don't think you would ever see out of this Court no matter who's writing the opinion – a reference to the text of the statute which appears in the margin, and it's then in a footnote, and never resurfaces in the case again. It is a long and passionate discussion about the policy that animated the statute, and whether it would be better served by one rule or another, but the statutory text relegated to a footnote. It never reappears in the text.

And I think precisely because the debate is narrowed and there's a real sense in which we're all textualists now, I think that that probably lessens the chance that a decision like that would have broader implications for other statutes. Again, it'll have an atmospheric effect; people will *cert*ainly cite it. But at the end of the day, I think it will be decided on the text and the structure of the next statute that comes before them.

Is there one more question? Yeah?

Audience Question

Could you elaborate briefly on the relationship between the White House and the SG's Office, and would you expect the White House to be more involved if the President happened to have been President of Harvard Law Review? [*Laughter*.]

Paul Clement

I can try to answer it. I'm just not sure I can answer it briefly. Let me try to take both parts of it just quickly. One is, my view is that there ought to be and has been, in my experience, a healthy degree of independence in the Solicitor General's Office to kind of make the legal judgments that they feel are best. You can look at an organizational chart and wonder why in the world is that the case. The Solicitor General pretty clearly works for the Attorney General, who pretty clearly works for the President.

And I suppose as a matter of pure kind of theory, the President and the Attorney General could countermand every decision that the Solicitor General makes, and the Solicitor General would have no choice but to sort of fall into line or resign. I think if that happened with any frequency, resignation would start to look pretty good. And I say that in part because, look, every Solicitor General, and anyone who's worked in the Office, is

very fond of reminding people that the Solicitor General is the only officer in the government required by law to be – by statute – to be learned in the law. The Attorney General doesn't have that requirement; Supreme Court Justices don't have that requirement. We have it, and we like it.

But the reason I bring that up is not just because I like hearing it and saying it loud; I bring it up because that's our job. We are supposed to be learned in the law. We are supposed to bring expert judgment about whether a case is *cert*-worthy, whether a legal position will fly in the Supreme Court of the United States. What we are *not* is supposed to be learned in policy. And it's not a matter of where we're supposed to use the fact that we sort of control this bottleneck of whether a case is filed with the Supreme Court to inject our own policy views.

And what you can often see happen in the SG's Office is situation where there are two parts tio the federal government, both of whom ultimately report to the President, who have diametrically opposed views as a policy matter. And we're actually in a position where we could file a legal position consistent with either policy view. And maybe we could file, in our view, a better brief or a more robust brief, addressing all the issues in the case if we go one way, and only a narrow brief limited to a single issue if we were to go the other way.

But we really feel like doing our job, the law part, we could go either way. And in those situations, I suppose I could decide, well, I don't know a lot about banking policy, but what the heck – I like this policy. But I've always viewed that as a situation where, actually the way it should work is, the SG should pick up the phone and call the White House and say, "Hey, guys, you're the policy guys. I could zig here, I could zag here. Just let me know where you guys are on a policy matter, and we can take it from there and do the legal work."

So I actually think that when the system is working well, the calls – it's not that there should be some absolute hermetic seal between the White House and the Justice Department, or the SG's Office, at least. But I actually think if the system's working well, the calls should be going in this direction on Pennsylvania Avenue and not that direction. Will that change in the next administration? I hope not. And I have plenty of friends from law school and elsewhere who are going to be in this administration, and to the extent they'll listen, I'll try to urge this model on them, because I just think it's good government – objectively the right model.

I will say, anecdotally, that in some ways, putting aside all the other legal disputes of the Bush administration, I think the lawyers in the SG's Office may have benefited from the fact that the President was not a lawyer these last eight years, because in talking to some of my predecessors from the last time that we had sort of a constitutional law professor as the President a little over eight years ago, that there was maybe more of a tendency to want to talk through some of the legal issues in great depth. And as I say, I think if the system's working well, more often than not – much more often than not – in almost every case, the legal positions should just be left for the SG. People will defer, not because

they have to as a matter of power or theory, but just because that's the way the system, I think, works best and works well. So I would *cert*ainly recommend that model to the next folks.

Well, thank you very much. It's been great to be with you. [*Applause.*]

Ryan Meyers

We are ready to begin our first panel discussion of the day. Here, to introduce the panelists and the moderator, is Mike Levitt, Assistant General Counsel of Legislation and Regulation.

GC Perspectives – The Evolution of Law Practice at DOC

Michael Levitt

Thank you. It's my privilege this morning to introduce this illustrious panel of former general counsels. It's appropriate that I be asked to do this, since I pre-date every one of them, and so I can personally attribute…I can be witness to their contributions to the Department. And if you really want to know what it was like to work for any of them, see me at the next break.

I'm going to introduce them in the order that they appeared in my life. First is Homer Moyer, who is a member of Miller and Chevalier, where he founded the firm's international department, and previously served as member of the firm's executive Committee. He counsels governments and private clients on matters including the Foreign Corrupt Practices Act, the Export Administration Act, WTO panels, and Appellate Body disputes, and AD and CVD duties laws.

As a political appointee in both Democratic and Republican administrations, Mr. Moyer served as General Counsel here from 1980 and 1981. And previously to that, he was a counselor to the Secretary and a Deputy General Counsel before that. Before entering government, he practiced with Covington & Burling; he wrote *Justice in the Military: A Treatise on Military Law*; he served in the office of the Judge Advocate General of the Navy with collateral duties at the White House.

He's a past Chair of the ABA's Section of International Law, where he cofounded and chaired the ABA's Central European and Eurasian Law Initiative, and the Central European and Eurasian Law Initiative Institute in Prague. He is the recipient of the 2008 ABA's Section of International Law Lifetime Achievement Award. Mr. Moyer holds a B.A. from Emory University and an LL.B. from Yale Law School.

Next to Homer is Andrew Pincus. Andy is a member at Mayer Brown, where he focuses his appellate practice on briefing and arguing cases in the Supreme Court of the United

States and in federal and state appellate courts. Andy has argued 18 cases before the Supreme Court of the U.S., including just a couple years ago, *Illinois Tool Works*, and last year, the *Weyerhaeuser Company v. Ross-Simmons Hardwood*, both of which he won unanimously. In addition, Andy has filed more than a hundred briefs in other cases in the Court. Prior to joining Mayer Brown, Andy was Assistant to the Solicitor General from '84 through '88.

Andy was the General Counsel here from '97 to 2000, and during that tenure, he formulated and implemented policies dealing with intellectual property, electronic authentication. Andy was the principal proponent behind the E-Sign Act, where he was singled out by the President in [his signing] statement for his work on that. And it's fair to say that without Andy's contribution to that law, it would not exist.

Andy holds a B.A. from Yale University, and a J.D. from Columbia University Law School, where he was the James Kent Scholar, a Harlan Fiske Stone Scholar, and the *Notes & Comments* Editor at Columbia Law Review.

And next to Andy is Ted Kassinger. Ted is a partner in the Washington office of O'Melveny & Myers, where he co-chairs the International Trade Practice, and is also a member of the firm's strategic counseling practice. Ted joined the firm after serving as Deputy Secretary here at the Commerce Department in 2004-2005, and before that, he was the General Counsel here from 2001 through 2004.

Upon concluding his tenure at the Commerce Department, Ted received the Secretary of Commerce's William C. Redfield Award, which is the Department's highest honor. From '85 to 2001, Ted practiced law with another major international law firm, following his earlier practice as an attorney with the U.S. Senate Committee on Finance, the United States Department of State, and the U.S. International Trade Commission.

Ted is Chairman of the U.S. Department of State's Advisory Committee on International Economic Policy, and a member of the Council on Foreign Relations. He also serves as a member of the Board on the Earth Conservation Corps. Ted holds a B.L.A. and J.D. from the University of Virginia, where he was the *Notes* Editor of the Georgia Law Review.

By prior agreement, I'm not going to say anything about Barbara, but suffice to say, she's the Assistant General Counsel for Administration. And if you don't already know her, you're probably not at the right event. So without further ado, I turn the panel over to Barbara.

Barbara Fredericks

Thank you, Mike. As I like to tell people, Mike and I are together. He's a lot older than I am; he's been here longer. I know two of the gentlemen to the left of me, but not the third. But I think all of you who've been in this town, if you didn't know them before, after hearing their credentials, I think we are incredibly grateful for them to come today and to give us their insights. And I'm going to try to keep my remarks really short and try to just allow you as much time as possible to ask your questions when they're through.

By agreement, our three distinguished guests have determined that they're willing to give you a brief introduction of their thoughts on being General Counsel, their tenure, and some of the highlights in their own words – what happened when they were there. So I'm going to start with Mr. Moyer in order of seniority – not necessarily age or importance. But Mr. Moyer is the first one we have on the stage here today, and he's agreed to begin, so I'll just turn it over to you.

Homer Moyer

Barbara, thank you. Mike, thank you. Quite distressing to be the most senior of the three on the panel. I've been given dispensation to talk a little bit about lawyering during transitions – that seems to be a timely subject. And it's a process that we, as a country, really haven't quite mastered yet about doing it right. There've been problems both in terms of promptness and speed in getting transitions done in substance and transferring the information and the knowledge. But this group, you play, potentially, a very important role, I think, in terms of facilitating what is a very important process.

If there's a time to get it right, this seems like a pretty good time to have an effective transition. We're engaged in two different wars, we have an economic crisis, we have terrorism threats, and we have a change in parties, and that's obviously a more challenging transition than the others. The transition period – the period between the election and inauguration – is 77 days, and if the transition begins the day after the election, it probably has started way too late, although people don't want to talk about it and don't want to jinx it before then.

But ideally, by Thanksgiving, you have the key White House positions – executive office positions – filled. By Inauguration Day, you certainly want your Cabinet in place and confirmed that day. And within the next 30 days, ideally, you have 100 sub-Cabinet positions filled. That's kind of a tall order. The paperwork burden, the vetting process – all of those, as you know, are slow and difficult. But it's an important process; it's one that we should get right. And I have to say it looks like this one is off to as good a start on both sides as I have seen, and I think that's very important.

So how do we get it right? We all watch the Olympics – the 4 by 100, and you know what happens when the baton gets dropped. And that's high risk when it comes to governments. So let me mention a couple of things. No one has asked me to make suggestions, but I'll make a couple as we go along. But starting with the most obvious,

and that is the importance of the incoming administration and the outgoing administration communicating – talking to one another. That should seem an obvious point, and it is, but having been through two transitions here at the Department, I can tell you it's not always the case.

The Reagan transition got high marks for getting a transition team in place early, but it also issued a directive to the incoming appointees not to talk to their predecessors. It was quite an extraordinary thing, and they were given the directive. I don't know if it was for fear of tainting them or if the outgoing administration plainly had so little to tell them that would be useful that it was not worth the time. But in any event, there was that directive.

And I was in my office, and Malcolm Baldridge, the Secretary-designate was down in the Deputy Secretary's office. And on the 19th of January, he called me and said, "Homer," he said, "I know I'm not supposed to talk to you, but would you come down to my office for a couple of minutes?" And of course, there were two or three issues that were going to break the following week on which he didn't have the necessary background. So talking to one another, one-on-one meetings between predecessors and successors, good communication – this is something, obviously, that you may be able to facilitate to the extent that you can – important to do.

By way of an off-the-wall suggestion, let me mention the following: tradition is that all of the political appointees tender their resignations and are asked to tender their resignations as of the 20th of January. You may recall that when Sandra Day O'Connor resigned from the Supreme Court, her letter to the President said, "I resign effective the date my successor is confirmed." Now, I don't propose that as a general proposition that might distort the confirmation process itself, but in key positions, that might make sense to have continuity to avoid the kinds of gaps at key political policy-level positions, and frankly, by blurring what has too frequently been an overly charged partisan divide.

Obviously, before the 20th of January, the incoming administration should resist the temptation to try to govern, and the outgoing administration needs to govern right up to that point. It's interesting to note by way in terms of transitions – roughly 350 political positions in the government – right now, about half are vacant. That's quite extraordinary in and of itself when you think about transitions.

The substance of transition: you've probably heard the term "briefing books." They obviously can be very important to facilitate the information flow, but they're not always effective. One rule of thumb is that if the book is too heavy to lift, it probably will not serve the purpose that its authors intended.

Another suggestion that I would make is that every briefing book, including the briefing book about "This is what the Commerce Department does," begins with a one-page summary. It can be done – you may use bullets. But I would start with that one-page summary, and then go to the heavier, more detailed tabs and briefing books, and help folks into the water here in terms of substance of which there's a whole lot in this Department.

Obviously, issues need to be prioritized – the most important, the most urgent. Where there are likely to be modifications of policy, options may be appropriate to lay out. But this is a process in which you and your clients can provide an important public service by helping these two camps communicate effectively, pass the baton smoothly, and avoid disruptions and gaps in the governing process.

And finally, let me just say a word about what some of you who have been through prior transitions have seen, and those of you who have not probably will see. Namely, that people who are the new political appointees are typically coming from a very different milieu, a different background, a different set of experiences, and they don't necessarily translate automatically. For example – and by the way, they will come in almost always with great enthusiasm and exuberance and excitement and verve and vigor and ready to go – you needn't mention this outside of this room, but there'll be things that they do not know – things they don't know about the Department or how government works.

And one of the challenges that often appears is the simple notion of shared power. There will be some Type A decision-makers who come into positions and who may assume that you make decisions in the same way, and won't intuitively sense the importance of the Congress, the role of the White House – or more importantly, the White House staff – the role of interagency deliberations and coordination. And so helping them understand that can be enormously important because it's a different type of decision-making, and in some respects, it calls for a different style of leadership in terms of consulting, coordinating, building consensus, preparing politically with ___ the kinds of issues and decisions that need to be made.

Dealing with the press may be quite new. Knowing how to deal with constituents… And this is a Department that is seen as having a natural constituency that it promotes, that it also regulates, that expects to be consulted. And so you have questions about whether this Department should advocate Detroit's position or provide tough love. I mean, there are some hard issues here, I think, that are unique, in some respects, to this Department. And many will be unaware of and unprepared for the kinds of ethical mishaps, the conflict of interest issues, the press scrutiny, and ways in which it's simply different in government than it is in the private sector in terms of appropriate behavior.

Now, one thing that your role has in common with private practice is that simply saying "no" or "you can't do that" is not necessarily the most helpful or welcome response. You almost always are in a position to talk about how that might be done or alternative approaches. You might have to – and this will call on your deftness and your diplomacy – but you may have to say, "That's just a terrific idea, but in order to do that, we might have to amend the Constitution or deal with the statutory constraints."

So it's going to be a very interesting time. I think it's an important part of your responsibilities as lawyers in the Department. It's a *very* important time in terms of public service and what's good for the country, and so I wish you well with that.

Barbara Fredericks

Homer, I said I was going to ask this before, but just to put it in context, could you just tell the group who you served under both the President and the Secretary, so there's some context?

