INTERVIEW X

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Tape 1 of 1

W: The original role of the attorney general was as legal advisor to the president and the executive branch. He also represented the government in the Supreme Court, but not elsewhere unless by special arrangement and with added fees. It wasn't even a full-time job to be attorney general in those days. Not until 1870 was the Department of Justice created. Now, obviously the basic activities of the Department of Justice, the ones that occupy most of its manpower and most of the attention of the attorney general, are law enforcement and litigation.

There remains, however, this basic role of legal advisor to the president and the cabinet that is an original role of the attorney general. This is the role that the Office of Legal Counsel seeks to perform on behalf of the attorney general. And part of the legal advisor role, obviously, is dealing with the creation of new laws. Too many people think that laws come only from Congress. It's true that statutes come only from Congress, and then with presidential signature, or at least approval. But there is a very substantial body of what can properly be called law that comes from the executive branch with no

congressional participation. This can take several forms. Its most impressive form, I suppose, is the executive order process, where the president will issue an executive order, which becomes the law, as far as the executive branch, at least, is concerned and as far as the rest of the world is concerned, until and unless the Court upsets it. His authority to issue executive orders is not open-ended. He must issue them only pursuant to some authority. That authority can be either legislative or constitutional.

For instance, in his capacity as commander-in-chief of the armed forces, which is a constitutional capacity, he can issue executive orders involving national defense. He also issues a lot of orders under his power as being charged with the supervision of our foreign affairs. And there are a great many general authorities as head of the executive branch that give him constitutional authority to issue these orders.

The president also issues proclamations. Proclamations do not themselves have the force of law, but under many statutes they are prerequisite to certain other actions that he may take, such as the issuance of an executive order. To be precise about one example, before the president can order federal troops into a state to participate in putting down any civil disturbance or riot, he not only must be requested, usually by the governor, to do so, but also must find a state of emergency and proclaim and call upon the people to cease and desist and return to their homes. Thirty seconds later, he can issue an executive order, saying that they haven't done so, and that the disorder persists, and that he is ordering in the national troops. This is the protocol that is established in the statute that authorizes him to do this.

There are other cases where he can move in with troops where the state governor is flaunting the federal law and depriving people of federal rights himself. This would be the Oxford, Mississippi case, or the University of Alabama case. And it's a different authority. The federal government comes in to keep the state government from doing something wrong, or comes in at the request of the state government to help the state government put down civil disorders.

There are other kinds of proclamations in the tariff situation, where a proclamation will proclaim effective certain tariff schedules, and these things have, in effect, the force of law.

On an international level the president can enter into executive agreements. These are not treaties; they do not supersede statutes--they must yield to statutes, yet, unless and until a statute overturns them, and as long as they're not inconsistent with the statutes, they have the same force and effect as a treaty. A good example here is the Anti-Dumping Act, which is a statute, and the Anti-Dumping Code, which is an executive agreement between a great many nations that was negotiated in Geneva by our special representative for trade affairs Bill Roth.

B: This is dumping in the sense of flooding another country with exports?

W: Yes, that's what it really amounts to. This is the term of art on it, and that is the actual name of the statute. I won't attempt here to go into detail of what it involves. I'll simply point out that there are certain conditions required before the domestic act will permit imports to come in, is what it really amounts to, that need not be satisfied under the Anti-Dumping Code, the executive agreement.

On the other hand, the Tariff Commission can act under the executive agreement in a way which would not violate the statute. This is the kind of interrelation between presidential action and, in effect, law making and congressional and legislative law making that can get very, very intricate and, obviously, very important. In this particular case, there is also a proclamation involved because he has to proclaim these provisions as being in effect before they take effect as to certain domestic areas. I'm not going into much detail here, because my main point is simply to illustrate that there is an executive law-making role under executive agreements.

There's another kind of executive law-making which is, in effect, an implementation of existing statutory authority or treaty authority. An example of this would be the Selective Service regulations, which are issued by the president as an executive order. This is unfortunate in my view; I think it would be much better if they'd be issued by the director of Selective Service in a more easily changeable form. The executive order can be changed at the will of the president, but every time he changes them, he's politically on the spot, and this has some unfortunate consequences. Nevertheless, this whole great batch of regulations from Selective Service are the function of an executive order.

Similarly, the army court martial manual is issued as a presidential executive order. I have argued strongly, and with absolutely no success, that this should be issued by the secretary of defense as a regulation. The answer is that the prestige and stroke of having it as a presidential action outweigh the greater facility of having the secretary of defense issue it himself.

The Office of Legal Counsel has the obligation to review all executive orders for form and legality. Until 1962, this was exercised preliminary to a final review and forwarding by the attorney general to the White House. It became quite clear that this was a waste of the attorney general's time, because he didn't have time to deal with them anyway, and so, starting in 1962, the Office of Legal Counsel began conducting this review directly with the White House. And it also works on a preliminary and informal basis with the Bureau of the Budget and with the various departments that seek these executive orders.

B: With whom in the White House--a different man for each one, depending on the subject matter, or--

W: Usually, the special counsel has overall charge of the executive order picture, in this case, Harry McPherson. There were a good many orders, however, which went through [Joseph] Califano's shop. Larry Levinson, for instance, was the expert on Selective Service, and most of that went through him.

It was a real problem for us in OLC, when we ran into something like the army court martial manual, to take the time to go through it, and yet we could not in all honesty put our stamp of approval for form and legality on it until we looked through it. So, to everybody's anguish, DOD's [Department of Defense] as much as ours, we had to take the time to do it. And this was when I made my pitch to the secretary of defense to issue the thing as a regulation.

The normal executive-order process is that a department will propose an order, let's put it that way, which it sends to the Bureau of the Budget, which will, in turn,

circulate the order to departments and agencies which it thinks have an interest in the matter, and it will also circulate one to us usually at that point. After the input all comes back into the Bureau of the Budget, they will revise the order to such extent as they consider desirable, clear those revisions, and send it to us as the final stage for review on the way to the White House. So we are the final fuse as to the issuance of executive orders.

This is very important, because every once in a while, a secretary will feel that it would be very nice to have an executive order issued, or sometimes the head of an independent administration. And he will trundle the order into the White House. And unless there is some procedure like this, the temptation of a very busy special counsel is to go ahead and issue. What he does though, under the provisions of an executive order which spell all this out, is to send it to the Bureau of the Budget. There have been occasions when we have caught at the last minute a couple of orders that almost went out, or at least that the cabinet secretary thought was going out, and made it clear that they had to go through channels if they did raise legal problems. This happened particularly with Secretary Udall. When he had an executive order he wanted issued, he hated to go through anybody else. He would go straight to the White House with it, yet it had to go through other people.

I think that we were able to be of really significant assistance to the president by being sure that it all made sense; we had to check the legality of the authority under which the order was issued and check its reach, check its constitutionality, and often the basic question was whether the subject matter was appropriate for executive order or whether it

should require legislation. In the civil rights field, a great deal was done, in particular before my arrival, by executive order. John Doar, the assistant attorney general for the Civil Rights Division, became convinced that this was a very limited benefit, because you couldn't implement this if you didn't have the Congress behind it and get the money to do it. So he became rather opposed to the use of executive orders on basic shifts of civil rights positions.

