

White House Interview Program

DATE: April 26, 2000

INTERVIEWEE: ABNER MIKVA

INTERVIEWER: Martha Kumar and Terry Sullivan

[Disc 1 of 1]

AM: When I came in there, Bernie Nussbaum had left some files, and Lloyd [Cutler], of course - who lured me in there - left me everything he had. But I was shocked to find out—when Nussbaum walked in on whatever day it was in January in 1993—the office was absolutely bare. That there were no records of any kind, nothing on the—

MK: Now the Counsel's Office is one area where there should have been something; precedents, for example.

AM: Some of them get printed up and you get them through the Library of Congress. But, according to what I heard, anyway, we didn't even have sets of those.

MK: Because they got passed from [Ronald] Reagan to [George] Bush.

AM: Again, if it's the same party, there's more of a likelihood to be continuity. But there is apparently almost this tribal fear of the outgoing president that, if they leave anything to a successor of the opposite party, they'll get exposed. It's just nonsense.

MK: Part of it is the Presidential Records Act that calls for the materials to be—

AM: That you have to keep certain kinds of things. Even there, the combination of the Presidential Records Act and the fact that you just knew that the very energetic press and an even more energetic Congress make quite sure that anything that appears in writing is very likely to appear on the front page of the *New York Times*, some time in the future. We just never put anything in writing. At least I did [not put anything in writing]. All the habits I learned as a good litigator, where I took detailed notes about what was going on, I threw out the window. I glared at some of my deputies, Jane Sherbourne particularly, who kept records that just got the White House in trouble later on. But that's different than keeping an operations record of the kinds of the things the White House counsel is going to run into. They are covered in some of the precedents, but that the White House counsels don't keep for each other.

MK: [A. B.] Culvahouse said that he left about ten books of things, including precedents, statutes that were under litigation.

AM: Culvahouse and the [Gerald] Ford administration probably were the most—what's the word I'm looking for—thoughtful about their successors. Part of it was that Gerald Ford was a special kind of president. Edward Levi was a special kind of attorney general. And they really did take into account that there was always going to be a White House counsel and there was always going to be a press secretary, there was always going to be an office of domestic affairs, and that the more they knew about what the operations looked like—again, I didn't want to know what my predecessors....

White House Interview Program, Interview with Abner Mikva, Martha Joynt Kumar and Terry Sullivan, Chicago, IL., April 26, 2000. Judge Mikva served as Counsel to President Clinton in 1994 and 1995.

TS: So you didn't have an operations manual when you came in, even your Democratic predecessors didn't leave one?

AM: Remember, we didn't have a Democratic predecessor. We had Bush. I'm trying to remember. Bush's counsel was—

MK: Boyden Gray.

AM: —Boyden Gray. Boyden did take pot shots at the White House counsel's office and the administration. I think he thought that was part of his job, as being ex-White House counsel. I always knew that—if we had some problem—I would read a strong criticism of why we were having it, in the next day's paper.

MK: He's the first person who's done that as counsel.

AM: Yes. Most of us feel kind of a loyalty to the office because it [is] so high. Again, Culvahouse and—I can't remember who else was Republican.... Who was there during Reagan?

MK: [Fred] Fielding.

AM: Fielding. They were very supportive and they tried to be helpful but, again, there was no manual. And I think there should be.

MK: What did the President say to you when you came in? How did he twist your arm to get you there?

AM: He didn't have to twist as hard as people think. I had about one year left in my term as chief judge. At age seventy you have to step down. So I had made up my mind when I left the chief judgeship I was also going to take senior on the court, being a less active role on the court. When Lloyd Cutler suggested this to me it seemed like a great way to segue out of the court—where I was going to be diminishing my efforts anyway, and into the one branch that I really didn't know. So I had to clear it with “she who must be obeyed” and the family, but once he suggested and once I met with Leon Panetta, whom I had known from congressional days, the President didn't have to sell me very hard at all. I was ready. It was interesting work.

MK: What did you learn? You were saying you had said you had not served in the Executive Branch?