Homer Moyer

Sure. I came to the Department as Deputy General Counsel under President Ford when Elliot Richardson was brought back from exile to serve as the Secretary of Commerce. And I've survived that transition, continued as Deputy General Counsel under President Carter. The first Secretary of Commerce was Juanita Kreps, and then I became counselor to the Secretary under her. And she was succeeded by Philip Klutznick, a very successful real estate developer from Chicago, if that brings anything to mind to you. And he was a terrific Secretary.

Barbara Fredericks

Thank you. Andy, you want to go next?

Andrew Pincus

Sure, and I'll start by saying that I served under Bill Daley when he was Secretary and when President Clinton…in the second Clinton administration. It's great to be back here and see a lot of familiar faces, and it brings back a lot of memories of working together. I guess, unlike my two colleagues here, I wasn't here during a transition – at least, not a Presidential transition. Obviously, there was a Secretarial transition.

So I'm not really equipped to say much about that, although I do think what Homer has said about helping people when they come into the government, especially if they're coming from the private sector, is important. It is a different world, especially for people who are coming from outside Washington. If you're in Washington, you sort of probably have some experience dealing with the special fishbowl that both the government and, to some extent, the private sector operate under here. But it's very foreign to people who were in the private sector in other places, and it is a bit of a shock, and you can definitely help them along, I think, through that process.

Since I don't have a lot of transition expertise to share, I thought I would talk a little bit about my experience working with many of you and what I sort of see as the special benefits of working with you, and also the advantages that you can bring to your clients. I think one of the great aspects of the structure of the General Counsel's Office here is the fact that there are the sort of central components that deal with important issues like

ethics [and] administration, and working to make sure that the Department's voice is heard in the interagency process, and dealing with contracts and litigation and other kinds of matters that cut across.

But the offices within each of the bureaus, I think, really have an incredibly important role to play, much more akin to the job that an inside lawyer plays at a company. I mean, you are really counselors for the people who are running your bureaus, and I think the opportunity to be not just the lawyer who's sort of come to at the end to make sure everything's okay – and certainly not the lawyer, as Homer says, who's the naysayer – but the opportunity to be part of the decision-making process.

And bring to bear both the legal perspective, which obviously is important in a lot of things that the Department does, but your experience being here through many administrations and probably many different people in leadership positions in your bureaus and giving them a different take, maybe, on the historical perspective from what they may get from the folks who are in the non-legal components – actually doing the running of those various bureaus – is a really important role to play.

And I'd urge you to think about that, obviously – I don't want to be too forward – and develop a relationship with the people that come in. But I think it's a great perspective that you all have. It's a lot of knowledge that you all have. And I think, especially as all government today, increasingly, is operating in that fishbowl – and we now have 24/7 media looking for – almost desperate for – things to write about – I think you can really help folks along.

And I thought it might be useful to give some examples of that just in the work that I was privileged to do when I was here. As Mike mentioned, the late '90s were the magical time of e-commerce when the Internet was discovered by Al Gore, or at least it was coming into its own. And the Department really not necessarily automatically, but I think through a confluence of events, we were all really at the center of a lot of the important policy issues that were new then: What do you do about privacy on the Internet? What do you do about intellectual property on the Internet? As Mike said, what do you do about forming binding legal contracts on the Internet? What do you do about the domain name system – which actually, Commerce, through NTIA, had an important role in managing?

And we participated in all of those things, and although each of them had a policy aspect, a lot of the policy was legal. And so I think people – both in the central components of the GC's Office and all of them from Barbara to Mike to the folks in contracts and procurement – really played a role not just in sort of providing after-the-fact legal advice, but in really sitting at the table with the policy people and coming to some conclusions about what could we do to establish…

We had this odd situation where the U.S. government had set up the Internet through the, I guess, DARPA and some of the other military grant-making components, but there was a need to transform it into something that was civil. How could that oversight be set up

through the Commerce Department in a way that allowed the private sector – since this was this weird kind of international thing – to flourish, but still dealt with the fact that you needed some regulation of the system for assigning domain names?

So there was coordination and a comfort level that it wouldn't sort of go completely out of control. And working with the policy people, we structured this legal relationship and helped to foster the creation of the entity that became ICANN, which actually – although it's had its fits and starts over the years – has grown into a completely new animal, which is this private sector-led entity for managing a very important aspect of the Internet.

And although there have been efforts ranging from our own Congress to international organizations to the U.N. to try and get rid of ICANN and substitute something that was more governmental – either U.S. governmental or some U.N.-related organization – that hasn't happened. And I think that was a huge success that really, where a number of people in the Department working together to create this new beast, which we thought at the time might be a paradigm for lots of Internet management things, and I think, in some other areas, like privacy, has taken over to some extent, although it may be not as wholesomely as we would have liked.

The other thing that I think is worth talking about and maybe even more important, as I think in the new next couple of years, the Department's trade promotion function is going to be increasingly important because we're going to be looking desperately to the extent there are any countries that have any money to buy U.S. products to promoting them. And I think there, the CLDP program – which, I gather, is still around – has another, also very important, role to play not only in nation-building and law-building and helping emerging countries develop the kinds of legal systems that that will foster commerce, but frankly, having a very selfish U.S. aspect.

If you look at trade patterns around the world, countries that adopt U.S. systems, whether for measurement or for contracting or for other legal standards, are likely to be much more receptive markets for U.S. exports. And so I think there, too, working both within the General Counsel's Office, but even in your individual agencies, to promote those kinds of outreach efforts to emerging market economies could really bear fruits in the years to come.

And my guess is another place where the General Counsel's Office can play a role in addition to the things that we do ordinarily in counseling clients, but playing an important policy role in helping ourselves to advance the mission of the Department. Certainly, I thought that was a very important part of what we did when I was here.

And I guess the last thing – because I do want to return to it because I think it is going to be important, and Homer mentioned it, and with Barbara sitting up here, you can't help but have it come to mind – which is ethics. And I think it sounds like, from what the Obama transition program has talked about, ethics is going to be an important part of the coming administration as it is with all administrations.

And I think helping to guide people as they come in – whether senior people and, frankly, sometimes the most junior people who come in who may have even less of a front-of-mind concept of what those ideas are – but really helping to put those obligations in front of them and make sure that they're aware of them, I think, will be a very important part of both making the new administration successful, but also making the Department successful.

So maybe I'll stop there, and happy to talk more about these or other issues and questions.

Barbara Fredericks

Ted, do you want to finish this off or…?

Theodore Kassinger

Not literally.

Barbara Fredericks

Not literally.

Theodore Kassinger

It is, as Andy said, just a great pleasure to be back always, and see so many of you. Many of my fondest memories of law practice, certainly, took place in this building. When Lily first called and asked if I would participate in the panel, I think I understood her to say that the subject of the panel was going to be the evolution of law practice at the Department. And then as discussion continued, it was, well, obviously, we're in a transition, and that should be the most important thing. And then when Barbara and I talked the other day, it was, "Well, we really want to talk about some of your experiences and highlights."

And actually, all of those things are connected. Although, I must say, when I was first focused on the idea of the evolution of law practice, I imagined that the metaphor for that, of course, would be the famous print of the evolution of man that starts with the ape and then slowly, the figure stands up.

Homer Moyer

Careful, careful.

Theodore Kassinger

Yeah. See? Homer knows where I'm going, so… Well, we look along that timeline and think of, "Oh, my god. When were you here, Homer? I can't…" you know. Of course, by the time you got to Andy, it's the tall, upright figure with the weapon in hand. I'm sort of the more stoop figure as you head down the other line. And I guess, by the time you get to Lily, you're at the very model of the model Counsel General.

But in any event, I think there are things that are very constant over the years between all of us in the experiences we share. The things that change are, in many ways, more of the outside world. I think of the transition time eight years ago where we had a very short transition period of time, unlike the ideal that Homer described. I was mostly minding my own business when I was called the week before Christmas, and asked to come over and head up the transition team – the election finally being over at that point.

And we had thirty days, basically, to get a new Secretary confirmed and figure out what was going on, and it was doable. And it worked well because of the terrific support here. The first time I showed up, I think Barbara and Mike were both there and were sat at a long table, and there was a team of people and the briefing books were all there. And that is an incredibly important function.

One of the things, actually, I learned from Homer a long time ago when I talked to him once about the General Counsel's position well before I even imagined I would ever be in that position, was the centrality of the Office to the functioning of this Department. Homer mentioned to me once that the General Counsel was the third in the order of succession. And I didn't quite grasp what that was about until I arrived here and realized that the reason for that is that after the Deputy Secretary, there is no other person in the Department that has the responsibility and the perspective that cuts across the disparate bureaus that make up this Department.

And another thing I learned in my time here, as within any organization that has 39,000 people, you have lots of really terrific, able people, but you also have a few thieves and miscreants and people who don't do such a good job. And the 200 or so lawyers that formed the General Counsel's operation are really the conscience – the constant – of the Department. There is no more important time to be in that position than during a transition and in those first few months with a new administration.

I can tell you, leading a transition team is a very interesting experience. Every bureau presents its best face, as it should, about the issues that are going on, but people begin laying the groundwork even then for the proposed budget increases that will come the following budget cycle. And it's the lawyers that give the neutral advice, that give the best perspective, that give the framework for the new team to think about the issues and how the Department functions. So I echo very much what Andy and Homer said about the importance of transition and just reemphasize that that's a key part of your role.

One of the things that's something I could say with some reassurance now is that most of you don't know what the issues will be that will be front and center for the new Secretary and the new team today. I certainly didn't know that in December of 2000 and January 2001. I remember when Secretary Evans was named to be the new Secretary – again, that was right before Christmas – and I met with him in the transition offices. And almost immediately, Senator Hollings and Senator McCain called and said, "We want to have the confirmation hearing the Friday after New Year's." And Secretary Evans, not only being exhausted after a two-year campaign and looking forward to a two-week vacation, there just was no way.

I said, "Don, you've got to do the hearing." I said, "This is great. If you give them three weeks – go to the end of January – they're going to think you have to know something. But if you come back on January 3rd, you don't have to worry so much." And so he went off to think about that, and with terrific people here working over the Christmas holidays and over the New Year's weekend, I was able to send him, as Homer says, the big stack of briefing books.

And he called me on New Year's Day and said, "What did you just send me?" And I said, "Well, it's your briefing books for the hearing on Friday." He said, "I cannot do this hearing." And I said, "Don, you've got to do this hearing. If you give them another two weeks, you're going to have to learn what's in those books." So he came back, and – he loves to tell the story himself – he said, "You know, they didn't expect me to know anything, and I didn't disappoint them."

But it actually set a great tone for the relationship he had with the Committee after that. He did work hard. He got his team together. The worst time, actually, wasn't January 3rd – it was January 21st. Sunday was the 20th, as it happened, that month. They were all sworn in ___ with the President, and he showed up Monday and there was nobody around. I had disappeared and others had disappeared, and he called and said, "You've got to come back."

So much to Barbara's consternation, there was an interloper hanging around the Secretary's office, not employed, but trying to help smooth things over. That, obviously, was untenable. And by that time, the President had announced his intent to nominate and I thought I would just hang out at my firm until I came over. But I resigned and came over as the advisor, which brings me to another point, and I'm picking up on something Homer said.

I very much hope, and I think most people do, that the confirmation processes work much better than they have happened over the last three or four administrations. The President, in my case, announced his intent to nominate me in January. I was the first person at the Commerce Department after the Secretary that was named. My nomination actually didn't go up until March, I was not confirmed until May, and I was the first person confirmed until after the Secretary.

And that only happened because, as you may recall, Senator McCain had an election reform bill and he had crafted it, as crafty senators do, so that it had a ___ component. And therefore, it was in the Commerce Committee's jurisdiction, and so we needed somebody from the Commerce Department to testify. And we said, "Well, you can't have the Secretary, and there's nobody else. But if you confirm the nominee for General Counsel, he will come testify." And amazingly, within the same week – within 48 hours – I had my hearing before the Committee, I was approved by the Committee, approved by the Senate, and confirmed.

And then I didn't testify because the administration couldn't decide what its position on the bill was. But hopefully, you will see a process over the next couple of months where people will be in place, up and running much faster. And whatever you can do to facilitate that will be important.

So I will just make two other observations. Again, going back to the point of what the issues will be: When I arrived, I was pretty despondent after I looked around and realized that Andy had taken all the fun issues in his tenure – the sexy Internet issues, the Digital Millennium Copyright Act – and I was trying to figure out what I would do. Well, this is the way it happens.

As it turned out, there was the census and redistricting, and in six weeks, we had to figure out what the count was going to be and whether there would be statistical adjustment. I discovered a couple of other things that Andy had left behind to guide us in our thinking of that. I didn't know anything about the census or census law, but what a terrific time working with the team here on trying to just get the legal standards set up, get the whole process set up.

And as it turned out, of course, the Census Bureau decided, in that case, that there were severe flaws in the statistical work they'd done, and so they went with the actual headcount and took the controversy away. It did end up in one of the great experiences I had, which was helping prepare and watching Ted Olson argue the *Utah v. North Carolina case* later on where, ironically enough, we had Ted Olson defending what some people thought of as statistical adjustment in the census – surely, one of the highlights of my tenure here.

But who could've forecast 9/11 in January 2001? A very unfortunate event that surely drove a great deal of the tenure we had here in the first four years. Similarly, climate change issues, oddly enough, I spent a lot of my time on. And that is the life of the General Counsel here. Your agenda's set by the Secretary, and the Secretary's agenda's set by the President. And as I've pointed out to someone recently, it must be the only Cabinet Department where what most of what the Secretary does every day has little to do with what most of the other 38,999 people are doing every day.

And so the General Counsel, again, is the interlocutor between the Secretary and those other things that have to go on every day. And in my case, it was just a terrific experience. So let me end there.

Barbara Fredericks

I'm just going to make one observation and just ask you – I think it's reiterating on some of the remarks you've all made – and then I'll just turn it over to you guys because we just have a few minutes for questions. But one of my observations, working under these two individuals – and it's obvious from Homer's tenure – as lawyers, we're technicians, and I have been in situations, even in this government, where basically clients turn and say, "I just want the legal answer. I'm not interested in having you involved in policy or helping me shape this."

And it's not been that way at Commerce and, particularly, with Andy and Ted who I worked for. It was really clear the reason that lawyers were brought in. One of the reasons we were brought in was both Secretaries had *tremendous* respect for and admiration for – and you, obviously, were their choices – and the other PAS's and everybody else who made major decisions in this agency knew the respect of the Secretary for you. And that's why, as lawyers, it really did make our jobs easier.

And I was wondering with all three of you, if you have any other observations on how we, as lawyers, can continue to play this, "What is it about?" Because we are here, and people don't pay our bills, literally, and so they, I think, sometimes take lawyers for granted. So how is it that you felt would be useful for us to know about to keep us in the loop and not just make us the technicians that we can be, but also bring us into the kinds of policy issues that are fun and make our jobs that much better?