On the other hand, there were a great many instances where, for instance, one of the executive orders makes it clear that, in awarding government contracts, the government agency should be sure that the companies are complying with the civil rights laws, and the Title VI, that requires equal employment opportunity, and so forth. So we got into the act on a judgment level here, too, as to whether an order was the kind of thing that should be issued or whether it should go by legislation.

B: [Did] the question of whether or not a fair housing measure should be done by executive order or by legislation ever come up?

W: Yes, very frequently and in many different forms. And we advised in most cases that it was the kind of thing that we thought ought to be done by legislation. We resisted the use of the executive order to short-circuit the congressional will if it was something that we thought was really in Congress' ball park. There were many, many kinds of areas in which the problem arose.

B: You said you resisted that. From whence was the pressure coming?

W: The pressure would come from the civil rights groups, often from the White House itself, from people in the White House, people in various government agencies who were

anxious to get fair housing, and from some people in our own department. But on almost every count, we decided that this was not the proper way to do it, that if you did get the order issued, it simply wouldn't work, and that you wouldn't get the funds to enforce it and administer it. I think the correctness of this decision has been borne out by the fact that even now that we have a fair housing law, the Congress has refused to appropriate funds for its enforcement, and you might as well not have it. We weren't interested in empty gestures; we were interested in things that would really make sense.

B: Did the President himself ever suggest such a thing?

W: I was never in personal contact with the President on this, but my understanding is that he simply asked his advisers, "What do we do about this?" and the consensus was that we don't issue an executive order; we go for legislation. And he went for legislation.

I think that it's all too easy for those that are apostles of Hill supremacy to think that everything ought to be by legislation and all too easy for those in favor of a wheeling and dealing executive branch to think that everything is possible by executive order. I personally believe in the separation of powers. So did Nick Katzenbach; so did Ramsey Clark. And we were not anxious in trying to usurp congressional authority any more than we were anxious to permit Congress to usurp any of ours. This finds particular illustration in the committee approval kind of problem that I've discussed elsewhere.

But the whole question of what you can properly do by executive order is far from clear, and it requires a value judgment in each case on what is most appropriate and how far the constitutional authority of the president extends. Any executive order can be repealed by the president at any time that he can politically afford to do so, and any

executive order is subordinate to legislation. But inertia being what it is, the issuance of an order can be very significant.

There are many orders where people have been interested in simply the cosmetics of seeming to be taking strong positions in civil rights and other areas, where, in substance, there would really not have been much change. I was never very sympathetic with this, and I also objected to vagueness in orders that would fuzz over the real areas of responsibility. One proposed order that never got issued, that went up and down the Hill a great many times, would have commanded the federal agencies to consider the availability of non-segregated housing in determining what plants should receive government contracts and would, in effect, have gotten the government contracting agency into the business of being sure that racial desegregation was taking place. This has been done by the Defense Department and others in specific contexts, but they decide these things after considering their military needs. The problem of a presidential executive order to everybody to do it is what hierarchy of values do you have, and where does this value, admittedly a good one, rank with the need of getting your cheapest production, getting your most efficient production. There are just all sorts of factors.

We felt that the first drafts of the orders that came through were much too vague on this, and we kept sending them back for re-dos. The final order that went to the White House was a great improvement over anything that came before. It was not issued by the White House, but the process can work here even if it never reaches fruition. I do not know why it wasn't issued. It could be that a lot of the operating agencies were concerned

that it wouldn't be a good idea even as crystallized, or slightly more crystallized. I won't claim it was perfect or crystal-clear anyway.

There are other orders that are issued that cause controversy where there's no doubt as to the legal position. An example would be the orders embargoing the Rhodesian government, pursuant to Security Council resolution. There were several blasts that the President had exceeded his authority here. They were utterly ill-founded. If the Security Council had voted these sanctions, the United States, under existing legislation, is charged with carrying out UN mandates in this kind of area. And what the President did was simply to implement the UN mandate.

Now whether we thought it was a good idea to implement the UN mandate or not in the Office of Legal Counsel was irrelevant. Our job was to see that at least it did not go beyond the UN mandate, and this we did. We had to be sure that all the proper precautions and safeguards were included, and we had to revise what the State Department submitted on it with this in mind. In fact, on most of the really tough executive orders, we did some redrafting. I mentioned earlier the order creating the Office of Foreign Direct Investments, limiting capital outflow, where we had a major role in the drafting, and there are a good many other orders that raised serious legal questions that we had to review.

We also were supposed to review every proclamation that was issued. We didn't always do this, but it was always with our own consent that we did not. Example: Mothers Day and Thanksgiving Day get proclamations; so does Fire Prevention Week and almost everything else you can think of. There's very little of legal significance

involved in these items. There is a matter of style, and some of the things that came to us were so horrendous that I hesitated to approve them as to form.

B: Grammatical style, or legal style--?

W: Grammatical style and just plain rhetoric. Some of it was pretty awful. As I stayed in office longer, I got more willing to send those things along without polishing them on the quite correct theory that the White House would usually rewrite them anyway.
But every once in a while just when we thought we were safe, that the last filter in the White House would catch it, we would see the words of the proclamation as it cleared us appearing in the presidential documents.

There was one case of a proclamation which I will mention here--I think it should stay confidential for a while, but it illustrates awfully well a difficulty of White House operation which is inherent in the system. The night that Martin Luther King was assassinated, it became clear that the federal government should in some way call a day of mourning. And I was on the phone a little bit that night getting people started to look into the precedents for what could be done with respect to a private citizen, because the lowering of flags and things for public officials was one thing and for private citizens is another. We found a couple of very good precedents. Dag Hammarskjold was the best one; he was a private citizen as far as our government was concerned. And there were a couple of others. So we decided that there was authority in the precedent and precedent for the issuance of that kind of a proclamation.

I got over to the White House early the next morning about eight o'clock to review what they had come up with, and I found that the proclamation was for a day of mourning

and for the lowering of flags on the day of the funeral, which would have been, at that point, presumably Sunday. This was Friday morning, bright and early. Every flag in New York was lowered, except the federal flags, already. Flags all over the country, including Washington, were lowered except the federal flags, which cannot just be arbitrarily lowered. Somebody has to say, "Lower them." Even the District of Columbia flags were lowered. There was our flag at the top, flying high and handsome over the White House. Bill Hopkins, who has been in the White House through more presidents than anybody, talked with me about this, and I asked him what the precedents were and shouldn't the flags go down. If they were going to go down at all, go down right away. Hopkins said he thought that the precedent supported a lowering of the flag from the time of proclamation to the time of interment, but that the presidential decision had been to just lower the flag on Sunday.

My view was that that may have been the presidential decision, but that it was reached on incomplete information, because the President could not conceivably have reached that decision if he had known that the custom was from the time of the proclamation to the time of interment.

B: Who was handling this in the White House?