AM: I learned the Executive Branch is much harder to function in than it is to criticize. As a congressman and even as a judge, it's so easy to take pot shots at how difficult it was for them to get their act together and how they couldn't organize a two-car funeral and all the other things that smart-ass congressmen say about the Executive Branch. Then when I got there and I realized that—by definition—the task of trying to move 260 million people generally in the same direction is not easy. I don't know how you run that branch differently than the countless meetings and the countless backings and forthings, and the fact of the matter is that the country is probably better off when the president doesn't go charging up the Hill. The more I saw this President in action, the more relieved I was that he was cautious about things like committing our troops and getting us into situations that we couldn't get out of. It's frustrating, even when you're there, and you try to send in a decision memo on something, on a judicial appointment or something. You send in one, but you need two. I'd send in three and they just wouldn't come back with that famous left-handed

check mark that you needed to move ahead. If it was something really urgent, by the fourth time around, as I'd come into the Oval Office area, Betty [Currie] [President Clinton's secretary] would say, "He hasn't done it yet." They would know what I was there for. And it's frustrating, but you understand why when you see it close up. It's probably the way the Executive Branch should work.

It's fascinating watching this Elian Gonzalez thing develop. I read several columns criticizing him [President Clinton] for not exercising leadership on it. I don't know what he really should have done there. I don't know what he could have done. He used his pulpit, which wasn't very effective. Nothing was going to persuade that Florida family to turn him loose. He didn't, as he shouldn't, prod [Attorney General] Janet Reno to move any faster than she did. I don't know if she should have moved faster or not. I'm inclined to think not. Once she did move, she was still criticized that she moved too fast, as it was. But how do you come to a simple decision like: deciding when to enforce the law about who has custody of a child? It took forever and wasn't pretty when it happened.

MK: What did you see the breakdown of your job as being? What parts of it were there?

AM: Well, part of it was that there is no real job description. It varies from president to president, counsel to counsel, and almost from time to time. I'm sure you've heard the [Franklin D.] Roosevelt story, when he made Judge [Benjamin] Rosenman his first White House counsel—mainly because Judge Roseman didn't have enough to keep him busy writing speeches and the other things he was doing. So FDR announced that he was creating this White House counsel, and Judge Roseman was going to be the White House counsel. One of the press people asked him, "Mr. President, what's he going to do?" And FDR supposedly answered, "Legal stuff." That's about as good a description as there probably is: "Legal stuff."

I can tell you the parts that I liked to do the most. I enjoyed being involved in the judicial appointments process. I enjoyed those times when I was in the loop on legislation, mostly from a policy point of view, but more of a mixed-policy legal. Walter Dellinger was head of the office of legal counsel when I was there. We were old friends and he was easy to work with. Those are the most interesting parts. The handling of the congressional investigations and the other things were, obviously, less pleasant, but they probably go with the territory. While I think that this administration has been particularly plagued with a Congress that seems to have nothing else to do but to conduct investigations into the Executive Branch, it's not that new. Congress was trying to run the Civil War over [Abraham] Lincoln's vigorous objections. They continued all the time I've been in Washington, even going back to—[Harry S.] Truman. [He] made his name originally as a senator out of what was a committee of the Senate, in which he was investigating the way the military was running World War II. Nobody interfered with FDR, but Truman did wield some congressional oversight. So it's hardly a new problem.

I found it least appealing because, as a former member, I knew how my former colleagues behave, but even I was shocked at how unrestrained they were. This is before Monica Lewinsky. As far as they were concerned, this President was fair game, the administration was fair game, and not just from the Republicans, but also Democrats.

MK: How did you separate out what issues would be personal issues to the President and what issues were ones that dealt with the presidency?

AM: With great care. It's a very hard question. I was very fortunate that David Kendall was personal attorney, and we could discuss what the line should be. There were some issues—like Whitewater and some of the others, Gennifer Flowers—that clearly fell on the personal side. But something as personal as [presidential] income taxes, which were done by an outside accountant and outside lawyers—Kendall's office handled that—but before the report was filed, before the return was filed, we had a long meeting in the residence with Kendall, the accountant, Mike McCurry, and me and one of my deputies. Because there was just no question that, when it was filed, the first questions Mike was going to have to handle in the gaggle [press briefing] was: "What's this, what's this, how come you only contributed this much?" In turn, I had to at least be aware of what kind of political presidential connotations there were the way the report was filed, and to make sure he and Hillary were aware of what they were signing their name[s] to. "Is that personal or is that presidential?"