Andrew Pincus

Well, you know, in corporate America, there's an aphorism, which is, what's the tone at the top of a company? And that's a big question, and a very important question, in deciding the governance and ethics and all kinds of things about various institutions, because the tone does come from the CEO. If you have a CEO that's sort of a go-getter type who says, "Don't bother me with the law. I want to do what I want," you might have one kind of result at the company. If you have a CEO that's smart but deliberate, and involves his or her whole team in the deliberations, you're going to have another kind of result – probably a better result.

And corporate governance experts have developed all kind of metrics for assessing the tone in private sector institutions, but I think that's true in institutions like the Commerce Department, too. The first question is, what does the Secretary see the role of the General Counsel as? Are you just the technician or are you a technician/advisor? And that's a question that recurs in companies, and it recurs here. And I think the more that the rest of the Departments sees the General Counsel in that role, the more they're going to get the idea that maybe that's sort of a sensible thing for them to do, too, with respect to the lawyers that work with them on a daily basis.

But I think they are building those relationships. I think what Homer said about "Don't just say no" is a very important thing for lawyers to keep in mind. It's easy to tell people that they can't do things, but part of the fun is helping them figure out if it's possible, obviously – how to get to the goal they want to get out in a way that's lawful, and along the way, to yourselves, become more than a lawyer, but a counselor. As Ted said and I said, you all have a tremendous amount of knowledge about the Department and how it works.

And so building that relationship with people as they come in so that they'll turn to you and not just as a technician but as an advisor, generally, is something that you should all try to do – A, because it helps the Department work better, but B, it'll make your jobs more fun.

Homer Moyer

And I think you have a natural advantage compared to private sector lawyers, in the sense that policy issues and legal issues in a government department and inextricably intertwined. If you want to talk about trade policy, you really can't do that with an understanding about the constraints and the structure of trade laws – marine mammals, it's the same thing. And so you will have information that is directly relevant to, that may shape policy, and that may create opportunities.

And so to the extent that is an interest of yours – and I think it should be – it's one of the great opportunities, in my view, of government service – you have sort of an entree to do that because the policy implications are so closely tied to the legal issues that it's natural for you to do. And if you default to pure legal advice, that's your option. But I think most government decision makers are interested in hearing a discussion of policy through, among others, the lenses of a lawyer – and indeed, a lot of your clients are going to be lawyers.

Barbara Fredericks

Ted, anything to add? Okay. Well, I mean, I have a bunch of questions, but does any-body want to start from the audience? Yeah, David?

Audience Member

I mean, there is going to be a new President, a new Secretary, but I'm more concerned about my new boss – the General Counsel. So you've all been in the position of the first day on the job. What did you find most helpful as you first walked in that first day or that first week, and was there something you didn't have that you wish you had had that you could perhaps supply?

Homer Moyer

I wish I'd had more experience – I was bewildered. And I think one of the most interesting differences – and it may be different for the General Counsel or the Deputy than a bureau – but I think the same theme runs there, and that is that I was struck by the fact that important issues were sort of bobbing by day by day. And I had come from a law firm where I was fairly low on the food chain, and I probably had spent a day on a footnote at some point.

And here, with these big issues, and my initial reaction was, "Oh, my god. It'd take three weeks to sort of frame the issue." And as I was getting ready to do that, the decision was made on the next issue – a lot like Lucille Ball and the pies on the conveyor belt. And a guy named Frank [Halsol] pulled me aside and said, "Homer," he said, "Look, you need to weigh in on these issues, and you won't have total knowledge. But if you don't do this, somebody else is going to."

And so the pace of dealing with issues, including legal issues, I found to be a big change and called for sort of a readjustment in your thinking. And that was certainly one thing that I saw that took some adjustment.

Theodore Kassinger

You know, part of the problem of stepping into the job the first day is you push off in the river and the current's moving pretty fast and you are spending a lot of time trying to get the oars in the oarlocks and trying to more or less stay on the direction you're headed. And as Homer suggests, it doesn't give you time to learn the things you need to learn and you don't bring them with you when you arrive.

This is a very prosaic observation, but the one thing I regret that I didn't have when I started – and never seemed to find time, except in emergency circumstances, to get – was kind of the basic legal framework of a lot of the programs that we had to give opinions about on the fly and pretty early on.

And there is no time, generally, but maybe it's one of those things you could think about, as the new General Counsel comes in, is some way of forcing that person to take a couple of days early on and have people come in and say, "Here's what the economics and statistics administration's all about, and here are the basic legal authorities that govern what it does, and here's the census issues that'll be coming up," and one by one. Now, you get to ___, that could take a year, but it was just hard to get my mind around *all* the different statutory, authorities, and rules, and just kind of the basic framework.

Barbara Fredericks

Do we have another question from the audience? Okay, I have a bunch. What's the thing that you miss most about being in the government, and what do you miss the least about going from government to private practice?

Andrew Pincus

Well, one is sort of a joke, but not really: no timesheets on the government. One of the worst parts of private practice, to me, is this sort of requirement that you account for either a quarter or a tenth of that hour. It's sort of mindless, but it's really annoying. I think, seriously, it sounds corny to say, but it was true when I worked at the Justice Department, and it was true when I worked here.

There's something very rewarding to think when you get up in the morning that you're going to work for the people of the United States, and that your job is to do the very best that you can to make the government work for them. And as wonderful as it is to represent companies and individuals occasionally, it doesn't compare to the opportunity to do that. And also, the fact is – at least, of what I do – the best kind of private practice lets you do the kind of counseling that we're talking about.

Since my life, as a litigator and as an appellate litigator, often involves parachuting into some single case after it's been tried in the district court, there's less of an opportunity. It's interesting intellectually because there's a legal puzzle, but you don't have the opportunity to sort of think about the client and its business and make suggestions about how it might do things better, and you all get to do that.

Theodore Kassinger

I'll take the other side of that question: What's the least thing that's…? You know, the frustrating part, I think, often about being here in this position is the lack of time, really, to train and take opportunities to stay abreast of what's happening in the business world or in the legal world – the things that affect your business. I know Barbara and Michael remember I made an effort to figure out how much money we spend on training every year per lawyer and what we could do to improve that, and I think it was less than $100 a year.

You will operate in, if anything, a much more resource-constrained environment over the next four years. And so I don't miss that. I'm glad to be back in an environment, fortunately, where training is an everyday thing and the firms we all work in invest a lot in that, and it's intellectually interesting, but also just professionally rewarding. And I think that's the thing that, I think, all of us would agree with Andy's observation – you know, the idea of participating with the public as your client in this building is just unsurpassed.

And I'm sure we all had these particular epiphanies. I remember mine very early on in my tenure here. I went to a meeting at the White House in the situation room – I thought that was pretty cool. And this was the first meeting we were going to have on that perennial issue of what to do about the steel industry. And Secretary Evans and Secretary Chao and just a couple of senior White House people and Secretary O'Neill were there – I think that was it.

And I remember about thirty minutes into this discussion, which was just a terrific policy-oriented discussion, thinking, "This beats writing reps and warranties any day of the week."

Homer Moyer

I mean, private practice and being a lawyer in government are very different, and I think they both have wonderful rewards. But the unique reward in government is you are – and maybe you take it for granted from time to time, but you're working on issues that really make a difference, and you're in a position to act in a way that is purely in the public interest. And that's very exciting stuff, and you don't get that in private practice – you get other things – but I think, as Andy said, that's unique. As I recall, I *don't* miss the coffee.

Barbara Fredericks

Well, I think that's improved. We actually have a Starbucks across the street, which we didn't have when I think you were here. And I think it's sort of interesting that all three of these individuals were able to show how, especially in a place like the Department of Commerce, we just can't predict what's going to come. We're always poised and ready, and we never know what shoe is going to drop, but it's always going to require a lawyer. So with that, I want to thank these individuals very much. I think we're out of our time, and…

[*Applause*.]

Teambuilding: Connecting Across Offices (DOC Lobby)

Ryan Meyers
Senior Counsel, Department of Commerce

...soon be moving to our team building exercise, and we'll be moving down to the lobby for that. But before we actually start moving and shifting, David Bowsher, I believe

who's here now, is going to come up and kind of explain the process for that. So at this point, I'll turn it over to David.

David Bowsher
Deputy General Counsel, Department of Commerce

Okay. For those of you who haven't actually met me in person, I'm David Bowsher. I'm the Deputy General Counsel. And next up on our fun-filled agenda today is a team-building exercise. Some of you may be asking yourselves the question that I first did when I heard about this: Why team-building and what the heck is it?

We all work in the Office of the General Counsel, but I suspect that a lot of us don't know too many folks outside of our Office and outside of the folks we interact with on a daily basis. And so this is really designed to introduce you to folks who you don't necessarily see on a daily – don't interact with on a daily basis, but who are also part of OGC, and who can be a resource that you can draw on in your day-to-day practice. And on the squishier side, it also helps us feel a greater sense of community as an organization.

Instructions. Now, you have to pay close attention to this because it's complicated, although I think when you get out and you do it, you'll see just how simple it is. In a couple minutes, we're all going to head out to the lobby. Those of you on the right side of the room – that's your right, my left, on that side of the room, that half of the room – you're going to go out that door. Those of you on this side of the room, you're going to go out this door.

You're going to go out the doors and walk down to the lobby. There'll be people directing you, and once you get out into the lobby, you'll be directed. There are going to be four numbered lines marked off with blue masking tape on the floor of the lobby, and you're going to be directed into four sets of two rows of people facing each other. You should be standing directly across the blue tape from somebody else.

Once we start this, you will have two minutes only to get to know the person standing across from you. When you hear the air horn, you should rotate. Each person is going to move one space to their right. So you're going to end up skipping people, but that just makes it a little more interesting. If you happen to be on the end of your row, you basically go from one side of the blue tape to the other side of the blue tape.

[*Off-camera comment*.]
Sorry about that. So, yeah, if you're at the end of a row, the right-hand end of a row, rather than having to go all the way back around, you just switch to the other side of the blue tape. That's how we'll work that. And we'll walk through this again once we get out there, and you're actually lined up across from folks. We've got some suggested questions for those of you who need a little help in getting to know the person across the tape from you, but don't feel bound to use the questions that we supply.

And, finally, we'll do this a number of times and let everybody get some good rotations in. And then we're going to break for lunch, but you actually have work you need to do over lunch. We want you to continue getting to know people outside of your office over lunch. So with that, unless anybody has any questions at this stage, I'll ask everybody to get up – feel free to leave stuff here if you want, but also feel free to take it with you – get up, split, go out the doors, and into the lobby.

Panel: Legal Perspectives on Free Trade

Ryan Meyers
Senior Counsel, Department of Commerce

We're now ready for our next panel discussion entitled *Legal Perspectives on Free Trade*. Here to introduce the panelists and moderator is John McInerney, Chief Counsel for the Import Administration.

John McInerney
Chief Counsel, OCC/IA

Good afternoon. It's my pleasure to introduce our distinguished panel here. Everyone is a Commerce alumnus. So working from left to right, we have David Marchick. I'm not going to read the entire biographies; I'll just give you the highlights. He's currently the Managing Director for Global Government and Regulatory Affairs at the Carlyle Group. And during the Clinton Administration, he served with the White House, USTR, and the Departments of State and Commerce.

Next we have Grant Aldonas.

David Marchick
Managing Director for Global Government and Regulatory Affairs
The Carlyle Group

They just put me on the left, just so...

John McInerney

Second from you're right, my left. Grant Aldonas, who is now the Senior Advisor at the Center for Strategic and International Studies, and in the years 2001 to 2005, he was the Under Secretary for ITA.

And finally, we have Karan Bhatia, who is currently a Vice President and Senior Counsel at General Electric. Prior to that, he was a Deputy United States Trade Representative. And here at Commerce, he was Deputy Under Secretary and Chief Counsel for the Bureau of Industry and Security. So that's our panel. And John Cobau, who is the Chief Counsel for International Commerce, will moderate the panel.

John Cobau
Chief Counsel, OCC/IC

Welcome to our panel on International Trade. It's actually called *Legal Aspects of Free Trade*. I'd like to particularly thank the panelists who are real experts in International Trade and Investment, both from the government side and from the private sector side. I think we're going to have a really interesting discussion here. As moderator, I'll start, make a couple of remarks, and then I'll have a couple of questions for the panelists. But I hope we'll have an opportunity for questions from the audience. I think at this time when the U.S. view on trade is in flux, it's a particularly interesting time to have this panel.

When I speak with young international trade lawyers, one of the things I always mention is the importance of the centrality of lawyers to international trade. And that's because our international trade and investment agreements both create law and they modify and amend existing legal systems. They create international law by creating a set of binding legal obligations between the parties to the agreement, between the countries. And our trade agreements are all enforceable and have robust dispute settlement mechanisms.

They also create, or at least they reinforce, domestic legal norms by... Though the agreements have a lot of annexes dealing with tariff rates and rules of origin, the heart of the agreements, I would argue, are much more legally focused things like requiring opportunity for common unproposed measures, requiring the opportunity for appeal. They're very legally focused.

With that said, I guess I'd like to start with Karan, and talk about his perspective at USCR. Karan, when you were at USCR, you negotiated trade and investment agreements. And now at GE, you see them from a private sector perspective. What kind of impact, if any, do you think these agreements have on the domestic legal environment in our trading partners and also in the United States?

Karan Bhatia
Vice President and Senior Counsel, General Electric

Well, John, first of all, thank you. Thanks for inviting me. It's a fabulous panel. I feel honored to be a part of it. Look, I think the question of the impact of these agreements on the legal environment in countries of many of our trading partners is, in a lot of ways, the

key question because I think the challenges that you see facing American companies today, including General Electric, isn't tariffs anymore.

I've only been there nine months, but I can tell you, not in one instance in those nine months has a business leader come up to me and said, "You know, what we really, really, really need to do is get rid of the tariffs that are preventing us from expanding further into X market or Y market." Tariffs are perceived to be a knowable cost of doing business. Now, there are some places where we wish they were lower. There are some places where we may in fact be precluded from being business, but at least they are a knowable cost, they are out there.

The far greater challenge, I think, that we see as a company, and that I certainly saw in the trade negotiations, was in what you would broadly call legal environment. It's in the non-tariff barriers, the laws, the regulations, the processes, and I think more broadly, and what you would call rule of law in these countries. And we have seen improvements, I would say, in rule of law around the world in the last fifteen, twenty years, whether you want to talk about Asia or Latin America, the Middle East, even in Africa, I think, in select places.

And the question that it's raised by your question is why – why has that happened? Well, thinking about this a little bit, I think there are multiple causes. I do think that bilateral agreements have been helpful. They have helped in specific cases where we have had these agreements negotiated and negotiated on these kinds of issues. I think they have moved governments forward.