W: It was very difficult to pinpoint exactly who was handling it. Several people were in on it. Jim Gaither and Matt Nimetz at least were in on it, and I'm sure that Marvin Watson was in on it somewhere, and by the time we were through, Ernie Goldstein was in on it a little. But what had happened before I got there, which was at about eight-fifteen, I don't really know. Nimetz had been working on it, I think, all night.

B: Was Harry McPherson involved? He normally handled civil rights--

W: This wasn't something that I talked with Harry on, and if he was involved on it, I didn't know it. My immediate contact was with Nimetz and Gaither, and it was Gaither that replied to my remonstrances that it was the President himself who made the decision. Well, I didn't think we could permit the President to continue with that decision without letting him know that the precedents were otherwise, because if we had, our flags would have continued to fly right until Sunday while popular opinion seethed. There's enough popular opinion [that was] mad about lowering the flags at all; they'd have been just as mad if they'd been lowered on Sunday. But meanwhile, everybody that thought that we certainly should in fact have a full national holiday of mourning would have been absolutely indignant, and I think with great justification, at our position on it.

So I asked where the President was and whether we could get him to reconsider this decision, and the proclamation was just being signed and ready to be released. He was in the Cabinet Room with his key civil rights advisers--that's probably where McPherson was--and the members of the press, and the representatives of a great many leading Negro groups. We obviously couldn't really go in and talk with him about this, and trying to get a word in to him became very hard. I couldn't find anybody that wanted to get him to reconsider the decision that, as far as they were concerned, had already been made, until I finally cornered Marvin Watson, and I explained to him that I thought the President was about to issue the wrong proclamation. Marvin said, "Well, if that's so, it's because he got the wrong facts and the wrong things put in front of him." I said, "You're absolutely right. That's exactly what happened, and I want to see that he gets the correct

facts in front of him. Now here are the precedents, and here is what he ought to do, and that order simply must be changed before it's released."

And Marvin succeeded in getting that word in to the President somehow, and the order did get changed, and we did declare a period of national mourning, flags at half-staff from the moment of its issuance, which was very shortly, until the funeral early next week. I think this illustrates how difficult it is to communicate with somebody as busy as the president about something that is basically a trivia. And I suppose in the whole scheme of national events, when the flags went down could properly be called a trivia. Yet it was not a trivia to the millions of Americans who were in mourning, and its political impact would have been no trivia at all. So that as a national matter, I regard it as quite significant.

You'll notice also that this was not a question of law. It was perfectly legal to order the flags down just for the day of the funeral. It was a matter of judgment; it was a matter of common sense; it was a matter of precedent. And any time you have something that's a matter of precedent, it is somewhat a matter of law because law thrives on precedent, particularly in the area of what the president can and cannot do in his relationships to Congress and the outside world. If you can show some other president who has done something like it, you're always in better shape to resist an allegation of your usurping authority or acting incorrectly, particularly if it was a Republican president, or, for that matter, any president.

So I was over there in my capacity of reviewing as to form and legality. I'm not sure if you would call this form; I guess you could. It certainly wasn't legality. But what

it really was, was common sense. And OLC, in my view, was always called upon to exercise that as well as legal judgment. Now, sometimes we would have to say, "Legally, you can do this. As a matter of policy, we suggest that you consider seriously whether it would be a good idea, or whether you shouldn't change it to something else." Now, there we could not speak with the authority of law, but we had the input; we had the opportunity to make our position known, and this was of inestimable value, in my view.

B: May I ask a question relevant to this episode? On that Thursday night of the assassination itself, had you started your researches into precedent on your own initiative or had you been--

W: We got a call from Matt Nimetz, and I called Leon Ulman, one of my deputies, and they both worked on it. So I was in on it, but not down looking up the books myself. I checked in then first thing in the morning to see what they had come up with, and as I say, just in time. What had happened was they had put a little checkslip in front of the President. "Check here. Do you want one day of mourning? Do you want something else?" But no advice as to what the precedents were as to what he ought to do. He had checked the first one which was pretty logical to him. And it was, unless you knew that other people had done it the other way and knew that every flag else[where] in the country was down.

This experience impressed upon me the importance of being willing to go back to the President to get him to reevaluate when you feel that he hasn't had an opportunity to analyze fully all the aspects. Some people, once the President has spoken, will just say, "Yes sir, that's that." That's fine, once he has really made up his mind. I believe that the

primary obligation of an assistant or a counsel is to make sure that he doesn't make up his mind without the full facts, even though he thinks he has. And I therefore go back and relitigate when I think a wrong decision has been reached. If I lose again, okay; we follow orders.

If I may interpolate here, Stewart Alsop's chapter in his book, *The Center*, on the CIA and the Bay of Pigs crisis, indicates to me that the Bay of Pigs tragedy was a consequence of the failure of people to relitigate with the President. They told him, he came out wrong because he didn't have all the facts, and instead of just insisting and going back over there and presenting it to him in person, they said, "Yes, sir," over the phone, and that was that. This would not have happened in an older administration, even under Kennedy. Nobody yet had confidence in whom they could trust, but it was an example of a truncated decision-making process where the president has made up his mind without knowing everything he needs to know to make it up correctly. I think if people had bulled their way into his presence to present the dire consequences of the alternative chosen, the unhappy medium chosen, I can't imagine that the President would have stuck with that decision. And when it can happen on a little thing like Martin Luther King, flag-lowering, in comparison to these other things, I think you can see how important it is that people working for the president serve his best interests by insisting that he review everything that needs to be reviewed, even though he doesn't want to very much.

(Interruption)

B: This is a continuation of tape ten. It is one day later than the previous material on this tape.

W: We were talking yesterday about executive law making, primarily through executive orders and proclamations. I pointed out that there must be a basis for the president's authority in issuing any such order or proclamation. Sometimes this authority is simply his capacity as the president and his constitutional authority as head of the executive branch. For more detailed programs, it's necessary to have statutory authority. Sometimes, as I mentioned earlier, a treaty can give him authority to issue either an executive order or a proclamation, because treaties, like the Constitution and statutes passed pursuant thereto, are the supreme law of the land.

There are other ways that do not involve overt presidential action that nevertheless very much constitute executive lawmaking. One example of this is interagency action, where the various departments of the government work together to institute a new program. Very frequently this is inspired by the White House. I'm thinking in particular here of the Veterans Service Center program, which I mentioned earlier, which was the result of an interagency action following on the heels of a task force and which was announced by the President as part of his legislative program, but did not itself require legislation.

Another example of interagency action was the New Town In Town program, which had its genesis with the Fort Lincoln project here in Washington. I was called over to the White House by Larry Levinson on very short notice one day to meet with GSA officials and the White House staff about the possibility--and also HUD officials--of

taking a site where the Justice Department had had a youth training center, which was now being superseded by a new installation in Morgantown, West Virginia, and using this to build a model town. The dangers of trying to build anything "model" are pretty obvious. For one thing, you have to get all aspects of the model taken care of, and if this had developed simply into an extension of existing ghetto areas, there would have been little to be accomplished by it. The idea, however, was that with this federal land, it would be possible to get private developers onto the land, working pursuant to a coordinated plan with all the government agencies, and have a pile up solution to perhaps some areas of our city problems, in school systems and convenience of service and stores and having an integrated community and having housing which was for low- and middle- and middle-upper-class, rather than all lower-class or middle class.