MK: Were there issues that came up that involved the prerogatives of the President, where your position would be different, because you were thinking in terms of the presidency, whereas you'd have other people—?

[Interruption]

MK: We were talking about the prerogatives of the President and whether there were times when you felt as part of your role as counsel that was to protect the prerogatives of the presidency and that you found yourself at loggerheads with a variety of people over it.

[Interruption]

AM: Interestingly, the biggest problems were with the President, because I think when you're occupying the office, including this one, you're just not aware of what the historical significance of what—. When you're making history, I don't think you're a very good student of history. It used to annoy me when I'd hear a member of Congress get up and say, "For the purpose of making legislative history." They didn't have a clue as to what some court would, later on, find to be important. And the President of the United States just can't really judge on a day-to-day basis the historical significance of what he's doing. He's going from crisis to crisis. That's the way the presidency works. I found the best example of that is: what meaning executive privilege took in this administration. Again, the problem isn't new. We've been fighting about executive privilege since George Washington. I think this President operated on the premise, pretty much, and I certainly did, that whatever the legal consequences or legal parameters were of executive privilege, if Congress really wanted something, politically it almost was impossible to deny it. The more you stood on privilege, the more you pointed to precedents, the more you showed these are the things that the president didn't turn over, the more they could make political hay out of it. As I say, we operated on the premise that you could resist and you could maybe negotiate, but that, by and large, if Congress really wanted anything, you have to give to them. Therefore, better act forthcoming.

I think the worst rap they put on this administration was that they have stonewalled on anything, with the exception of Monica—obviously it was stonewalled. It was after my time. But, when I was there, our policy was to give them everything. I remember the Mexican peso crisis where the effort to do it in cooperation with the Congress was literally a textbook effort. Secretary [Robert] Rubin had worked out the idea of getting some fast-track legislation through, which would bail the Mexican government out of a crisis. We had all the leadership over to the White House. [Robert] Dole, who was then Senate majority leader, signed off, and the Democrats signed off. [Newt] Gingrich signed off. [Richard] Gephardt

signed off. It was a done deal except that the next day Gingrich called the President and said he couldn't deliver the "yahoos" and, therefore, we couldn't get our fast track.

So Rubin went back to the drawing board and worked out this elaborate scheme that he had to do it by executive action. Again, all the leadership was called in. Everybody signed off on it, everybody agreed that was the way to do it. We're talking about our second largest trading partner. If Mexico had been allowed to go down the tubes, the reverberations would still be felt—I think—in the United States. So, everybody was in agreement. When it was done, and the Mexicans not only met all their obligations but they met them early, and we made money on the deal as a country, by the interest that they paid, nevertheless, the same "yahoos" are screaming this was all done so that Rubin could bail out his Wall Street friends, and insisted on an investigation. They started an investigation in the House Banking Committee. Jim Leach was the chair. We met on it in the senior staff. The President agreed we would turn over everything. We literally sent over truckloads of records. They had to create a special room. We emptied out the Treasury basement of every record there was on the Mexican peso crisis, everything that had been done. There weren't that many White House records, but there were tons of Treasury records. As I say, they actually had to create a separate room over in the House office building.