And I would give, as an example, simply the Bilateral Accession Agreement that we did with Vietnam during the course of its WTO accession, which I think helped move Vietnam along. I would point out that those bilateral agreements are often used, I think, as cover to some extent by the domestic leadership in these countries for changes that they would like to make, in any event.

But I think the larger reason, frankly – and this, in some ways, reflected that last comment – is exogenous sort of unilateral reasons that countries want to move forward. It may be the process of democratization that leads to greater rule of law, or it may be competition between economies as they realize that the need to attract foreign investment. And foreign trade does lead to a greater desire for rule of law.

So I think the long answer to your short question is that I think FTA's have been helpful; I think bilateral trade agreements have been helpful. But I think they are only part of the story. And one of the things that we need to be thinking about, I think, as a country, as a government, is, what are the mechanisms outside of bilateral agreements to help push that sort of reformed process, creating the legal environment that will enable companies like GE to be comfortable in doing business abroad. And I think there are a variety of mechanisms that people can be looking at: development policy, or transparency enhancements, or the role of companies or NGO's. But I'll stop there.

John Cobau

Great, thank you. Dave, I know you work a lot with U.S. investors abroad. Do you have a perspective on how the agreements that we're negotiating – are they having an impact in countries that we do business?

David Marchick

That answer is clearly, yes. The legal... First of all, thank you again for inviting me, and it's nice to be back at the Commerce Department. The framework, which has been put in place from the whole set of trade and investment agreements, have had a hugely positive impact. There's no doubt.

First of all, as a former lawyer that represented foreign investors looking at investing in the United States and around the world, investors want to have confidence that they can close their transactions. When a board is deliberating over whether to pull a trigger on a significant investment, there are basically two or three things they looks at (a) do we like the company and do we have confidence in their prospects; (b) are we getting a good price that meets our risk-adjusted return expectations; (c) and third, do we have confidence that the legal process for closing this transaction gives us comfort that we can put our money or our investors' money at risk?

And the legal framework that exists around the world is absolutely essential for those decisions, not only in the United States and Europe and other developed countries, but even more so in developing countries. To the same extent, the lack of legal certainty in certain developing countries creates risk that impedes investment.

And there are many times when either we've pursued investment at the Carlyle, or when my clients at my former firm pursued an investment where they basically said, "We don't have confidence in the legal environment or the rule of law or our ability to seek redress to make this investment. It's too risky. And it's not a matter of price, it's not a matter of the fact that we don't like this company, don't think their prospects are bright. It's that if something goes wrong or if there's a problem, we don't think we can have adequate access to courts, to the rule of law, or legal certainty."

And so I think the work that the Commerce Department has done, the work that USTR has done over literally a third a year period has been essential and imperative and very positive for the global economy.

John Cobau

Another legal aspect of free trade is the quasi-judicial dispute settlement system that we've established both in our free trade agreements, in our investment agreements, and multilaterally, in the WTO. It's, I think, a fairly large contrast between the trade area and other areas of international law where there really is binding and, I think most people

would argue, fairly effective dispute settlement. Grant, how do you think that this legal aspect of these trade agreements impacts the negotiation and their enforcement? Does it make negotiation harder or easier? And how does it impact compliance?

Grant Aldonas

John, I'm tempted, just like when we used to work together to say I was always informed by your judgment, but never felt bound by it. So actually, I was going to go off on a digression in a different direction. But in direct response to your question, the reality of the dispute settlement process is that not only is it critical institutionally, in terms of the arrangements in that it has by and large worked; it's surprising that even in the context of the U.S. Congress, we've actually had a remarkable degree of compliance, even when it's small litigants like Antigua and Barbuda bringing the case.

But more importantly, there is a value to being a participant in that process and to know that the expectations out of that process are consistent with the kind of legal values that are inherent in what I think is not only the underpinnings of our economy, but the underpinnings of a good and equitable international economy. And the more that countries are exposed to that through the process of dispute/settlement process, there is a process of learning. Having just sat through an ICA arbitration as an arbitrator, one of the things I found fascinating was the level at which the Argentine lawyers played the game, in part, because of the processes they'd been engaged in the WTO. It was the same team that litigated in the WTO as it litigated in front of these particular ICA on investment complaints.

But the problem, I think, also comes is that we haven't quite squared the circle, John, with what are very different legal cultures. And so you do run into things where, as you're negotiating, you may write a standard review, which, of course, is certainly relevant here at the Commerce Department where the legal culture of someone who grows up in a civil law system, even though the outcome, legally, of civil law decisions than common law decisions are not terribly different on contract matters and things like that. The technique that the lawyers bring to deciding cases is fundamentally different, and respect for things like a standard review is frankly not as healthy.

Now, one could reasonably quarrel whether Chevron's a decent export from the United States given the mess that it is in our own administrative law. But having said that, what you have a very difficult time is actually getting the right respect for what's written in the agreements because you're having people who are operating from a very different intellectual paradigm. And so there's still an awful lot of work to be done.

Now, what does it do in terms of the specifics of negotiation? It should lead us as negotiators to be thinking that there is now binding dispute settlement, and that the kinds of fudges that we could get away with back when I was at USDR in the 1980s are not things you can get away with now. In fact, it does require both a greater attention to

detail and an understanding of what is likely to flow out of the process through litigation. But it also requires that you have people who have counsel earlier on in the process.

And in some respects, it puts a greater premium on the legal advice that you get than negotiations because you need people who have had enough experience with the litigation process to inform your judgment about what you should be writing into the agreements. And that's one of the deficits we've suffered from in some respects. It's not just us – I mean, negotiators generally in the trading system – but it's one of the things that we have to cure going forward because you can't live in a system where you leave some things that come back and metastasize as political problems in the international trade framework because what you weren't doing was calling your lawyer to get some advice about this.

That's the guts of the system. We're better off in a system with binding dispute settlement, but it does put a very different pressure on both the negotiator and the counsel in any negotiation.

Karan Bhatia

I've learned better than to disagree with Grant on anything, so I'm not going to. It's interesting, I think you can look at disputes or commitments that contain disputes, ____ of provisions, and those that do not in two very different ways. I think one need only look at this weekend where the G20 came together and pledged that they would take no protectionist actions for the next twelve months. And literally less than 24 hours later, the Russians come in and announce they're going to hiking import tariffs. And a variety of steps have been taken in the course of the last week that have sort of, I think, belied the credibility of that...

Grant Aldonas

That was more the misunderstandings of the review...

Karan Bhatia

That's fair enough. And so the question is if you can get away with simply making broad commitments like that when there is no enforceable dispute settlement. Clearly, commitments that are not binding and that don't have dispute settlement attached to it are worthless, as some would argue. Now, I would not go so far... I do think there is a value to a potentially new paradigm of trade documents or of commitments. And this is something was being kicked around a little bit when I was at USTR. I think a BRT paper put this forward and it was interesting, that the idea of simply having negotiated a set of best practices.

And this is along the lines of what not infrequently gets done, for instance, in APEC – model measures, things that countries will strive to live up to. They don't contain an enforceable dispute settlement. They are not binding commitments in that respect. But I do think they serve a purpose and have a value in sort of at least orienting the discussions in a certain direction and setting sort of a framework for the binding trade agreements to follow through. And I don't think this is in disagreement. This is just simply pointing out that there is, I think, a value for agreements that don't necessarily have the hard and fast sort of legally binding nature that an FTA would by it's definition, I think.

Grant Aldonas

I think that's absolutely true. Karan, one thing that struck me from what you were saying, if you combine it with a dispute settlement, though, is the irony of this process is that to get where you want to go, in terms of economic development, you literally have to expand an individual's freedom essentially to improve their own lives so they can contribute to the cross-economic development, which means that if you're actually arguing for the right thing trade-wise, you are implicitly talking about the rights inside the market. And part of which you would want to bargain for in that context actually is the legal environment that David was just describing.

But when you combine that with dispute settlement, you really end up coming right down to this problem about what is the standard review. What latitude is left to the sovereign, essentially, to make judgments about domestic law, when, in fact, what we should be negotiating in many respects are actually the underlying premises of a market economy system in a way so you systematically align the incentives that favor human freedom. That would be a good thing, but we're still going to have to grapple, just as you're pointing out, with how do you do that, and then confront that issue with what binding dispute settlement means.

And it may be that we end up with codes of conduct or something like that, rather than binding legal obligations. But that's certainly the direction that the negotiations have to go.

David Marchick

I would encourage people to think about it in kind of three prongs in terms of the hierarchy of objectives and trade negotiations. The first prong would be the type of commitments, codes of conduct, principles that Karan talked about. Those are definitely beneficial and helpful, and will give investors and companies that are engaged in trade some confidence, but they aren't binding and they're flexible. Okay. At the same time, they're better than nothing.

Second prong are commitments for which there's binding dispute settlement. And countries, in my experience from negotiations, definitely looked harder and negotiated more over those provisions to which they would be bound. Okay? So from a hierarchical perspective, that's better than codes of conduct principles or general statements.

The third and greatest objective would be specific commitments subject to dispute settlement for which there's also political support in the system. The Europeans, for example, have had commitments on beef hormones and other agricultural products, have lost GMOs, have lost dispute settlement cases. Yet because of political restrictions or political problems, they still can't implement them regardless of the fact that they're bound.

And at the end of the day, that doesn't really help our ag producers or those companies that are seeking redress. Same thing would happen for the Chinese, same thing for the Russians. The market will punish those participants somewhat. There's certainly a lot less investment in Russia today than there was eighteen months ago because of the somewhat erratic – not somewhat – the erratic behavior of the Russian authorities. But that only goes so far.

So I think that if negotiators think about these issues in those three prongs, in terms of kind of a hierarchy, that's helpful as well.

John Cobau

I think it would be helpful if there's some questions from the audience. If anyone has any right now, that'd be great to hear them. If not, I also have some more questions.

Audience Member

[*Inaudible*.]

Grant Aldonas

Negatively. Yeah, I think there are two things going on. One is, there's a broader populous trend, Beth, and [her] politics, and we would be wise to understand its effects both sides of the aisle. In the Democratic side of the aisle, it comes out as a trade debate. In the Republican side of the aisle, it comes out more as an immigration debate. But you have to appreciate, both of those are ways that we interface with the global economy, and that to understand properly what's going on politically and what it means, implications, politically, for what's possible in terms of either progress or retrogression, it's better to understand in that context.

If Phil English were still there, he'd be just as protectionist as any Democrat, trust me. He has to be political given that he's from Erie. So one of the things that we have to say in that environment is not so much, "Oh, let's throw up our hands. It's going to be bad." But what can we do to shape that environment in a way that allows us to make progress. And there, my own reaction, Beth, would be, fairly early on in the Obama administration, like it or not, will be confronted with the need to actually make statements about trade. If nothing else, it will find itself at a summit of the America's in the spring as sort of the first multilateral summit where it will be called on the carpet to talk about. It would have to define a trade policy.

The wise thing to do, actually, is take those issues that are part of the Democratic agenda, and no longer think about trade liberalization as something as an end in itself – which I think for those of us engaged in trade, we had the luxury of doing for a long time – but think about how it contributes to other goals. So in this instance, if you take climate change, one thing on climate change we can do is do nothing and wait for the pressure to come from industries, which you guys would all face for protection as a result of the cap and trade system we adopt.

Another way to think about that is, what could we do in a context of financial services so General Electric can create a market that allows a farmer in Brazil to know that he has a financial stake in leaving the tree up rather than cutting it down and planting sugar. But that requires a fair degree of liberalization to get to that point so that person feels the power of the market reaching out to him and knows that he has an opportunity.

I'd say the same thing in terms of another set of issues that is near and dear to my heart on the development side. In the context of what we have as a WTO Round, we've driven into a *cul de sac*, and if we accelerate further, we'll wind up in our neighbor's house. We've gotta find a way out. And the way out is actually, again, with the Democratic administration, Democratic Congress, is to think more seriously about what would we bargain for if development mattered. Not conventionally, what issues do we take in a very [mercantalist] way, and what issues do the Indians take, but we need to change the paradigm.

And it really does go very much to the sorts of issues we've been talking about, which are much more about the legal environment in countries. So for example – this is completely naive, Beth – but one trade you could set up in that context would – Lula has the right approach in Brazil: "I want to help him, so what I'm going to do is I'm going to bargain for property rights for the poor and the *favelas* and get rid of my sugar piles." All right?

Everybody says to me, "That's naive," until I say that what companies like GE recognize is that it's the income growth that comes from development that creates the market. It's not the border measures and the tariffs that matter anymore. And you're starting to see that amongst global companies, and particularly amongst ag producers, they're getting it in the sense that cutting the tariff for 3% for FMC in Philadelphia no long matters much, as much as setting the environment in which FMC can operate fully in Brazil. So suddenly you set up the possibility of transactions in the international trade negotiations

that would further the interest of our exporters, but also further the interest of development. That's something where it's easier to command a majority in a Democratic Congress than the traditional way we've negotiated free trade.

And my guess is that if we are going to make progress – and I think we're all responsible for this – [we're essentially] helping an Obama administration create the political space so that they're not obliged to repeat what the senator said in Ohio, palling around with Sherrod Brown, but in fact has the opportunity to listen to the angels of his better nature; do the right thing, not only because it serves our interest, but it serves someone else's interest, and that will resonate in a different political context. Sorry, that was kind a long-winded...

David Marchick

Let me try to add to Grant's notion of a new paradigm because I think that's very important, perhaps the most important thing that I can add today. And at it's core, I think this gets to how the Commerce Department and the Commerce Department General Counsel Office approaches these issues to add value and be relevant. In the private, particularly now, I wake up every day saying, "How can I be relevant today and add value so my bosses know that I'm adding value? By the way, I would like to give you my resume..."

Grant Aldonas

You heard about the earlier speed-dating, so now...

Dave Marchick

...for any opening you might have. But the question is, how does the Congress Department and the General Counsel Office add value in this environment? Because not be totally bleak, but Karan and I wake up and we don't just take Prozac anymore, we get a Prozac drip. You have a President who I support, who didn't exactly embrace trade liberalization in the campaign, to put it mildly. You don't have fast-track. The Doha Round is not even on life support. The bilaterals that Karan negotiated... Karan is the only guy that I know that could actually – besides Obama – produce a hundred thousand people in the streets in Korea, and they weren't cheering him.

So the bilaterals that have been negotiated, I think, are up in the air, and the bilaterals that you were hoping to negotiate are not even in the air. The political consensus on the Hill is dead. Should I stop there or should I keep going? So everybody is going to say, "Well, we should just focus on enforcement." Okay, well, the easy things to do on enforcement have been done. In the Clinton administration, we basically, after negotiating the WTO, we said, "Let's do a list of every single dispute settlement agreement that

we can bring and that we can win, and let's file it now." Okay? Everything that can be done that's easy has been done. So you all don't really have a great hand to play.