This idea appealed to the President immensely. He got about as enthusiastic on this program as anything that I've seen him take up, and he was delighted when Joe Moody and Lawson Knott of GSA came up with the idea that they thought they could do it from their standpoint. There were still a great many legal problems involved. The questions of what kind of compensation would be paid for the land, [under] what kind of arrangements the land could be turned over to private developers, what authority the various HUD agencies should have in relation to various District of Columbia government agencies, and a real hornet's nest, frankly, of legal problems. But we concluded that it could be done, and I assigned my top deputy, Martin Richman, to work with the GSA people on it after I had made the initial contacts. The idea did not stop with this one center, however. Immediately, interest turned to the concept of taking surplus

defense installations that were no longer needed and were located properly in or near a city, and then turning those over to the local community there.

B: Were those ideas originating with the President himself?

W: I think the idea originated with somebody on the White House staff, not with the President himself. The President simply doesn't have time to sit down and originate, but he gets a string of ideas put in front of him, and he will decide which ones he likes, and this one he loved. He loved it so much that he asked GSA and HUD to form instant task forces to go out all over the country and look at these various properties to determine which were suitable for this kind of development. Meanwhile, he asked us to work with these organizations in determining the legal aspects. And, of course, DOD got in on these task forces too, where defense properties were involved.

B: When was this? I don't believe you've mentioned the date. Approximately?

W: My recollection is that this was late 1967, and that his ambition was to get the first spade of ground turned in Fort Lincoln by the new year. That turned out to be impossible, but if I'm off, it's not by far here. It was at least in that general area.

He also insisted that there be an immediate follow-through on this project by all of the interested departments, and there were quite regular meetings, usually at GSA, attended on some occasions by Secretary [Robert] McNamara himself, and by Secretary [Robert] Weaver himself. I usually represented the attorney general at these meetings; sometimes Mr. Richman did, and on one occasion the attorney general himself [came]. There was a desire to get all of the principals themselves involved. And Lawson Knott, the administrator of General Services, was in on all of the meetings.

We soon found that the prototype of Fort Lincoln here in the District of Columbia, the boys training school here--it was no longer a fort or defense property; it was under Justice Department's Bureau of Prisons. What would work there would not necessarily be transposable into a community where the mayors and the governors had other ideas, and where there had to be a very careful meshing with the congressmen involved--who was going to get the credit for this, and if you leak it enough for the congressmen to get the credit, the value of land all around builds up, and, in some instances, the communities nearby object. This happened in New York, for instance. There was a vigorous objection from a nearby community in Brooklyn which felt that using the Brooklyn Navy Yard or the old Floyd Bennett Field for this kind of a project would reduce the property values in their area. So you're entering a very complex community problem when you take on something like this. There's also a great deal of jockeying about who would be doing the building, who would be doing the master planning.

This is, however, an illustration of the executive coming in with innovation on a multi-departmental basis and really working out the law. It's more a matter of determining what the law is on this point, because we found that by and large the authority was there, tucked away in various regulations of the Redevelopment Land Agency in the District and the HUD programs, federal housing. There are other programs on assistance to new housing and model cities development. But the marshaling of the various legal aspects raised by this kind of a program was an exceedingly difficult job. The task forces did go out, they did pick cities where they thought priorities were properly allocated, and they came pretty close in a few cities. I remember that San Antonio and

Kansas City and Minneapolis, as well as Brooklyn and Floyd Bennett Field, were all top-grade prospects.

In San Antonio, I have been told that the project foundered partly because of opposition from the local congressman who did not feel that he had been included early enough. In Minneapolis, I believe, there were some problems with the location not being quite close enough in town. In Brooklyn, as I mentioned, the problem came from the nearby residents and their political stroke, which they then began to exercise through their city council. And in Kansas City, I think things went better than most places, but there may have been a little problem with the local government. Without being sure of the details of these, which I am not, I think it's fair to say as a final evaluation that, even with the top-level effort here, the only program that has gotten substantially off the ground as of this date has been Fort Lincoln, and that is encountering a mare's nest of problems itself in terms of how much independence it can have from the District school system, and from the District police, and fire services. And if it fits right into those existing patterns, what can be done to improve the situation there?

But the idea, the concept, of the new town in town was a challenging and dynamic one, which I think was very appropriately explored by the executive branch. I don't think that the fact there were problems means that the whole idea was without merit. It does prove, though, that instant success in this kind of project, even with the top-level attention that this received, is very difficult to come by. It also shows the importance of having "can do" people instead of "can't do" people, because the easy thing to do is sit by and wring your hands and say it can't be done. And this is what the HUD people had been

doing until GSA came in and insisted that it could be done. I think the President was properly appreciative of the "can do" approach of the GSA, as he was to the "cannot do" approach of HUD. Once the signals got given and the marching orders came out, HUD did dig right in and do the best it could.

Another kind of interagency action, which has a bit of impact on law, is in a program such as Medicare, where you have HEW and all of its constituent outfits, public health, National Institute of Mental Health and their whole health program tied in, and you have a civil rights problem with hospitals, particularly the South, refusing to accept patients under Medicare and refusing to participate. This was a crisis that fortunately never came off, but one of those that government must prepare for. And so here again, the executive branch marshaled its forces, organizing primarily through the White House offices. And Phil Lee, the assistant secretary for HEW, [William H.] Stewart, the surgeon general in charge of public health, the Defense Department people and ourselves, both civil rights and OLC from Justice, got into the act to see what could be done about this.

The decision was to make available, where necessary, hospital facilities of the armed forces and of the Veterans Administration, to the extent necessary to take care of critical cases where the local hospitals would not do so. This required more legal interpretation of the extent to which emergency care was permitted, and we kept it pretty much down to emergency at the beginning stages. We weren't talking about the ordinary patient who's going to be there for a long time, because we didn't have that kind of facility. Yet we could not permit patients who were critically ill to be denied medical care because the local hospital wasn't participating in Medicare and therefore wouldn't

serve them. This was something on which the President felt very strongly, and he made it entirely clear to everybody concerned that the answer had to be found. The answer was found, and we were thoroughly prepared for that contingency. Fortunately, the contingency never arose. There was a great deal of grumbling, but nevertheless, with eventual acquiescence, almost all of the hospitals in the South did sign up with Medicare. But if we hadn't been prepared for that, we would have been derelict in our duty.

B: Who coordinated that one for the White House?

W: Doug Cater, who was the expert on health and education. He did a very good job of it, and everybody, I think, cooperated quite well. I attended a large meeting in his office where most of the top brass of the army and navy and air force medical corps and VA seemed to be represented. Civilians were in the minority. And they were quite prepared to go in there and do the job, to the extent that it didn't conflict with their operational needs with veterans coming back from Vietnam, and those were arranged so that there would be no conflict.