One day I got a call—there was kind of a code in my office. If the President wanted to see me and was in his usual good mood and would be jovial and chitchat about golf for a while, my secretary would come in and say, "The President wants to see you." But if it was clear that he was mad about something the message was, "You're wanted in the Oval." I got the message: "You're wanted in the Oval." I didn't know what it was about but, obviously, it was some kind of problem. So on the way down I'd grab Panetta. It was always good to have somebody else. You'd walk in the Oval Office and this very gentle, kindly president could act like the sternest high school principal. There he is sitting behind the desk and the two of us are standing there like errant schoolboys. He says, "What the hell is going on? I thought we were going to turn over everything on this Mexican peso crisis." Panetta looks at me and says, "Mr. President, we did." He said, "I just got a phone call from Gingrich, saying we're stonewalling him on some documents." I start to think and there were three documents that we had held [back] that were memos of telephone conferences the President had had with President Zedillo [Mexico]. I said, "Mr. President, all there are are three memos of telephone conferences you had with Zedillo. Obviously, we don't want to release those." The idea of a foreign head of state being quoted in the newspapers on what he said to the President.... I figured that would be the end of it. He's still irritated and mad at Gingrich, and me, and Panetta. He said, "Well, all we talked about was the weather, for crying out loud. Turn them over." And we had to spend several minutes talking him down, to make him aware that those were not documents that should be disclosed. So we didn't.

MK: So did you win most of those?

AM: On prerogatives?

Mk: Yes.

AM: I think so. Again, I don't want to make it sound like I was constantly taking them on. I wasn't. Actually I think some of the other—I think Leon Panetta probably had to take him on on more of them than I did. There probably weren't that many, all told.

TS: Did it make a difference you were a former member [of the Congress]?

AM: Well, we all became somewhat shell-shocked after November of 1994. I could not conceive of losing the House in that election. The President took it very, very hard and went into a state of shock for some time. I think that all of us—me, Panetta, other people with Hill experience—felt sure of what we knew about how the Hill operated that I used to know. First of all, it was a whole different set of characters. Secondly, they had an altogether different agenda than any Congress had had in recent times, and I think that the 1994 election was the watershed in terms of the Congress really turning into a partisan brawl.

Up through the 1994 election, there were still some relationships between Democrats and Republicans. They got on with each other, worked together. After the 1994 election, it was perceived as a battleground and worked out that way.

MK: Were there any Republicans that you were able to effectively work with on nominations that would come in and help when there was trouble, say people like Ken Duberstein or Culvahouse?

AM: Very few from the private sector, at least not as far as I was concerned. I would call Fred Fielding every once in a while. I talked to Culvahouse a couple of times. But, again, the partisanship had gotten so heavy that I think they sort of felt they didn't want to get involved. And on the Hill—Jim Leach is an old friend and when that peso committee investigation started, he really tried. I don't think he ever thought that what we had done with Mexico was wrong. I think he was pursuing the investigation because he was getting pushed by his members, and by the Speaker, but he certainly didn't want to do it in any way that would embarrass the President. On the other hand, I didn't feel that I could have a back-channel with him. Henry Hyde is somebody I go back to the state legislature with; we were old, old friends. But even there I tried to do a couple things that he was somewhat sympathetic to, habeas corpus and some others. And at a certain point he would say, "Look, I don't run this agenda."

I think that the people that I knew, and that I would have worked with, really had to pick their spots. Hyde is a perfect example. He decided he was going to take on the "Contract with America" and Gingrich and the others on term limits. He was very effective on knocking them down, but I don't think he felt he could that with a lot of issues.

MK: In looking at the nominations, of how nominations were handled, what was the relationship with the Justice department?

AM: Excellent. Part of it is that—and I think this, again, varies from administration to administration, depending on the personnel. I never felt that there was any kind of an adversarial relationship going on between the White House and the Justice Department. Sometimes Eldie Acheson or the Attorney General had some strong views—usually against somebody rather than for somebody. But it usually was relatively easy to persuade everybody, including me and the Chief of Staff, of what the problems were. And then it was just a question of getting the President to pull back. But usually we were all on the same page. If there was somebody that there was trouble [with], getting confirmed, I was just delighted how everybody worked together on it to try to make it happen.

I heard these horrible stories when I was getting confirmed. You may have the White House, but then you lose Justice. If you lose Justice, you automatically lose confirmation. There was none of that.

MK: Where would the names come from?

AM: Every place you would suspect. District judges were predominantly senatorial although every once in a while the President or the political process would gin up a name. The Court of Appeals were, at least the ones I saw, in part bar-association-driven, part academia-driven, and part self-driven. A lot of district judges. Nobody stands for public office in this country, not even a district judge, to be elevated. He's got to put on a campaign.