So then the question is, okay, well, what do we do? How are we relevant? And let me add a couple more points here. First, as Karan said, the tariffs have come down. A lot of the non-tariff barriers have also come down. The private sector is much more sophisticated today than it was in 1993 when we negotiated the WTO. Investment moves quickly, just-in-time delivery is real, GE... If there are tariff barriers in Malaysia, GE will figure out how to get their products in and out through sourcing in another country, which has low barriers with Malaysia. They don't need to export from the United States because they are so sophisticated and efficient that they can move around and source regardless of trade agreements.

Countries are in a competitive environment to attract investment and trade, and so they are pursuing initiatives on their own – except for Russian, maybe, and a couple others – to be more open, more transparent, and have greater rule of law. And so the delta between what you have today and what you can have tomorrow from a trade agreement is much smaller. What does that mean? The coalition in favor of trade agreements is less energized and narrower. When we did the NAFTA agreement and the WTO agreement, every single business interest in the United States, large businesses, was intensely motivated to get those deals approved because they could see and calculate how it would impact their bottom line to have those agreements in place.

Very few businesses can demonstrate that delta in the Doha Round. Okay? So what does this mean. How do those involved in the trade apparatus in the U.S. government be relevant? First, take a very client-driven approach, okay, where your clients are specific businesses, specific American entities, specific foreign entities in the United States that happen to manufacture here regardless of... It doesn't matter who owns thing anymore; it matters whether there's production and economic activity in the United States, in my view.

Focus on specific enforcement measures that you can take to make a difference, to have a delta between the way those firms operate today and the way they can operate tomorrow. Second, find specific [sectoral] initiatives that you don't last-track for, that you can pursue, that may or may not be very sexy. There are not going to be a lot of rose garden signing statements in the next few years for trade agreements. So some pretty mundane things, like customs harmonization, facilitating trade – pretty boring stuff from a political perspective, but critical things from helping U.S. businesses or helping foreign companies that export from the United States, and help specific industries solve their problems abroad.

I think it will be very important for everybody in the Commerce Department and USTR and part of the State Department to figure out how can we add value, how can we be relevant in this very difficult environment where you have no political consensus, trade agreements are much more difficult, and the easy things to enforce have already been

enforced. So, anyway, I don't want to cause you all to have to take a Prozac drip in the morning, but I just throw that out.

Karan Bhatia

I promise I'll be brief on this because I know there are other questions, but just one point here, which is, I think, both Grant and Dave have given exactly the right answer in terms of how to push continued trade liberalization, how to have an offensive agenda. And I particularly agree with the idea that you're going to have to fit it into some other initiative because trade for trade sake is just dead. I don't think you're going to be – at least in the near term – I don't think there is going to be a great deal of political currency behind that idea. But if you think the glass was half empty with Dave, who was describing just...

I think the real concern I have is that we are actually going to lose what gains we have made. I think that in the context of anti-dumping or countervailing duty legislation or in legislation on immigration or whatever angle it is, we may very realistically stand the likelihood of disengaging further from a process of globalization, or putting – our tax policy, I think, is another huge area. So while I'm encouraging – and we, ourselves, are thinking about how do we make sure that the bicycle keeps moving forward, albeit at a slower pace or dressed up as something other than trade policy.

I think we also need to be pretty resolute in making sure that what gains we have accomplished, because there have been fantastic gains in terms of opening markets, including our own market over the course of the last forty or fifty years, that those not slide back, so...

Grant Aldonas

So I want to say two vignettes just to cap this off, and add something to what Dave is saying. I agree about the client-driven approach, but I do remember that the first time Don Evans and I traveled, It was down to Buenos Aires, and the first conversation we were going to have was with the Brazilian Commerce Minister. And my last words to Don before we walked in the room was, "Remember, he speaks Portuguese." And no sooner are we in the room, but he says, "I'm sorry, I never learned to speak Spanish." And I looked at him like, "For god sakes! It was just five seconds ago..." My point in saying that is, you may not have a principle...

Male

What is the point in saying that, Grant?

Grant Aldonas

You may not actually have a principal who actually knows...

Male

Secretary Evans...

Grant Aldonas

Yeah, that's right, or at least his [portrait], right? Actually, I've got an even better one. I remember him calling up before Doha saying, "Grant, I'm sorry but I can't go to *Dayho* with you." So I said, "Boss, fine. How about Doha? Is that anywhere on the list?"

But my point is, is that part of your job, and I mean this seriously, is that if you think about the great advice I've always gotten from lawyers at the Commerce Department, it's because in what you do, part of what you have to think about is unique, which is the role the law plays in setting the paradigm for competition in the economy. And the truth is, what we actually need to do is think hard about that paradigm ourselves and the underlying premises, and then try and find a way to bring that into the rest of the world. Because that's what's essential, not just for GE to succeed as a company, but that's what's essential, actually, for economic development. It's what essential in our own economy to allow us to raise our productivity.

And a lot of the value you add as part of that process to think about what you do links to these underlying premises. Because ultimately, the goal has to be to drive those premises. And let's understand this: what we've negotiated for years as trade are just the broader measures, right? The things that really matter lie beyond the board, and we're now seeing that not only from the point of view of our companies, but for what really matters. What turns that one bulwark against going backwards is to make sure that we remind ourselves about what actually does work about markets. I know this is a tough time to say it.

In fact, I was watching the President on television talk about free markets at the Manhattan Institute, and I was reminded at what my seventh grade gym teacher told us all, which was, "You can't recover your virginity just by pulling your pants back up." Right? And my point in saying that is that I'm looking at this and I'm saying, "Well, I don't think our advocacy is going to be all that great if we've just done seven hundred billion dollars intervention and socialized the losses and financial markets – no offense, David. But you understand my point is that at some level, those of us that don't spend all our time with pathology and understand that the legal system sets a framework that by and large works because it allows individuals to exercise the freedom to improve themselves is what we most want to see in our best export.

So doing some serious thinking about what we do at the Commerce Department contributes to that would actually help inform whoever is going to come in because they're

going to have to grapple with this situation that David described. They're going to have to find a broader theme within which these bits, whether it's the enforcement side or the negotiations, fit. And my own sense is – David, I don't know if you'd agree with this – but I think you don't have the luxury in some senses of waiting. It's like Hillary's idea about a pause. I never thought it could work because the reality is when you sit down and talk about any foreign affairs topic, trade always ends of being a part of it; the economic engagement ends up being a part of it.

So really, the Obama administration and the Secretary of Commerce are going to have to come in and frame a vision, like it or not, better that what we're doing, in some respects, is using what we know about how the law provides this foundation to make sure that we shape the way that vision is articulated, both because it's in our own interest, GE will do better, Dave will do better, but also because I think it's in the world's interest.

Karan Bhatia

By the way, that should be a quote, underlying goal of all of this, I should point out, that GE does better. That not a bad...

Grant Aldonas

I was kidding Karan, and my wife always tell me that GE wrote the tax code, so I guess it is a key consideration.

David Marchick

The thing that really upsets me about GE getting all this government money is that Karan got an SCS spot and I didn't.

Karan Bhatia

Meanwhile, I'm still thinking about his seventh grade gym teacher.

Grant Aldonas

It was a great line, I really have to admit. It applies to so many situations.

John Cobau

Before the conversation degenerates still more, I'm going to try and exert a little bit of authority here. All three of you, I think, have had the experience of working with lawyers here at Commerce in a policy position. And speaking to a group of lawyers at Commerce, I think it would be helpful for us to hear what things you like to hear, what things you didn't like to hear, when it was that you thought the lawyers were really adding value and when you thought they really weren't.

Grant Aldonas

Well, I guess the thing is, don't be like COPA with all that stuff on textiles. That was the most useless advice I ever got. But, no, in all seriousness, what I actually always appreciated – and John's actually a good example of it, and John McInerney is a good example of it as well – is that my instinct was never to be satisfied with the initial answer. And what I was always pressing for was some way of solving an underlying problem. And what I found exciting about working with them is they were willing to work with me to try and figure out that, and that's what a great lawyer is, right?

The average lawyer can tell you what not to do, right? It's sort of like, go to the library and figure out what Section 61 says about the definition of gross income – not that hard. But the good lawyer is someone who actually says, "What's the objective we're actually trying to achieve? And then, how do I help my client get there within the confines of the law so that the integrity of the system is preserved and the ethics that we're all bound by are observed?" But at the same time, we're trying to move the process ahead." And I have to say, I always felt comfortable with the lawyers I dealt with here because that's the kind of advice I got, John.

Karan Bhatia

It's hard to add much to that. I agree, and I have to say, I didn't work in ITA. I worked in BIS, which has its own set of demands on it. And at a time post-9/11 where there was particularly rigorous focus on export controls, and I actually found that the team that I worked with at BIS to adopt that approach, the Chief Counsel's Office, to try and adopt a sort of client-friendly approach while at the end of the day, making sure that you're not compromising the core interests of the agency. You will find, and you're going to find this, with every group coming in.

And those of you who've been here for transitions in administration will have seen this more than I will. The new group is going to come in and then think that they've got fabulous, brilliant thoughts on how to reinvent the mouse trap, and it takes some patience to sort of walk them through the legal constraints and analyses to explain why it is things are the way they are now, trying to help that new team figure out a way to build a better mouse trap, or to facilitate their vision is obviously going to be core to it.

I'd say one last thing, which is having been the alumnus, not just from the Commerce Department, but from USTR and Transportation as well, it was only at the end, after having worked with all three, that I appreciated the incredible value of having lawyers who work well in an interagency setting. The best Commerce lawyers I worked with were ones – actually, I worked with one trade issues, leaving aside export controls for a second, on trade issues – with ones who I ended up working with in the context of incredibly tense, tough, free trade agreement negotiations where midnight, two in the morning in Seoul, they're the ones coming up with the ideas of how to resolve this problem to get the solution where it needs to go.

And to be honest with you, these were issues where the safest thing for some of these folks to have done would have been to have hunkered down and not offered anything new because the institutional interest had always cut in favor of coming out with the broader goal and the broader good. But I will forever fondly remember the IA legal team who helped bring that thing to a successful conclusion, so...

Grant Aldonas

I'm curious, based on what David was saying about the response in Korea, what advice they gave you about being burned in effigy in the middle of Seoul.

Karan Bhatia

It was more than a hundred thousand. I had two hundred thousand people out there. It was actually extraordinary. We get there for that final round, and I knew it was serious when I got into the hotel and, literally, they had guards, these paramilitary guys elbow-to-elbow, lined up from the doorway all the way to the elevators, so through the hotel lobby. And the only real advantage, the only thing that made me feel good about this, was I could see all the lobbyists sort of waving over the top of these folks, knowing that they were being kept at bay. Of course, now I'm one of the guys who's sort of waving out there on the sidelines.

David Marchick

I always felt that Karan was kind of the Paris Hilton of trade negotiations.

Grant Aldonas

Well, and then I go back to my seventh grade gym teacher, so...

David Marchick

John, over to you.

John Cobau

Do we have any more questions? Yes?

Audience Member

I think another trade barrier that doesn't get discussed as much ___ is corruption. On the one hand, there are increasing investments and competition from China and Russian companies and everything. On the other hand, you have increasing enforcement of the SCPA by the Department of Justice. And as Commerce Department, we're kind of stuck in the middle between the enforcement agencies and trying to be an advocate for U.S. industry. The National Trade Ford Trade Counsel is now kinda come out and said that DOJ is being too aggressive, which we have some problems with. But at the same time, how do we address those concerns?

Grant Aldonas

Well, guess I... Here's your fundamental problem, and I used to run Transparency International in the United States, and it's the fact that we have a system as we do with many regulatory issues that's based on a gotcha model. There are only negative cones-quences from what you do wrong under the FCPA. There's very little that someone like Dave was talking about, getting up and adding value in the morning. It's hard for somebody who's advising inside a company or outside a company to figure out how they're actually adding value to the bottom line.

But you could very much change accounting standards and unpack the concept of goodwill so that you demonstrate the nexus between good compliance – which is no more than a really sound accounting system, to be honest with you, and the value that it provides to share holders, and the confidence that [they] can have. But that requires not rethinking so much of enforcement tools and things we classically do. It actually means going back to the accounting profession, the ratings agency, and the SCC saying, "We've got to get this right so that there's an incentive for good compliance rather than just a negative consequence from bad compliance.

Beyond that, in terms of trade negotiations, the important thing is that every time you liberalize trade, you take away an opportunity for failure – engineers' thing about engineering systems as eliminating the opportunities for failure so that you can always produce a positive result. In this system, every time you reduce a tariff or you eliminate a tariff category, you eliminate an opportunity for Customs officials to have their hand out.

So we shouldn't neglect that in this fight, with respect to corruption, that trade liberalization in and of itself, does have a very powerful indirect effect to increase transparency.

Wholly apart from the rules on transparency we write, which are valuable in and of themselves, but the mere fact that you're liberalizing means there's less of an opportunity for some individual in government to have an incentive in Swaziland to reach out and demand the bribe.

And just as testament to that, I know U.S. Steel made an investment in a steel plant in Slovakia; took a front page ad, and it basically said, "If we find anybody in our supply chain requesting a bribe or taking a bribe, they're gone immediately." Well, because of the size of Slovakia and the size of the steel plant, this had the effect of cleaning up the entire economy in terms of corruption. But it's a good and valuable thing, and that wouldn't happen, interestingly enough, without the FCPA. So I'm not actually one of those guys who think the FCPA is a bad thing, but I do think that we would arm people inside corporate America with a better set of tools if they could demonstrate that good compliance was actually adding to shareholder value. And that's largely an accounting matter.

John Cobau

Karan?

Karan Bhatia

No, I would add this to the list of things that as we start re-thinking FTA's or bilateral trade agreements, and so forth, being an area to see whether there could usefully be incorporated. We have not historically had FCPA type commitments in agreements. It raises a number of complicated, difficult issues in terms of negotiating those kinds of things. But I will say, if you want to talk about something that will both spur development and increase the level of comfort the big American multi-nationals have in doing business abroad – and for that matter, all American business, as it should be – this would be very, very high on that list. This is something that clearly chills our willingness to invest in certain countries or to go into certain countries, and adds tremendous cost to our business of *doing* business in countries that have troubling records in this area.

So it's an interesting thing to start thinking about, do we do development agreements rather than trade agreements? And in the course of the development agreement, as a quid pro quo for tariff reductions or conditional tariff reductions, would you want to see some set of enforcement measures and proven record on corruption? I don’t know, but it's an interesting thing.

Grant Aldonas

No, I agree, I agree with him. It's a huge task.

Karan Bhatia

Yeah.

John Cobau

Well, let me just make out a couple concluding remarks. First of all, I'd like to thank again the panelists. I think we've heard, at least from me, some very interesting thoughts about both the legal nature of free trade and about ways forward on the trade agenda. I think we're all going to be groping for new ways to talk about trade and how we can continue to promote U.S. exports, promote U.S. economic growth in the context of what will undoubtedly be a new trade agenda.