This brings up another kind of executive lawmaking, which is the departmental regulation. The reason that the southern hospitals were reluctant about entering the program was not only the statutory requirements against discrimination, but the HEW regulations, which, in their view, went considerably beyond the statutory requirements. I think the issue that aroused more emotional heat than any other was the semi-private room and whether there really had to be racial mixture in a two-bed room. I don't know how this was finally worked out. I think that what probably happened in real life was that on-the-spot hospital assignment avoided this except where necessary. In other instances,

the hospital authorities themselves may have favored the idea and fostered it. But certainly, one thing that was very clear was that there would be no case where a Negro patient would be turned away because the only bed left was in a room with white people. That simply could not be tolerated and was not. And as far as I know, this is one of those happy crises that went away. But the idea, the concept of department regulation, is very important here as executive law making.

Another example of this is the Office of Education guidelines of the school systems, which have recently been coming under considerable fire. Without attempting to evaluate these, I think it's fair to say that they were, in a sense, executive law making because they take the rather broad general mandate of the statute, which is, of course, congressional law making, and then bring it down to earth by regulations that cannot conflict with that law, but that can certainly fill in a great many chinks and details that the legislators never thought of. This frequently arouses indignation. Yet if it is not done, you are living with these vaguenesses, and that isn't always desirable, either. By and large, any organization administering a complex program needs a certain amount of leeway on how it administers it. It's impossible for the Congress, even if one assumes that it has infinite wisdom, to foresee in advance all the ramifications of a complex program. And so administrative leeway and executive flexibility is very important. At the same time, the executive must be careful not to violate the mandate of the Congress.

B: Were you ever asked by a congressman for a formal legal opinion on the question of whether or not the school guidelines extended the authority of the statute?

W: The congressmen, first, have no authority to ask the department for an official legal opinion. And second, the department has no authority to give them an official legal opinion. Our statute provides that we are counsel for the executive branch, and they can get somebody in the executive branch to ask us for an opinion, but when they ask us themselves, which they do sometimes on various topics, we reply to them that we're not in a position to pass on these things for them, but it may interest them to know such and such. Then we will spell out as much as we think can be helpful.

I think that most of the challenge to the Office of Education guidelines and the Public Health guidelines were made to HEW and were made on the floor of Congress. I don't think anybody really expected the attorney general to declare them invalid. Moreover, these were all issued before I got there, but I would imagine and really feel quite confident that they were cleared with the Department of Justice; probably the Civil Rights Division would have had the most direct occasion to review them. I wouldn't be at all surprised if they also applied to our office; in fact, I seem to remember some indication that they had.

But every time there was a new effort to further civil rights by executive orders or by departmental regulations, you had a bit of a problem on your hands, because there were always some people who wanted to go farther than the law would permit, simply because you couldn't get the law you wanted through Congress.

Even on the housing program, for fair housing, there were many who thought that that whole program should have been achieved by executive order. The decision to seek legislation instead was, again, made before I arrived. I'm sure it had political, as well as

legal, ramifications, one basic political one being that you can have a program, but if you don't have any money to carry it out, it doesn't do you much good. As I mentioned earlier, this has happened indeed even with legislation in the fair housing program.

Another way that executive impact on lawmaking can register is through a contracting power. The Defense Department and GSA, for instance, can say, "If you are to contract with us, then you must observe equal employment regulations and provide equal employment opportunities; and if you don't want to, that's your business, but you can't get any contracts with us." The world of government contracts is not a world of equal bargaining power. There are very few major corporations that can afford to go without government contracts, at least in the defense area. There are some, and I was just told the other day of a copper company that carefully has avoided all government contracts, maybe simply because they don't want the government interference and control that comes through this contracting power. There is in the Labor Department an Office of Federal Contract Compliance, which supervises these holders of federal contracts to be sure that they are complying with the labor laws and with the equal employment laws.

One of the main things that the union wanted was to use this contracting power to beat down non-union corporations. The most notorious example of this was J. P. Stevens [and] Company, which has been found guilty by the NLRB [National Labor Relations Board] of manifold unfair labor practices, and the unions insisted that, therefore, the federal government should not do business with a law violator and should cross these companies off its list for contracts. The problem was complicated, from the government's standpoint, by the fact that this company produced something like 30 per cent of all the

khaki used by the armed forces, and we might have cut off our nose to spite our face if, with the Vietnam conflagration on, we had sought to use this kind of sanction.

From the legal standpoint, however, there was a more basic problem. It goes back to the ancient *Mikado* line about making the punishment fit the crime. There are penalties for violating the National Labor Relations Act. A company found guilty of such violations pays those penalties. But there's nothing that says that it has another penalty, for instance, of being unable to do business with the government. Once the legal concept is accepted that anybody who violates one law cannot do business with the government, you have a great deal of trouble doing business with GE and Westinghouse, for instance which violated the antitrust laws. It's very difficult to draw a line as to where you stop.

On the other hand, there is no doubt that once the contract is in effect, where there are laws and regulations, as in the case of equal employment, that contractor simply must follow those rules, or he loses his contract or gets penalized some other way. The J. P. Stevens [and] Company problem was further complicated by the fact that, at that stage, the order was still open for judicial review, so that you would have been jumping the gun before a really final decision was reached. The decision in that case--the first time it came up was the summer of 1966. It kept coming up several times thereafter. Every time that I was familiar with it, the decision was made that this was not an appropriate use of the federal contracting power.

Other cases where the federal contracting power has received great use, though, is in particularly the Defense Department area where they are opening a new base. They

will say, for instance, that their people cannot have housing in communities which are not integrated. They can't live off the base. Those areas will be off limits.

A real splat occurred on the decision of the AEC [Atomic Energy Commission] to place a new atomic plant in Wheaton, Illinois, far from the maddening throng and far from any integrated housing facilities, really pretty far from any low-income housing facilities. And there was quite an argument within the federal government on that particular grant, and this fueled efforts that I mentioned earlier to get an executive order that would say that, in determining plant sites and locations, agencies would consider the availability of integrated housing and low-income housing facilities nearby, or at least transportation to low-income housing and integrated housing facilities.

These are all matters in which I was more or less on the fringes, but they illustrate the fact that the federal executive branch is wielding an immense amount of authority in ways that do affect what happens, at least as much as the laws of the Congress. This is one thing the Congress objects to. In some instances, they may have appropriate occasion for concern, but usually--in fact, just about always in the cases that I watched, the executive did not take action that I felt could justifiably be criticized as going beyond its authority. If it had, I would have said so. And we had to clear these orders before they got issued. There were some things proposed that would have gone beyond the executive branch's proper authority, but none that were actually issued, to my present knowledge and in my personal opinion.

I mentioned earlier that an executive agreement can also be entered into by the president without the advice and consent of the Senate, and in that respect, is unlike a

treaty. This is another delicate line. What do you do by executive agreement, and what do you do by treaty? An example of an executive agreement--I can think of three examples: one I mentioned earlier is the Anti-Dumping Code; another is our agreement with Spain for military bases, which is in the papers a bit these days; and a third is the INTELSAT agreement of 1964, which set up the International Satellite Communications Consortium. This executive agreement is now in the process of renegotiation. It does not have treaty status; it is therefore subject to the provisions of the COMSAT Act. If it were a treaty coming after the COMSAT [Communications Satellite] Act, and the Senate ratified it, then it would prevail. But there are some very close questions as to how far the foreign-affairs authority of the president extends. And here, again, I think that you get into practical considerations of what politically is viable and feasible, as well as what is technically legal.