MK: What kind of campaign do they have to put on?

AM: It's a lobbying campaign, getting all kinds of phone calls into every place that's in the loop. White House Counsel's Office, the Department of Justice, the Chief of Staff, the President himself—if you have that kind of clout.

MK: Where did the President come into it? What nominations was he interested in?

AM: Usually he cared about the Court of Appeals appointments. Not all of them equally. He cared about some more than others and he cared about some for what I consider very good reasons. He was very anxious to get more Hispanics on the court of appeals, not just because that's a good thing but because he wanted a larger pool if a vacancy occurred on the Supreme Court. He would have loved to have been the first president to appoint the first Hispanic judge. So he would constantly try to promote—but then there were some that came in through.... You have to understand, when I use the word political process I don't use it in pejorative terms. I consider it the way the system is supposed to work. But there were some that would come in directly through the political process. The primary movers were people who had been helpful to the President in California or Florida, or whatever, and that, "He would be a great judge, you've really got to help him." He would care about some others. Every once in a while he would care more than he should.

MK: What do you do in that circumstance?

AM: Try to persuade him that it's a bad idea. In most instances we were able to do that. I'm trying to think if there were any that we went ahead with. I think from the time I was there and the things I knew about during these last seven years, I think he's made [fewer] bad appointments at the bench than any president in history. Now he hasn't made all that many good ones. It's always a tradeoff, because you use up chits to put on....

[Interruption]

AM: That's the difference in the way Mike McCurry ran the Press Office compared to his successors or his predecessors. I don't think it was just me. I think that the press genuinely trusted him. They felt that he was a straight shooter and wasn't going to look for ways to make their job hard. And, even during the height of the [Lewinsky] scandal while he was there, he never lied to them. He never sent them off in the wrong direction. In return they didn't barrel him. Nobody was giving free passes to William Jefferson Clinton, but they didn't use the Press Secretary as a way of beating up on the President. But that's not true of everyone who was there before him. I can't remember who the people were there during [Richard] Nixon but I remember that the press—the press secretary, even as they were aiming at the President—

MK: Well, [Ron] Ziegler. Ron Ziegler had a great deal of difficulty, and Jerry Warren had to come in and do the briefings.

AM: Dee Dee [Myers] had trouble, had a great deal of trouble. I don't know why. I wasn't there during that time.

MK: There was the wrong person in the wrong job. She didn't have the kind of experience that it takes to be a spokesperson for the President. A person that is in a campaign has a very different kind of experience. The threshold of proof is so different and reporters don't go after you for every word a candidate says, but once you come into the White House you have records of everything the President has said and you have to have a sense of language—which she didn't have.

AM: The other thing is that, early on, she lost the confidence of her client and then it really gets—whereas with McCurry even when the President might wish he'd use up a few of his chits, there was nothing other than great admiration for the professional he was.

MK: That's true.

AM: Did you see “West Wing” [fictional television series about White House operations] at all?

MK: I've seen a couple of them.

AM: I'm so impressed. Apparently Dee Dee [Myers] is one of the major consultants on that and I think the portrayal is quite accurate. People don't quite talk in the shorthand.

MK: It's a little snappier.

AM: But there are those kinds of crises and the crisis management of walking in every morning, no matter what you have on your list of things to do, that isn't what you're going to spend your time on, because something happens in between.

MK: What did you anticipate when you came in, that you would be spending your time on?

AM: I think I anticipated that I would spend more time on legislation than I did, partly because the legislative offices when I had been in Congress were not as good or as strong as they were more recently, in particular in Clinton. So I just assumed, “I know what goes on on the Hill, and legislative offices can't find their way out of a paper bag, and I can really be helpful.” But it didn't turn out that way. First of all, our legislative office was much better than I had given that institution credit for when I was in Congress.

MK: Did you provide advice on ways of fashioning legislation?