I'd like to thank the panelists and the audience. This is certainly the first panel I've ever done in which we have mentioned Paris Hilton, President Lula, and Grant's seventh grade gym teacher. I'm hoping it's also the last panel I'm doing where those topics would come up. But thank you again for participating.

Ryan Meyers

Well, thank you for staying with us today. We've come to the keynote portion of our program, and here, to introduce our speaker, is a man who needs no introduction in this audience: the Deputy Secretary of Commerce. Mr. Secretary.

[*Applause*.]

Legal Leadership in Transition

John Sullivan
Deputy Secretary of Commerce

I've always wanted to actually wield a gavel. Wow. I'm so impressed with this conference. I must commend the General Counsel for all the accoutrements: my binder here, a gavel, peppermint patties. I must say, I've been put to shame as the former General Counsel of the Department – I'm embarrassed that I never had the inspiration to do such a thing. So my apologies to all of my former colleagues and OGC for depriving you of this great benefit.

But it's a great honor and privilege for me, today, to introduce our keynote speaker who's an old friend of mine. David Leitch, as you all know, is the Group Vice President and General Counsel of Ford Motor Company. Prior to joining Ford as general counsel in April of 2005, David served in the White House as Deputy Counsel to President Bush. He advised the President on a whole host of issues – White House staff and the administration, generally, on very tricky issues in the war on terror and judicial nominations and a whole host of important legal matters and policy matters for the administration in the country.

Before serving in the White House, he was Chief Counsel of the Federal Aviation Administration, where he served from June 2001 to December 2002. In the interregnum between going from FAA to the White House, my recollection is that David was involved in advising on the establishment of the Homeland Security Department. So he is imminently qualified to talk about lawyering and legal challenges in transition and trying times not just from his experience in the Bush administration, obviously, but as anybody who reads the papers or watches TV, as General Counsel of Ford Motor Company – he's got a lot on his plate.

I've known David for years. Before he came into the administration – this administration – he was a partner at Hogan and Hartson as a litigator and a pilot litigator. Before that, he was a deputy assistant attorney general in the Office of Legal Counsel at the Justice Department, which is where I first met David. He began his legal career after graduating first in his class from the University of Virginia. He clerked for Judge J. Harvie Wilkinson on the Fourth Circuit, and then for Chief Justice William Rehnquist of the Supreme Court.

So you can see, he's got a magnificent biography and particularly well-suited for this conference about lawyering and providing legal advice in transition. He's done that in spades, and is a good friend and a great guy. And it's my honor to introduce David Leitch.

[*Applause*.]

David Leitch

Well, I guess we're just about out of time. Thank you, John, for that incredibly kind introduction, and it really is an honor to be here today. I hope the Inspector General's not here to see the mints and things, but I'm sure he'll find out. The little gavel here reminds me of…I spent the day yesterday on Capitol Hill with our CEO, who is among those testifying before the House of Financial Services Committee, chaired by Barney Frank, who runs a great hearing and just a really tight ship. There are 73 members of the committee, and you can imagine trying to keep that kind of hearing on time.

What was interesting to me, though, was that he used this end of the gavel just so it's not…I think he didn't want to be too overbearing when the five minutes was up. It's a

little more, but he would just kind of tap it on the desk and everybody knew exactly what it meant, and it was kind of interesting. The witnesses took a while to pick up on that, but the members certainly seemed to know.

It is a *very* interesting week for us at Ford Motor Company and for the entire automotive industry, and there are developments, even this afternoon, on Capitol Hill. An announcement was made that I haven't had the time to fully digest it, but it sounds as if we've been told to bring back plans for more hearings the week after Thanksgiving, and there'll be a further session of the Congress the week of December 8th to consider what they might do for the industry. It is an incredibly fascinating industry to work in, as you might imagine, not just when we're struggling, although, frankly, I don't know what it's like to be there when there's good times.

But it's incredibly complex. The products are fun and interesting. The history is great. I mean, Ford Motor Company – people ask me kind of why I went to Ford Motor Company, and one of the things that occurred to me was Ford Motor Company is such an American icon that most school children learn more about Henry Ford than they do about many of our presidents when they're getting their education. And it just kind of tells you something about the role of the company and of the industry in our society.

I think it's been a really healthy and interesting debate that brings out a lot of very interesting philosophical issues about the role of government, about how businesses should be run, and what government's involvement should be. I question some of my own assumptions about those things as I go through it, but I think it's a fascinating time for all of us, and it'll be interesting to see how it turns out. So in the midst of all that, I am really pleased to take a little pause to be with you today to talk about, what I think is, a very interesting and important and timely topic: legal leadership in transition.

I have to say, candidly, I found the topic that I was asked to address a bit ambiguous, perhaps intentionally so. Given the circumstances under which we gather, perhaps the most natural way to understand the topic is that you want to hear about legal leadership in a time of transition, specifically during a presidential transition.

But one asked to address the topic of legal leadership in transition might just as well think he's been asked to talk about some sort of transition taking place with respect to legal leadership – a transition in the way legal services are offered or the roles that legal leaders are asked to play. The more I thought about the apparent ambiguity in the topic, however, it occurred to me that no clarification of its intended scope was necessary because I think it's useful for us to talk about both topics.

Let me begin with legal leadership in a time of transition, such as during a presidential transition. For many of you, of course – who I assume have been here at the Department for many years – this is not your first time around the block on transition from one administration to the next, and I'm sure that you have a lot of lessons and thoughts that you've gathered through the years about what the best way is to handle that.

I've been through a few transitions myself, as you just heard from John Sullivan's kind introduction. I've had anywhere from seven to nine different jobs in the 23 years since I graduated from law school, depending on how you count them. You'd think that'd be easy, but I won't explain it to you. Not only did I experience the personal transition from job to job, but I've been in jobs wherein transitions occurred around me.

I clerked for William Rehnquist when he went from being Associate Justice to being the Chief Justice. I worked as a political appointee, as John mentioned, in the Office of Legal Counsel during the election in 1992, and the transition to the Clinton administration. I served as part of the Bush transition team at Justice in 2000 and 2001. I was Deputy White House Counsel when Alberto Gonzales became the Attorney General, and Harriet Miers became my new boss. And in the private sector, I'd been the General Counsel at Ford for about a year and a half when Bill Ford stepped down from the role as CEO and brought in Alan Mulally from Boeing to serve as our CEO.

So what have I learned from all of these transitions that might be of use to you? Well, I'd never really stopped to catalogue the lessons that I think are important, but I did have a chance to do so in preparing to be with you today, and I have several thoughts to offer about the roles of lawyers that should be played in a time of transition. First, legal leadership in a time of transition serves as an absolutely critical repository of the norms and practices of an organization. Lawyers need to be prepared to offer, in a systematic way, advice to the new leadership at each and every department in the executive branch.

Soon, many of the big offices around here will be occupied by people who've never worked in the Department of Commerce, or maybe even have never worked for the federal government. Legal leadership requires that each of those men and women be advised in clear terms about the rights, duties, responsibilities, and limitations of the offices they hold. One cannot expect these individuals to be, in any way, familiar with the variety of regulations and requirements with which they must comply. Instead, it takes the leadership of this group here in this office to come alongside these new public servants, and to assist them in complying with rules regarding financial disclosure, ethical standards, travel, and the like.

Not only will they need clear and wise counsel on such generally applicable rules, but the new team will also need to be fully briefed on all of the statutes, regulations, programs, and policies that apply to the Department. The Office of the General Counsel has a critical, if not *the* critical, role to fulfill in making sure the new team is up and running as quickly as possible.

Second, legal leadership in a time of transition should be very focused on continuity of operations. While your new department leaders are trying to meet each other and their teams, find their way around the building, and get up to speed on their authorities and responsibilities, the legal office – along with many other offices in the Department – plays a critical role in ensuring that ongoing duties and responsibilities do not fall through the cracks.

The public at large, I think, has very little understanding of how unsettling and distracting transitions can be, or of the lag time between old leadership and new that occurs during a presidential transition. They will, understandably, have little patience if the responsibilities of the Department go unfulfilled during that time. Unfortunately, by contrast, our nation's enemies may well assume that our guard is down during this period. It's up to all of you to make sure that the public interest is protected during transition.

Third, legal leadership in a time of transition requires a keen awareness of the lawyer's role and on organization. Most importantly, lawyers, in nearly every context, do not act as principals, but rather as agents. We do not advance our own interest, but those of the client. A lawyer acting as such in the midst of a transition must always remember that both old and new decision-makers are put into place for a reason, and should serve to enhance their ability to engage in the legal exercise of authority and the positions with which they have been entrusted.

Nowhere is this more true than in public service. Each new administration arrives with a mantle of our democracy on its shoulders, and its leadership and authority has to be respected. No matter what our views of the policies proposed by new leaders, we must respect their legitimacy and serve to advance their interests and agendas within the bounds of the law. And until they arrive, of course, we should all recognize that the leaders in place now are still legitimate and responsible public officials – and John didn't make me say that.

As I say, fulfilling our role, no matter who is in charge, is something with which lawyers should be comfortable, because we are always called to serve the interest of others – our clients. And, of course, transition may be a time of anxiety and insecurity, of adjustment and dislocation. It does not, however, excuse our duty to serve the interests advanced by our clients within the bounds of the law. Indeed, one might well suggest that presidential transitions are within limits designed to be periods of upheaval.

The incoming administration, after all, ran explicitly on a platform of change and the officials about to arrive at the Department will certainly feel obligated and entitled to reexamine agencies, agency rules, roles, and practices. Do not be threatened by this. Of course, such dramatic change can be quite unsettling, but as we remind ourselves every day at Ford Motor Company, we need to have emotional resilience through the ups and downs of our professional lives. We're being tested right now, I can tell you that.

It is not inconsistent with what I have said, however, to also believe, as I do, that the lawyer's role in most organizations is shifting and expanding. While we must respect the chain of command the roles of new organizational leadership, I would also submit that lawyers serving in corporations or in government agencies cannot and should not any longer limit themselves to providing narrowly-bounded legal advice, and then sitting back content that we have fulfilled our role.

On the contrary, I have, over the years, come to appreciate that the best lawyers – especially those who serve in leadership positions – play a much broader role than simply

providing legal advice, and that we are very much experiencing legal leadership in transition in the second respect I mentioned earlier: a transition in the role of legal leadership.

In today's legal and business environment, being a legal leader means being more than a sharp lawyer, though that will always be a foundational requirement. It also means having a strong voice on, what I will refer to as, post-legal issues – those issues that remain the duty and responsibility of a lawyer, even after we have given legal advice. It means being a counselor, in the truest sense of the word, on significant matters like finance, human resources, labor issues, and business strategies, in my case.

In considering the lawyer's leadership role with respect to these post-legal issues, it is perfectly appropriate – indeed, some would say necessary – for a lawyer in today's environment to consider questions such as these: The proposed course of action is legally defensible, but is it ethical or moral? Do we want to defend it? You'd be on solid legal ground to take the course of action you propose, but will it be misunderstood by the public or by the press? While this argument bolsters our legal position, it is not necessary and might be misperceived. Do we want to make it anyway, and risk criticism based on a misrepresentation? And finally, will regulators, employees, or congressional committees think you're making a bad decision, despite its legal propriety?

These considerations – those that come into play after giving our best legal judgment – are and ought to be a common part of the role of legal leaders in 2008. Indeed, the roles of counsel and counselor are mutually reinforcing. It's a given that a lawyer must be in the room and have a seat at the table to offer legal advice when decisions are made.

Once at the table, however, he is expected – both by wise management and by those who might be examining the process in retrospect – to be fully a member of the team and offer judgments and opinions on the wider range of perspectives that must be considered. And if he is not in a position to do so, he will not be considered a valued member of the team, and may not be included in the room, even for the benefit of his legal views, when important decisions are made.

Where does a lawyer learn the skills necessary to serve this broader role? Well, in my experience, law school education in this country does *not* prepare us for this expanded role. It is appropriately focused on making us outstanding lawyers, in the first instance, and it should be a given that newly minted lawyers have the tools necessary to provide clients with – or at least, to develop – an informed understanding of their legal rights and obligations, or to zealously assert the client's position under the rules of the adversary system.

To that end, most of law school involves learning about the law and the legal process, learning the language of the law, learning to think like lawyers. Now, all this is very important foundational learning, and frankly, the most that young lawyers can be expected to master, but it barely scratches the surface on the broader skills necessary to serve as a counselor.

Some of us went from law school to judicial clerkships. In that capacity, there was tremendous pressure, as I felt when I was clerking for the late Chief Justice Rehnquist, to use all the tools I learned in law school to come up with the correct – or at least, the best – answer to each legal issue. But certainly, in that environment, consideration of the variety of other issues is not appropriate and, in all events, is not the place of a law clerk, as I was frequently reminded by the Chief Justice.

Most law students leave law school and become associates at large law firms. If you knew the basic doctrines of the law, learned how to do legal research, trained yourself to think logically and persuasively, and worked on your writing skills, you had all the tools necessary to serve the interests of the partners who were, in effect, your clients in their early years.

I was privileged to work with a partner named John Roberts, from whom I learned a great deal about the broader range of considerations that the lawyer must take into account in connection with dispensing legal advice. Not many young lawyers are so fortunate, but it is clear that they must seek out opportunities to provide themselves with the skills necessary not just to offer the best legal answer, but to provide a broader role so critical to clients.

Lawyers who want to advance in the profession and serve as not just legal counsel, but also as counselor, must make a conscious effort to observe and develop all sorts of skills that are not necessarily connected to the pure practice of law. I have come to this realization over time by observing the expectations placed on others, while I still had the opportunity to learn from their experience.

In my own case, after clerking and being an associate at Hogan and Hartson, I left to work at the Justice Department's Office of Legal Counsel, as John Sullivan mentioned. In each of these jobs, I had a supporting role, providing my best legal judgments to those who had to make the ultimate calls – judges, partners in law firms or clients, or senior government officials. In the Office of Legal Counsel, in fact, we prided ourselves on making no judgments other than legal judgments.

As you know, OLC provides legal advice to the executive branch. Agencies may and often do disagree about who has the authority to do what or about the limits of the law or the constitution. It is OLC that resolves such legal questions for the executive branch except, of course, when overruled by the Attorney General or the President. In answering those types of questions, OLC lawyers do not offer advice on whether the proposed course of action is good policy. They offer no suggestions on how it might be perceived by the public; they have no stated views on the morality, the effectiveness, the wisdom, or the efficiency of proposed solutions to problems.

During my years on OLC, I was, of course, aware that, somewhere, other people – decision makers and policy folks – were struggling with all of those issues. But at least in the early years, I naively assumed that this was not something a lawyer had to be

concerned with – what a luxury that was, and how mistaken. Eventually, as I saw people like Mike Luttig and Tim Flanagan – who were my bosses in OLC – head off to give the advice to senior government officials.