B: Can an executive agreement, like an executive order, be unilaterally rescinded at any time?

W: There's a difference in that the executive agreement has other parties to it. Whereas the executive order is the act solely of the president, for the president to rescind an executive agreement would be for him to go back on a contract with another country. The executive agreement can be overcome, however, at any time by statute. In that case, the Congress has gone back on the president's executive contract with the other country. It's something that one does not do lightly, because in a world of foreign relations, reciprocity usually results in having that kind of a shotgun kick as hard as it shoots.

B: Without Congress intervening, it would have to be a mutual agreement to cancel?

W: Yes, unless the agreement itself provides for withdrawal upon one year's notice, which is quite frequently the case. This kind of agreement will usually provide some provisions for termination, often unilateral termination. And usually they're only for a term of years. It is our position, and has been consistently, despite some urgings otherwise in some quarters, that an executive agreement cannot create an alliance. That takes a treaty. And there are other things. You can't modify existing laws by executive agreements, and you can't undertake obligations which would commit us to war. You can undertake obligations that would make it very difficult for us to avoid going to war, but you cannot trigger the war-making power by an executive agreement. That takes a treaty.

Let's take the NATO [North Atlantic Treaty Organization] alliance. This is something where there is a treaty. For instance, the executive agreement with Spain on military bases in Spain. This is a pretty interesting problem which is presently being discussed a bit, and I don't think it's appropriate to comment much more on it at this time. But I think the problem does highlight another area where presidential action, to a certain extent, is not only permissible, but often the only way to achieve some of these things, whereas beyond that point, you simply have to have Senate approval. Even if you do it by treaty, the House objects because they're not in on the treaty-making process. They prefer it to be done by the regular legislative process.

So you have this whole array of executive lawmaking functions: the president doing it through executive order or proclamation; the president causing it to be done by interagency action; the agencies themselves taking action by regulation or by use of the contract power; the president using executive agreements. It's quite an arsenal of

executive weapons, and I think it's underrated and under-appreciated in general discussions of government as to how important this role is.

There's one more role that I suppose could be called executive lawmaking, although it is really quite different. It's rather an executive interpretation as to what the law is. This lies in the area of our responsibility and that of the attorney general in issuing opinions which resolve disputes between various agencies or advise an agency as to whether a course of action it takes is legal or not. Obviously, this is not law making in the sense that it creates something completely new, because it is expounding that which already exists, either in the Constitution or in the statute or under executive order. At the same time, one must recognize that courts have the same situation and what the courts come up with has the force of law. In some instances where they innovate, it is judicial law making. By this same token, there are cases where the attorney general's opinion has the effect of law, at least within the executive branch, because what he says determines how the executive branch will react to a particular situation and the rules that it will apply.

Within any recent administration, there have been relatively few formal attorney general's opinions; there used to be a great many more. There are several reasons for this. One is that with the proliferation of agencies and problems, there is more of a tendency to iron things out on a practical level or an informal and unofficial level. The attorney general's opinion itself is quite a cumbersome thing. It has to be written just as carefully as a Supreme Court opinion, and it puts the attorney general squarely on the line in a situation which may have political consequences, and which certainly invites the attention

of anybody who doesn't agree within the Congress to what he can do to change it. Most of these cases are fairly controversial or the attorney general would never get asked for the opinion. If it were something that were clear cut, it would never get that far.

There are a good many instances where, to avoid putting the attorney general directly on the line and making it a full-fledged opinion of the attorney general, publishable in the volumes as such, an opinion comes instead from the Office of Legal Counsel. For instance, the Department of State very frequently uses this technique, and in this approach the legal adviser writes the assistant attorney general in charge of OLC. In other cases, the general counsel will do it. In the official opinion, however, the cabinet member himself or the president asks the attorney general for an opinion.

There are a good many ground rules that the attorney general has as to when he will or will not issue opinions in an effort to prevent abuse of this power. It's a very handy thing for everybody to invoke his mantle where they think they can get him to go along. One rule that he has is that he will not issue an opinion if it is a matter which can, and probably will, be decided with fairly prompt action by litigation, because then he would be just sticking out his neck when the Court is the one appropriately to decide the question and when his position can be as a litigator before the court.

Another kind of problem where he will not rule is where the agency itself does not have a legitimate interest in seeking that kind of a ruling. On one occasion, for instance, the Department of Commerce asked us for an opinion at the behest of the Maritime Administration, when the sole purpose of that opinion would have been to make life easier for the American-owned cargo vessel trade. This didn't seem to us to be an

appropriate occasion for us. We didn't think that the Maritime Administration or the Commerce Department itself had a viable interest in this, and if it is just acting as a conduit for someone who has no right to ask the attorney general's opinion, we would usually discourage them from formalizing or perpetuating the request. As I mentioned earlier, neither congressmen nor anybody on the outside has the right to ask the attorney general for an opinion, and the attorney general, indeed, has no real authority to give them any opinion that would have any binding force. His authority is within the executive branch, however, and this is a pretty broad authority when you consider how great the consequences are that flow from executive action.

Another rule that we have imposed is that before the attorney general will give an opinion, we insist that a cabinet secretary requesting the opinion enclose the opinion of his general counsel. This serves several purposes. One is it provides us with a good nutshell summary of their arguments, in effect, a brief. It also puts their people on the line to where they don't try to duck the hot ones by sending them to us without taking a stand themselves. This has a remarkably salutary effect of holding down the number of requests that we get. At the same time, there are situations where it really is important to have [an] official attorney general opinion.

One example I can think of is whether the Fanny Mae obligations, Federal National Mortgage Association obligations, invoke the full faith and credit of the United States government. Attorney General Nick Katzenbach, on his last day in office, signed an official attorney general's opinion that it did, that you couldn't have a government corporation, even though it was a separate corporation, in on making a commitment

which it would then dishonor, which the country would let it dishonor. The conclusion that it did involve the full faith and credit of the United States government met with some opposition in Congress and aroused some accusations of "back-door financing," which the Republicans were pretty indignant about as a whole. However, on a more practical level, it reduced the interest rate paid by Fanny Mae by a substantial amount, because the full faith and credit clause carried with it an assured payment, and therefore reduced the tab so that the taxpayers saved a considerable amount of money by this decision.

Another case was the Johnson Act, which was named after Hiram Johnson, enacted in something like 1933, where the Congress decreed that any government in default on its war debts could not receive credit from the United States or any bank or financial institution in the United States. Obviously, this was enacted in the context of the World War I debts, the war debts that had not been repaid by anybody except Finland. It was being used by bankers and a good many other financial institutions as a reason why they could not advance credit in many situations where credit would seem desirable. Rumania, for instance, came over and was seeking extensive credit, and Rumania apparently had a debt obligation to the United States which it had not repaid.

The State Department was joined by the lawyers for the New York banks in requesting us to reevaluate opinions that had been issued by Robert Kennedy and an informal OLC opinion by Assistant Attorney General Katzenbach, which, while taking care of part of the problem, cast grave doubt on other aspects of it. I won't go into details on this. The opinion speaks for itself. It was not an easy one to write because Homer Cummings had come out in one opinion in 1934 that did a pretty good job, but then the

Kennedy and Katzenbach opinions, with a somewhat more limited focus, had perpetuated problems that the Cummings opinion really didn't raise under the act. Our opinion, which was signed by Attorney General Ramsey Clark and was, of course, prepared in our office, went back to the Cummings opinion as the fount and interpreted the act in a way where, in a normal business transaction, the credit involved in that transaction, rather than in a long-term loan for no specific use, was considered to be exempt from the Johnson Act coverage. This, in effect, meant that there was no criminal-penalty threat on a bank or financial institution extending this kind of credit; therefore, that excuse was gone. Not much credit has been extended in these areas, I understand, and there's a case that can be made for the fact that the Johnson Act was a bit of a crutch for those who didn't want to make the loans anyway. Nevertheless, it was a case where we were able, by an official attorney general's opinion, to remove a stumbling block that otherwise would have impeded the flow of commerce.

Other attorney generals' opinions included a very difficult argument between the State Department and the Selective Service Commission on the status of aliens who had permanent resident privileges in the United States, but were not citizens and came from countries--there were a few countries, the main ones were Austria, Italy, Switzerland, and Argentina--where there were old treaties saying that neither country would draft aliens from the other country into its armed forces. The countries involved were remarkably exercised about this when you consider that the people involved weren't planning to go back there anyway, but had committed themselves pretty well to staying in America. It became a real *cause célèbre* at the State Department, and the Austrian ambassador in

particular was vehement in his pressures on the State Department; so was the Italian ambassador.

We were asked if we couldn't possibly rule that this treaty prevailed, despite statutory provisions on which General [Lewis] Hershey relied, which came much later, and which Hershey insisted superseded these treaty provisions as a matter of our domestic law. There was considerable threat that we would be hauled before the International Court of Justice if we persevered in the Hershey approach. In terms of numbers of people, there were very few. In terms of the heat of the issue, it was a very hot one indeed. We looked into it and determined that, as a matter of law, the whole legislative history was a potpourri of confusion. There were lower-court opinions, which had furthered rather than reduced the confusion, and you could make a case for Hershey's direction, but it seemed to us that the better case on balance lay with the State Department, that Congress had not expressly repudiated these treaties, and that a treaty obligation is of sufficient standing and sanctity to where it should not be repudiated by implication. If the Congress wanted to repudiate it directly, it could come in and do so, but it had not done so, in our view, to date. And in this view General Hershey differed.

We did then go on in the opinion to point out that under another provision of the Immigration Act any permanent resident alien who invoked his treaty right not to be drafted also forfeited his right to become a U.S. citizen. This took a good deal of the political heat out of it, because we were not permitting the resident aliens to have their cake and eat it, too. It did not leave everybody satisfied; as with most decisions where you have this kind of sharp-drawn line conflict, you can't keep both parties happy, and if

you do, either they don't understand the situation, or you've been remarkably ingenious, or something is wrong in the opinion. In this case, I think we had a very sound and sensible, as well as legally correct, position. Hershey is still challenging it, I understand, and wants to challenge it in court. But meanwhile, he has to go along with it because it is the official legal position of the executive branch when the attorney general speaks.

Now on that kind of a point, for OLC to speak would do no good at all. Hershey couldn't care less what OLC says. He doesn't care very much what the attorney general says, as long as he thinks he's right, but he did, with the addition of our last part of the opinion that these people would forfeit their rights to citizenship, go along with the opinion, and we did not have a major political brouhaha. I think this is an example of how a legal question of immense technicality has a potential for conflagration on the political front, vastly outweighing its substantive importance. This really wasn't all that important involving that many people; yet it could really have become explosive. And part of our function was not only to get the right legal result, which I am convinced we did, but also to defuse the explosive to where it wouldn't blow up in the face of the administration.

Here again, there was White House participation but it didn't reach the presidential level, to my knowledge. Larry Levinson was the main one who worked these things out with General Hershey and us and Colonel [Daniel] Omer in General Hershey's office, with whom my people met. There were several other quite controversial opinions issued by the attorney general during my regime at OLC; all of them were prepared, or at least put in final form, in our office. But then, they really did have to be cleared with the

attorney general, and there really were changes that the attorney general made whenever he felt that some things should be handled differently. So despite our work on it, it's not reasonable to say that they were really our opinions. They were the attorney general's opinions. There were some instances where we might have preferred different wording and different emphasis. There was no point, however, where we did not feel that the result was intellectually supportable and really correctly stated the law.

Just to mention one more really controversial one, we held that the Department of Transportation could stretch out the commitment of highway trust funds for the new highway program, even where those had been in general committed, as long as they had not been allocated to a specific project. And this is what was done in 1966, a stretch-out, which evoked the indignant response of congressmen in whose districts where roads were being slowed down. A congressman notices this kind of thing very quickly and reacts very sharply. It's not only a matter of transportation convenience; it's the contractors in his district, the payrolls in his district. It's just like any other public works project. We held, and again I am convinced correctly, that this was entirely within the authority of the Department of Transportation as long as the funds had not been specifically earmarked or committed to a specific project. At that point, there was a contractual commitment that meant we had to go through with it, but there were enough of these others to where the slow-down was entirely feasible. This again received considerable attack on the Hill.

I've mentioned elsewhere, but I think I can mention here briefly two illustrations of the kinds of situations where the Office of Legal Counsel gave opinions rather than the attorney general. This is in a case, as I mentioned before, where you prefer to low-key the

situation, where it may be a passing kind of a problem that does not require the permanent sanction of the official attorney general's opinion. One of these involved the dispute between Commerce and State as to whether the Safety of Life at Sea Convention provisions on cruise ships would be violated by stiffer provisions enacted into legislation. And here the legislation wasn't even on the books yet; it was a matter of what the administration would seek. We received an official request from the legal adviser of the Department of State to advise that the statute in its proposed form would indeed violate--the convention would therefore not be appropriate in connection with our treaty commitment. This was a treaty which we had very recently ratified, and it would have been very unwise, because if you go around repudiating treaties right and left, you're in trouble with every country in the world, and they violate the ones with you that you don't want them to violate and point to your violation as an excuse. In this instance, we concluded that the convention would be violated, and the result was that the proposed legislation was changed, even though in this situation we liked the way the Department of Commerce would have come out as a substantive matter, we couldn't quite reach it.

Another example is the PL 480 argument between State and the Department of Agriculture, where the question was vegetable oil for Yugoslavia. Have I mentioned this earlier?

B: Yes, you went through the--

W: I'll just use that then as an example here.