I began to appreciate what I would come to understand more personally in later years: lawyers and leadership roles do not have the luxury of offering legal advice and walking away – at least, the good ones don't. For each of the not illegal matters we considered at OLC, the lawyers actually delivering the legal advice were in the room when decisions were made. And by being in the room, they were often expected to offer judgments beyond the legal answer. Had they not gone into these situations ready to volunteer thoughts or respond to questions about post-legal considerations, they would've been woefully unprepared, and even embarrassed, by their narrow approach to the whole problem in all its complexities.

Because, however, they were not just counsel, but also counselors, they were prepared to offer a broader range of advice and their counsel was often sought out and valued. This is not just a question of having an opportunity to offer policy judgments, ethical views, public affairs, advice or common sense. We're increasingly expected, as lawyers, to provide a wide spectrum of advice to our clients so they are not criticized or embarrassed or harmed, despite the legality of their actions. They may not always accept our views, but we are derelict if we're not prepared to offer them, especially when we think something important is being overlooked.

A recent example of the broad roll that attorneys can and should play involves the controversy over the administration's dismissals of U.S. attorneys. If one thing is clear about this controversy, it's that the administration's action to dismiss *cert*ain U.S. attorneys was perfectly legal. All U.S. attorneys, like all Presidential appointees, serve at the pleasure of the President. This means the President can remove appointees whenever he chooses to do so. There was nothing wrong, nothing improper, no laws were broken when this handful of U.S. attorneys were asked to step down.

If the sole public focus was on the legality of removing these U.S. attorneys, the outcry would've ended the first week, or perhaps the event would've avoided public consciousness altogether. And yet this issue was splashed over the airwaves for weeks on end because other considerations came to dominate the debate. Chief among these, of course, was the political outcry by opponents of the administration and senators who feel that what they regarded as their prerogative over U.S. attorney appointments were not respected.

Curiously, when you examine the record, it is clear that some of the lawyers involved in this process anticipated the likely political fallout, and expressly warned of the many complexities that could be involved in this perfectly legal action. My point is not to debate the merits of the decision or the way it was handled; my focus is solely on the role of the lawyer. And I think it's quite clear that any lawyer involved in this decision would've been derelict, simply to point out the legality of dismissing U.S. attorneys without also highlighting other issues for the decision makers.

As this case demonstrates, of course, fulfilling that broader responsibility is not necessarily sufficient to avoid later controversy, but we must take appropriate opportunities to make our clients aware of the broader issues we see. The lesson for the lawyer is that the advice we must be prepared to give our clients – in your case, the Secretary, the Deputy Secretary, the Department itself, other officials – has to be informed by the fact that situations in our organization can be compliant with every law and every regulation, yet utterly non-compliant with the best advice and best resolution with the best interest of our clients.

The need to consider the broader array of issues is not limited to the white-hot glare of partisan politics. Indeed, I can tell you that in my current role, I am routinely expected not just to offer my views on the legality of what the company intends to do, but also to give my views on ethics, morals, public affairs, strategy, policy, and other post-legal issues.

As I mentioned, over the past week and more, I've been heavily involved in the testimony on Capitol Hill in trying to get our CEO and others ready to make the case that's at issue, and almost none of what I did involved consideration of purely legal issues. I was involved for the judgment and the mind of the lawyer, and also because we frame good arguments and we know how to communicate, one hopes.

Some days, I long for the time when my job was much more narrowly defined. I love what I do, but it is a far distance from the pure practice of law that shaped my earlier career. When I was doing the mental gymnastics necessary for my job with Chief Justice Rehnquist or trying to convince my partner, John Roberts, of the most effective way to grapple with a legal argument in a brief we were preparing, I never thought there would come a time when so little of my daily role would involve the intellectual challenge of a mind-bending issue of constitutional law or statutory construction or reading of precedence.

And yet, from the vantage point I now enjoy, it is plain that it is a rare organization and an unwise, and perhaps unsuccessful, one that does not expect its legal staff to help protect the organization from all sorts harm – not just legal harm, but reputational, financial, political, and public harm. Indeed, as the ABA model rules of professional conduct state: In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

How, then, should a lawyer exercise leadership and prepare to be in a position to offer this kind of advice? And let me offer five suggestions. First, constantly sharpen and refine your ethical antenna. To fulfill your broader role as a counselor, you need to develop the moral compass that tells you what is right and what is wrong in any particular situation. Resolve, to yourself, never to set aside your moral and ethical compass when you're giving legal advice to a client.

Second, be a student of the press and of public perception. Both the press and the public are notoriously fickle and hard to predict. But to truly serve our clients, we must have a strong sense of how things will be judged in the event they're made public. When I worked at the White House, we called this the "*Washington Post* test." Is the decision you or your client about to make something you would be comfortable reading about in the *Washington Post* the next morning? This doesn't mean you let public perception dictate all of your decisions – sometimes the best decisions are unpopular – but you ought to be in a position to raise the issue.

Third – and I have a feeling I don't really need to tell this audience much about this – learn about politics and politicians. When issues touch on public policy, be aware of the views held by influential political players. Who are they, and what do they think? Is there a particular constituency that will be offended by an action? Should someone reach out to them for consultation or at least give them a heads up about what's to come? Be smart and savvy about the political world.

Fourth, develop a backbone because you'll need it. It's often not easy to speak up in a management committee or in the halls of a government agency and say to your client that you believe a proposed course of action is unmoral, unwise, or politically risky. Some decision makers, who are experts in politics or public affairs, will resent what they believe is an intrusion on their turf. You're playing in their sandbox, and they'd just as soon have you stay in the legal sandbox. But if you're to be effective and fulfilling your broader duties to your client, you'll have to be willing to speak up and offer your views on these broader issues.

And five, know your business or your client's business inside and out in order to have credibility with the senior leadership. You will need to earn a seat at the table. You must be interested in and educated about the business itself – the business of the agency, in this case – and not just known as the person who offers legal guidance.

Finally, a word of caution: To succeed as a legal leader, a lawyer should be careful not to view her role as counselor as a license to become a crusader. She should choose her battles wisely. We must recognize that, while we can and should share views on the non-legal aspects of issues with our client and the team, it is only on legal questions that we are truly expert. Along those lines, we must be willing to defer to the expertise of others. If we're unwilling to show some restraint and humility, we will become the proverbial noisy gong or clanging cymbal, and we'll be ineffective as a lawyer, not to mention as a counselor.

Doing all this well every day – especially in an organization that is going through signify-cant transition – can be the challenge of a career, but it can also be the most gratifying experience of a career. Even on the most trying days, that is how I view my job today. And I know that each of you, as public servants of the first order, look forward to the transition that lies ahead and to fulfilling your role as legal leaders in a time of transition. Thank you very much.

[*Applause*.]

I can take some questions or comments. Let me have a little dialogue if anybody has some thoughts. Yes?

Audience Member

Can you talk for a minute about the transition from being a government lawyer to being an in-house counsel, and how your role was different or the same in those two situations?

David Leitch

The biggest difference is perhaps the most obvious one, and that is the financial aspects. Not my personal financial aspects, but just that the day in and day out business of a corporation is profit, loss, cash, sales – all those things – and SEC reporting – a whole variety of financial management issues. So I spend my time, much more, in meetings about pure business issues than I would have at the FAA, which is probably the most analogous situation of any of the jobs that I've had.

So you measure success and failure every day by the stock price and the sales, and, obviously, we're not ___ up a lot of success on that front recently. So you're much more involved in the financial side of things, which is not at work as much, particularly in the lawyer's role, I think, in government. So there's a big difference in context.

The other thing is people are the same. I mean, every big organization has kind of the same issues. Everyone has a different culture, but you end up with a lot of the same behavioral issues or norms, and so I think there's a lot that transitions from one to the other as well.

I think we have a question down here.

Audience Member

Yes, you mentioned providing policy advice. Do you think that lawyers, when providing policy advice as opposed to legal advice, brings something to the table that others in the room don't in terms of our training or our way of looking at things, so that you are now providing legal advice? We will, inevitably, provide a different a perspective. Or is that sort of irrelevant, in your opinion, whereas, just like everybody else, we're providing policy advice?

David Leitch

It would, of course, be nice to say, "Well, we're sort of better at a lot of things, not just the law," and we can say that in this room, but don't tell everyone else. My real point is sometimes lawyers…it depends on the lawyer. Sometimes lawyers are pretty good at those kinds of things, and sometimes they're not. My point is, really, that when you're in the room, you're expected to be a participant – at least, in the circumstances in which I've operated.

And you want to be a participant because, frankly, after the fact, if all you've done is listen to other people go about and making a perfectly legal, yet very bad, decision, you haven't really offered the help that they obviously needed. And yet, you're going to be blamed for being in the room. And I think that's why…but you can't overdo that. You have to respect the roles that other people play. But my point was you can't just say, "Well, it's legal. Thanks a lot. I'll see you later. Good luck." – that's the minimum. But I think we're often expected to do a lot more than that, and we are not fulfilling our duty if we don't.

And I also think it helps us actually get invited into the room because the whole issue of: Are you a valued member of the team, or are you just the person who comes in when the group that's making a decision thinks it has identified a legal problem, query how they do that on their own without you being there? So if you're a part of the team – a valued member of the team – for all the purposes for which it's making decisions, you can be in the room because they want you there. They value your views and advice – not just legal advice.

And then you don't have to count on a group of people untrained to recognize legal issues to know when they need to call you and to invite you into the room when they think they've got a solution, only to have you be the skunk who tell them that it's not going to work, and then they say, "Well, why did we call that guy?"

Audience Member

How many lawyers are there in the General Counsel's office at headquarters and ___...?

David Leitch

[*Voice overlap.*] A lot fewer than there used to be, unfortunately. We have about a little more than 200 lawyers worldwide, so it's about half in Dearborn and about half in other places around the world – 10 in China, 20 in Germany, five in Brazil – various scattered other places – Vietnam, Thailand, Taiwan, Australia, South Africa, on and on, Mexico, Canada. So we do business in just about every country in the world. John Sullivan was telling me was at a Ford dealer in Iraq. Yes?

Audience Member

Obviously, the Commerce Department wants U.S. industry to be very successful. Do you think that there is any role for the Commerce Department in what you would be proposing as in the weeks ahead and in what you're proposing to the government? I know that in the area of federal assistance, in the past, we've provided funding for research and development, but I didn't know if there was anything specific that you would be suggesting that the Commerce Department might do?

David Leitch

Well, thank you for the question. We've actually had great help from the Commerce Department on the Section 136 regulations, which are really the Energy Department's regulations. This is the advanced technology funding – what you probably hear referred to as "the first 25 billion" or, at least, that's how we like to refer to it. But I know a group of folks from here, including David Bowsher and others, have been actively involved in helping the Energy Department fulfill its responsibilities to get those regulations out very quickly, and they did come out quite quickly. So that's a very significant part of, I think, helping the industry.

We're always happy to listen to other things that are…or to come up with other ideas about what might be done, and I think we have a very good relationship with the Commerce Department. The issues that we now face, I think, probably would swamp your budget, so that's why we're now seeking the second $25 billion. But we appreciate the mission of the Department. I think there's a lot of good work going on. But the 136 regulations are absolutely critical, so a lot of good work there.

I don't know why the Energy Department needed your help, but I'm sure they were happy to take it. And the Secretary's been very helpful to our industry. You know, he spent a number of years in Michigan before coming to Commerce, and I know he speaks quite often to the CEOs of the company – probably more than he would like, but we appreciate that.

Other questions or comments? I know it's near the end of a long day for you. Well, thank you very much.

[*Applause*.]

Ryan Meyers

The final address of the day, immediately following that, Lily will come up for some concluding remarks.

[*Applause*.]

Address by the Deputy Secretary

John Sullivan

Thank you, Ryan. I have some prepared remarks, but I'd also, as David was quite generous in doing, like to turn it over to questions. The topic for my speech…Lily suggested I talk to the lawyers from OGC about the perspective of a client. And I've gone around for the last year and a half joking about how liberating it was to not be the General Counsel and to be the Deputy Secretary and to be able to respond to tough legal issues with a wave of the hand and say, "Oh, well, you'll have to check with the lawyers about that. I couldn't *possibly* offer any advice on that tricky legal issue."

I've now found as I begin to think about life after government service, in talking to people who are professional in placing people in private sector jobs, when I phrased the issue about doing something other than be a lawyer or practice law because of my great experiences having been Deputy Secretary – after they stopped laughing – they point out that I'd spent almost 25 years as either a law student, law clerk, summer associate, associate, partner, government lawyer, and that this short time I've had as Deputy Secretary is not going to qualify me for anything.

So I'm actually quite pleased that I will likely be going back into the practice of law come next year. I had an interesting experience in something I hadn't anticipated. About a month or so ago, I was up in Cambridge visiting with a couple of professors at Harvard Law School. And just as a brief aside, as I was walking across the law school campus, I noticed all the students looking uncomfortable in their suits with their list of law firms that they were going to visit for on-campus interviews.

And I was having sort of a flashback to 25 years ago and thinking, "Geez, I'm going to be in the same position as these kids in a few months. I should maybe ask them for some advice about where the hot firms are – you know, 'Hey, buddy. Can you help me out? What did you hear about this firm?'"

But interestingly enough, I discovered – and I haven't seen this reported in the press yet, but I'm told that applications to law schools generally – and to Harvard Law School in particular – are skyrocketing. And the reason is that young people who would otherwise be thinking about going to work on Wall Street, there aren't any investment banks on Wall Street – they're not going there. Those young people who were at investment banks and were thinking about going to business school have thought a little different about that career option and are deciding to go to law school to have legal training and a law degree so that when the institution they're working for – whether it's a bank or an insurance company or some other entity – goes belly-up, that they've got a law degree and a profession that they can rely on to support themselves and to sustain themselves professionally and intellectually.

And as much as I've joked over the last year and a half about being Deputy Secretary and not being the General Counsel and being able to ask the lawyers what they think, it's actually given me time to reflect on how important it is, to me, to be a lawyer, and how much it's meant to me over these last almost thirty years now from when I started my law

school applications. It's such a part of my outlook on life that I really can't imagine doing anything other than practicing law when I'm done here with my service at the Department.

It's not to say I don't enjoy being Deputy Secretary – it really is a great job. It's made that much more enjoyable by being able to work with great lawyers here at the Department who have really kept us on the straight and narrow. I'm proud of our record – that record that we've established here over these many years – and it's really due to the work of the career lawyers at the Department.

Political appointees like Lily or myself or some of the prior people you've seen this morning on the panels that spoke – Ted Kassinger, my former law Andy Pinkus, etc. – they come and go. When I was at OLC, there was a very elderly gentleman who worked there who, at the time, was in his eighties. He had been on the brief for the United States in the Steel Seizure case [*Youngstown Sheet & Tube Co. v. Sawyer*] in the early '50s. Believe it or not, it's true – you can check that.

And I once asked him about how it was, what his experiences, having worked…he'd worked in the Office of Legal Counsel for decades, and having had very prominent people head the office who then went on to great things – whether it's William Rehnquist or Justice Scalia. And he looked at me and gave me that look of an 80-year-old looking at this young lawyer asking a stupid question, and he said in response to the political leaders of the office – he's of German American ancestry – he said, "They come, they go."

That's true of me, and Lily and all of us – they come, they go. But the work goes on, and the work gets done by the career people here who are the institutional memory – who are the backbone of this Department. And I've said it on every occasion I've gotten, whether it's been a town meeting with the Supreme Court or any other opportunity to say from the heart, how much I feel and how proud I am to say to the incoming transition team what a great group of civil servants we have here at the Department.

And specifically, I've been able to point out what a great group of civil servant lawyers we have here at the Department who will serve the incoming administration as well as they have served us, and that is you have served in an outstanding way. I couldn't have gotten more support as a client, as the Deputy Secretary, or as the General Counsel providing advice to the Secretary. It's been a great honor to work here and to work with you lawyers who have done such a great job. It sounds like a cliché, but I really mean it.

It's evident just in the – to borrow David's expression of the *Washington Post* test – we haven't been, in a negative way because of something that lawyers did or didn't do here, in the *Washington Post*. And that's not my standard for excellence – it's a minimum – but that's just a threshold. We have kept the focus of the Department on its mission.

We haven't been distracted by mistakes, legal problems, self-inflicted wounds that can distract an entire Cabinet department from its important mission, when they spend all

their time responding to media inquiries, congressional inquiries, about mistakes that were made – and as David pointed out, mistakes that probably could've been caught by a lawyer, had that lawyer – had he or she – had the nerve to say, "Maybe legally, you can do it, but you probably shouldn't."

And I've been in any number of meetings here at the Department with lawyers in this Department – career lawyers – who had said that to me, "Legally, we probably could do it, but we really shouldn't." And you know what? More often than not, they're right. And our record, I think, I'm proud to stand by on what we've done over these… I hate to turn this into a valedictory address – we've still got two months left to go, and I don't want to jinx us about what's going to happen over the next two months.

But it's my firm conviction that this incoming administration – and we've gotten along. We've had several great meetings – I know some of you have been in meetings with them. We've had some very productive, constructive meetings with the incoming transition, and I am thrilled to be able to tell them how well-served they will be by the lawyers here who work at the Department.

As a client, look at it from the perspective of the Deputy Secretary: a lot of what David Leitch said has resonance for me about lawyers doing more than just providing the correct legal answer because more often than not, the legal answer is, "Yeah, you can do it." But the hard question to answer is, should we? And lawyers who've been at this Department for a long time – for decades – will have seen mistakes made in the past, and be able to provide that type of informed judgment for us, as we conclude our last couple of months here, and for the incoming team about what we should do – not just what we can do.

And I'd just like to echo what David said on that score: It's not an easy thing to do. As David said, one of his rules, I thought was absolutely right, was that you do have to have a backbone to be able to do that – to walk into a very senior person's office and tell them that, yeah, legally, they could do what they're thinking about doing, but they really shouldn't. I've had a number of lawyers that I've worked with here who have had a strong backbone – I won't point out exactly who they are who've been able to come in and tell me, quite clearly, where things were right and wrong – and I very much appreciated that.

And it's ultimately a part of what I try to enforce…what I try to encourage, I should say – not enforce because you can't enforce it – in the Office of the General Counsel, which is teamwork and having offices and lawyers talk to each other and work with each other cooperatively. It is essential. There's nothing more frustrating, from a client's perspective, than to see bureaucratic lines cause – whether it's legal advice or policy advice – not to be fully debated and formulated, and teamwork – offices working together cooperatively, lawyers working together cooperatively – for the wellbeing of all, and ultimately produces the best legal advice.

And I want to conclude these remarks, and then turn it over to you for questions to see if there are any other issues that you'd like to talk with me about. But before I do that, Secretary Gutierrez has some leadership principles, and they're certainly applicable to legal leadership. His first rule – and I've learned, emphatically, the importance of it in my four years or so – almost four years now – at Commerce – and that's the importance of choosing good people and putting them in the right job. Choosing the right people to do the right job.

The way the Secretary puts it, he says the best decisions he's made in his career – the homeruns he's hit – have been the personnel decisions that he's made. And the biggest mistakes he's made that he's most regretted have been some of the personnel decisions that he's made. The right personnel decision – the correct decision – putting the right person in the right job – can lead to great things. Putting the wrong person in a job can create problems that linger for years, and it's something that I have learned here, and it really is a key to being a successful leader.

His second principle is the will to lead and join the challenge and pressure of leadership, and there's *cert*ainly enough pressure in some of the decisions we make. And some of that pressure is political pressure – and by that, I don't mean partisan political pressure, but pressure from a particular member of Congress who's maybe not satisfied with an allocation of money for a grant or a disaster relief. And doing the right thing can sometimes require the will to lead and to say, "Yeah, we really can't do more than what we're doing. We're either not authorized by law, or there are other uses for this money." But it's a hard thing to do.

The third principle he has: the willingness to make difficult decisions related to the second principle. A great leader confronts the problem that he or she faces – doesn't hide or doesn't run from it. And many of the problems we confront, we can't run from because staff – congressional staff – track us down or OMB tracks us down. I've learned you can't hide.

Fourth, his fourth principle is the importance of believing in something greater than oneself. That's easy here at Commerce. We're doing the people's work. We're doing work that's important for the nation's economy, for national security, economic security. And we're – each of us – one small part of a larger team that's doing the people's work and it's something we all should take pride in, and I certainly do.

And fifth, the Secretary says: the quality of a good leader is someone who knows what they do well and what others do better. And that, again, is something that I've learned in spades here. There are a few things I can do, but there are a lot of things that a lot of people here do better than I. And one thing I've learned is to let people do their jobs. And it's related to the first principle: you put the right person in the right job, and then you let them do the job, and things will work out.

So I'm not sure I'll get to speak to a group of OGC lawyers again before I depart, so, again, let me say thank you for the privilege of having served as General Counsel. It was

a great honor. I'll have no greater job, I'm sure, in my career. It was a great opportunity for me, and I look back on the day I got the call from presidential personnel asking me if I wanted to talk to this guy, Carlos Gutierrez about coming to the Commerce Department. It was the best phone call I ever got.

So thank you, and I'd be happy to take questions on any subject you want.

Audience Member

We had a panel earlier today of general counsels who had a chance to sort of talk about the highlights of subject matter and topics that they will never forget, and I was wondering if you wanted a chance to talk about that.

John Sullivan

Wow. Good question, and I should have anticipated it. Really, I hadn't. You know, Public Affairs prepares remarks for me, and I just ramble. If I'm going to ramble, I should at least anticipate good questions like that. I turn this into my valedictory address, and now I'm asked a good question. Boy, I'll… You know, it's something that I've actually had to think about over the last few weeks in thinking about putting together my resume – what have I done for the last three or four years?

The first major thing I worked on when I came here was the softwood lumber dispute we had with Canada. At the time, and my recollection is, we didn't have an under secretary for international trade. Tim had just passed away suddenly and tragically. I don't think we had a confirmed assistant secretary for import administration. And so John ___ spent a huge amount of time trying to educate me on NAFTA panels and the facts of this dispute and the legal issues, and then there was nobody between me and the Secretary then. I had to, then, go in with John and try to explain it all to him.

And I remember that being quite a…that was a daunting task for me, unlike some of my predecessors – Ted Kassinger, in particular – I didn't come here with a background as a trade lawyer. So I really was thrown into this complex, lengthy year's long complex dispute with multiple ___ the World Trade Organization and NAFTA issuing different conflicting decisions. And in some ways, it reminded me…it was actually good that I had come from…it was the first major thing that I worked on when I came here from the Defense Department because, basically, every day of my life at the Pentagon was a chaotic learning experience for me.

I hadn't served in the military, had never been inside the Pentagon until my first day of work. So every day, I would drive down the GW Parkway with white knuckles on the steering wheel, thinking, like, "Oh, my god. What's going to happen today at the Pentagon?" And one thing I learned was there's no such thing…well, I shouldn't be so

categorical. I was about to say, "There's no such thing as a stupid question." I've heard some stupid questions.

But for the most part, there's no such thing as a stupid question. And the first couple of weeks at the Pentagon – and I had a similar experience, then, with the softwood lumber dispute – somebody would say something about "the XYZ with the this and the that and the three and the four," and I'd sort of pretend I knew what they were talking about – "Okay." And I'd just get myself into trouble because then the discussion would go on and I'd be completely lost.

So I finally learned that I just stop and ask, "What do you mean?" And I didn't have to say, "What does NAFTA stand for?" I had some recollection of reading about NAFTA from 1993, 1994. But there was a lot of basic learning I had to do here at Commerce, which, I'm sure, was frustrating for the lawyers and the career policy people in IA to bring a person like me, coming in from the outside, up to speed.

But really, my collection is there was really no one else in the bureaucracy above the level of Deputy Assistant Secretary because of people not being confirmed in Tim's death. So I was forced into it, and that was ultimately turned out, we had a successful – at least from our perspective – resolution to it. But that was sort of the biggest challenge I had coming in right off the bat.

Some of the other highlights of my career: I've really enjoyed the opportunities I've had to travel on behalf of the United States. I've gotten to do, as Deputy Secretary, several trade missions, and it's a great thing to go into a foreign country and represent the United States government. It's also a great responsibility. If you think about it, it can be quite intimidating that you're going into a foreign country and speaking with senior government ministers and you are the embodiment of the United States government, and you've got to be prepared and on your toes and present well.

But it was a good challenge. It was a lot of fun. Last month, I went on a trip that took me to Tbilisi, Georgia and ___. We stopped briefly in Dubai and Kuwait, and then finally, we spent three days in Baghdad for a business dialogue with the Iraqi government. And it was quite a contrast with my – again, moving back to my role as GC, when I traveled to Baghdad with Secretary Gutierrez in 2006, it was not a good time to be in Baghdad. The security situation had deteriorated dramatically – there was a rocket fired at us over our heads when we were there with the Secretary. It was July, it was 117 degrees – it was just miserable.

This time, part of the reason that it didn't feel quite so oppressive was that we were there at the end of October, and it was about 75 degrees. But the security situation had changed dramatically. It was palpable – the change. When we were there in 2006, we went to a trade expo at Al Rasheed Hotel, and it was held in a little outer lobby that's about the size of this little area in front of the stage. And we had to work to fill that space with tables for display of products that the Iraq Chamber of Commerce had brought in and merchants that brought in from Baghdad.

When we were there for this business dialogue – it was on November 1st – the foyer that we'd had the trade expo led into an enormous ballroom at the Al Rasheed Hotel, which we filled, virtually, to capacity with media, with business representatives, with Iraqi government officials, U.S. government officials for a day-long conference on ways that Iraq can improve its business climate to attract more investment and improve its economy, and make its economy more successful and ultimately lead, we hope, to peace and prosperity.

But I was able to point out, in one discussion, the contrast between where we were in 2006 – literally in the hotel with our trade expo – and how things were two years later. There was basically a lot of tragic violence and sacrifice by a lot of people – Americans, Iraqis, and people from other countries – to try to turn that situation around. It hasn't righted itself yet, but it's going in the right direction.

And you should all be proud of the fact that the Commerce Department is represented in Baghdad. We have senior commercial service officers in Baghdad and we have our Iraq task force here who's working very hard on developing business relationships with Iraqis, looking for business opportunities for U.S. companies in Iraq, people who travel to Iraq quite frequently, at risk to themselves – personal risk. And I'm very proud of what we've done there, and we have made some significant advances.

We had a meeting with the President-Elect's transition team today, and we were talking about ITA issues. And I said one of the issues that the new administration will need to confront is – and we had this discussion with the Ambassador Crocker and others in Baghdad earlier this month – as the security situation, we hope, improves further and the Defense Department begins to scale back its resources that it commits to Iraq, which are substantial… And not just for physical security, but they have a task force on a business instability operations, which has done a lot of work that would otherwise be done by agencies like the Commerce Department. But because of the security situation, it's been done by the Defense Department.

They're going to be gradually, we hope, drawing down, and agencies like the Commerce Department, ITA, others within Commerce, folks at the State Department and other agencies of the U.S. government are going to have to increase their efforts because, really, we've just taken the first step to improving the business climate in Iraq by improving security. There's a whole heck of a lot more that needs to be done. And a lot of the work has been done by the Defense Department, but they won't be there to do it going forward, and part of that work is going to have to be picked up by the Commerce Department.

So those are a couple of things that occurred to me, both at the beginning and at the end, that frame my time here and will give me things to tell my grandkids someday about what I did when I was in government. Other questions? It's been a long day, I know. Well, again, thank you very much for being such great colleagues. And I'm not leaving yet – got another couple of months with me – but again, thank you very much.

[*Applause*.]

Concluding Remarks

Lily Fu Claffee

Well, well, well, I've now seen everything. Folks in this room have done what was previously unthinkable, which is to actually meet and possibly even exceed the Deputy Secretary's expectations in terms of legal quality. I can't tell you how many associates now, they've moved on to other things. They're partner-age or they've moved on to corporations. But people who would have their jaws drop at having heard what the Deputy Secretary said about this organization and its quality of lawyering and the quality of its people. I think it's a real testament to you. He's a tough boss. And I know, because I worked for him for almost ten years, and I've got to say, it's very impressive.

But seriously, thank you, John, for your very kind and heartfelt remarks. Your compliments mean a lot us because you know this organization better than most folks do. We've come to the end of our conference. I want to say a few thank-you's before I dismiss folks. First, I want to thank the conference planning committee for doing all of this work. Guys, are you out there? Raise your hands for folks. Thank you very much. These people were... [*Applause.*] And Apollo Mendez and his folks in his office. [*Applause.*] And the number of oter volunteers who helpedus today with our team-building exercise and our wonderful AV person, Dan. Thank you. [*Applause.*]

I hope you've gotten as much out of today as I know I have, and we in the front office have. I particularly hope that you heard something today – you may not have heard every solution to how to be a legal leader or how to handle a transition, but I hope you heard something today that might be useful to you in doing your jobs as we enter the next presidential administration.

If you found this conference valuable and you found that spending the day together with your fellow lawyers valuable, I would encourage you to tell the next GC that you did get something out of this conference and encourage him or her to hold one next year; maybe even make it a tradition for the legal organization here. In any event, I know that you're going to make the new leadership as proud as you've made me, and as you've made John. And I want to thank you for attending, and I want you to have a great rest of the afternoon. Thanks a lot.

[*End of conference*.]