B: The point here being that was one where your office did the opinion--

W: We did the opinion, and we cleared it with the attorney general. He knew perfectly well what we were doing; I would never go off on my own without clearing it with him in that kind of area. But we were on the line and not himself. Remarkably, there was very little flak in the *Congressional Record* against our opinion or against us. If the attorney general himself had been on the line, I believe that the flak would have been greater because the political mileage out of attacking the attorney general would have been greater. So it was a good occasion to low-key it. And there were a great many times when we did this, and the opinion is just as binding on the executive branch. Everybody is going to follow it just as much.

Even more frequently, though, we would deal informally with these people. We wouldn't write out even an official OLC opinion. That was done only when it had to be shown to somebody or had to resolve an actual dispute. Much more frequently, we would work behind the scenes with these organizations to try to work out the problem and tell them what they could do without going to the trouble of a full-fledged panoply on each of them.

In effect, of course, there was an OLC opinion every time an executive order was issued. Our opinion was that the executive order was acceptable as to form and legality. Once in a while, we got into some arguments about our authority to cause trouble here, because, in one case, for instance, Governor [Price] Daniel had an executive order that he wanted to issue changing the name of his Office of Emergency Planning to the Office of Emergency Planning and Federal-State Relations. He also wanted to recite in the order everything that had been done in the field in the past couple of years. On the first point,

we had objections as to the legality, because the name of that office was created by statute, and we did not think that it could be changed by executive order. This is an example of where an executive order would be run in contravention of a statute, even though it was an awfully minor thing. On form, executive orders are not recitals of accomplishments. They're orders for the future.

Governor Daniel felt quite strongly on the desirability of pulling all this history together into one place, and eventually we rewrote the order in our office to omit the change in name and to restate the history in a form that we considered more appropriate for executive order. But we did get it in, so as a matter of form, we made the changes; but as a matter of substance left everything in that Governor Daniel wanted in. We just made it read better and more normally. In terms of the legal problem, though, the name change, we referred him to the Congress. He did seek legislation to make that change; he got half of his loaf. They changed the name to Office of Emergency Preparedness, but they left off the "and Federal-State Relations."

Here again, we are in the hot spot because the governor has taken this order directly to the President and asked that it be issued. The President has put it into the stream with the Bureau of the Budget, and it comes back to us through Budget on the way to the President, and we obviously had to discuss this with the White House staff. Price Daniel was a personal friend of mine, and I discussed it with him by phone as well, and I think that we ended up with everybody fairly satisfied--I won't say exuberant, but at least feeling that they had gotten what they really needed.

This might be a good time for me to include a reference to some of the techniques that we used in dealing with these various agencies and with [the] White House and the administration. As I've mentioned earlier, we have regarded ourselves as an Office of Legal Counsel, not simply an office of executive adjudications. While our opinions do come out as adjudications in many instances, more frequently we prefer to give the counsel that solves the problem before it arises or crystallizes that completely. We follow certain legal rules--not legal rules--concepts that I think go to the making of the compleat counselor--I spell that as C-O-M-P-L-E-A-T, as in *The Compleat Angler*. Rule number one would be at all costs avoid naked legal advice; nothing is more dangerous. You can give it in one factual context; it can be distorted and used in another factual context where there are other elements present that are not appreciated by the person using the advice.

This is the same theory, in a sense, that courts use when they refuse to give advisory opinions. They want to see an actual-fact context of a real dispute being decided before they apply. And we insisted on knowing the factual background of the instances in which we were asked for opinions before we gave them, even orally. This was particularly true in dealing with a White House staff which wants to use an opinion of OLC or of the attorney general as a bargaining weapon. Similarly, State Department frequently would like to use our views in persuading congressional committees on various things, and we had to be very careful about how this was used.

I don't think I've mentioned the AID [Agency for International Development] bill fight, have I?

B: I don't think so, no.

W: This was another of my early problems in mid-1966. It's part of the committee veto problem. I guess I've written about it elsewhere. It again illustrates several of these concepts that I'm talking about. [William] Fulbright and the Senate Foreign Relations Committee hung an amendment onto the AID bill that would limit our aid under certain programs to ten countries. Any excess beyond ten could be made only if the executive came to the committee and got its approval of that aid, even after the law had passed.

This raises the very serious committee veto and committee approval problem, which I have discussed elsewhere. The theory of the Constitution is that once the Congress legislates, the executive executes. And here the executive, under valid legislation, would not have been able to execute without going back, not to the Congress as a whole, but to a particular committee of the Congress. And we believed that this raised serious constitutional problems. If you go waving the constitutional flag around the Congress, however, and tell them that they are encroaching on executive prerogatives, their first reaction is, great, let's do it! Because they feel that their prerogatives have been cut down. Therefore, it's one thing to be saying that to a court and another thing to be saying it to Congress.

This same problem arises in many other contexts, but in this context, the AID people and the State people seem[ed] to think it would be great to get an opinion from us in writing that this was unconstitutional, which they could then use with the committee. We thought this would be bad tactics and bad judgment and might very well result in precedents that would erode further the capacity of the executive to resist in this area, because the whole history of precedent is the interaction of the Congress and the

executive branch, and we thought that it ought to be handled very carefully. We did feel that the problem existed, and we wanted to do everything we could to help them lick the problem. What we did was help them in the preparation of position papers, which talked about the serious constitutional problem that would be raised without blatantly declaring it unconstitutional.

I also talked personally to several people on the Hill, both members of the Senate and members of the House, one of whom said, "Oh, yes, I know the amendment that you mean. We've always referred to that as the unconstitutional provision." And they knew it, but that didn't keep it from passing the Senate. It did not pass the House, and in the conference committee, with the help of the various position papers, we were able to change this into a report-and-wait requirement, where the ten-country limit could be expanded by the simple expedient of having the executive branch report to the committee what it was going to do and wait sixty days before it did it, but with no requirement of action from the committee itself.

But here again is a case where talking in the abstract, if we turned over a piece of paper, it then can be used in ways that are very unwise, and we therefore were cautious about how we did this.

A second basic principle is always to look to the enlightened self-interest of the people you're dealing with. Our best illustration of this, I think, is the DOD [Department of Defense] FCC-30 circuit fight, which I mentioned, where we had to persuade everybody involved, not that the law said one particular thing, because it wasn't all that clear, and they would have gone to court to challenge that assertion. Rather, we had to

persuade them that their own enlightened self-interest and that of our government was best served by following this particular course of action. Now, this cannot be a fake argument; it has to be a real argument. But the art of successful negotiation is basically meshing the fundamental needs of the two parties and having them look at all the problem from the long-range view of what they're getting as a package. And this was a basic negotiating technique that we used.

A third technique is not a technique either; it's really substantive: always keep the high moral ground. Never take a position that is open to moral attack, because when you do, they're looking downhill right at you. As long as you are on the high moral ground, they're coming uphill at you, and they have an awful time getting at you. Very frequently, within the same substantive situation, you can shape your issue in a way where you have the moral advantage, whereas if you're not careful or you use the wrong words, or let your emphasis get in the wrong place, you give the other party an opportunity for moral--

End of Tape 1 of 1 and Interview X

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