AM: Some. Not as much as I would have wished. Again, part of it is that the staff of the legislative office was very good, first off; and partly, like a lot of other things I wished I had done, there wasn't time to do it. The times that I got involved heavily were when there was a combination of policy and language and strategy. For example, the line item veto. Obviously I had never been for it. I'm still not for it. It's bad policy. This President wanted one. I was not about to talk him out of it. Walter Dellinger and I had talked about how historically and institutionally it was a bad idea but, as long as we worked for somebody who wanted it, we ought to try to give him one that could pass constitutional muster and not upset the balance, anymore than it was going to do. So we spent a lot of time on it. An awful lot of memos from Professor Dellinger about what we could do to make it constitutional. We came up with a couple of schemes. One that even went so far as to get introduced as a proposal, that we think might have passed constitutional muster. Except that

it was kind of a Rube Goldberg apparatus, if you remember who that reference was to. Do you know who Goldberg was?

MK: No.

AM: Senator [Jay] Rockefeller may have actually introduced it. One of the senators may have introduced it, but we couldn't get it off the ground, because it was too complicated. Basically, what it would have done was—just before final passage—the appropriations bill would have been divided into those pieces that were veto-able, whatever policy we had. So that there would [be] the equivalent of separate votes on a bunch of bills. Even though the president would sign one, it would be the equivalent of his signing a lot of bills and then vetoing those he didn't want to approve. It would have met the objection that the court finally used to strike it down, because they said it violated the presentment clause. This was not the way the legislative process should work. But, as I say, it was just so complicated when we went in to explain it to the President, I would see a kind of glaze and I knew we didn't have him.

MK: What kinds of things did you take in to him and how often did you see him?

AM: The often part would vary from what I was working on—from sometimes several times a day to sometimes [once] a week or two. I thought that my influence with him would be diminished if I came to him on trivial things, so I tried to make shots that I considered to be important. Push on things I felt were important. One thing that I pushed very hard on that I lost—that was important—was habeas corpus. The staff and I really worked very hard to get them this close to agreeing on an alternative to what we finally ended up doing. That would have saved habeas corpus from the near-demise that it suffered. But our timing was bad. It was right at the time of the Oklahoma [City] bombing. The Oklahoma Attorney General came in with the Oklahoma delegation—citizens and survivors—and persuaded the President. They didn't persuade him, I don't think. But they insisted that this was a most important issue of the day, that if we didn't pass habeas corpus reform to get rid of these long, drawn-out appeals that—I don't even think we had caught [Timothy] McVeigh yet. Maybe we had, but he hadn't been tried. But, if we didn't pass a reform of the habeas corpus it would be a disaster. When they left, [the President] just called me in and said, "I'm not going to take that on."

MK: What about during the election? There seemed to be some freight trains that moved then, that were difficult to stop. After the TWA plane went down, there was a discussion of terrorism, the Terrorism Act.

AM: Yes. He wasn't involved that much in that. That was [FBI Director] Louis Freeh. Freeh was bound and determined to get something through. I remember we had a big meeting in the Situation Room. Tony Lake probably presided, because there were national security implications. Merrick Garland—who was then number three in Justice—and I were the only two who were trying to resist what we considered excesses in the bill. Freeh just shot us down. I think at that point the President was prepared to go wherever his advisers ended up. If we had come out of that meeting with Freeh with some kind of modifications I think [the President] would have gone along.

MK: Well, the facts just weren't there in the TWA plane—that it was terrorism.

AM: That's right. Again, as you know from your [inaudible] in the press, we sometimes move—not on the facts, but the appearance of facts.

MK: Also, during 1996, the extension to Canada of the Cuban embargo.

AM: I wasn't there for that one so I don't remember—.

MK: You missed that one.

AM: Yes.

MK: He ended up having to walk back on that one, but that wasn't until after the election.

AM: I don't remember that, and I missed NAFTA [North American Free Trade Agreement], too. Now that's one where he—for a President who had never really been that involved in foreign affairs before he became President, I think he's done incredibly well. Part of it is this incredibly quick study to understand the ups and downs and sideways and pratfalls and glory that you can get out of something. But this is also one of those places, as I think I said at the beginning, I want restraint. I think this President does exercise great restraint, sometimes to the point where we look like this helpless giant we're accused of being. The fact is, we're not quite as gigantic as we say we are. He remembers the politics of Vietnam much better than a lot of people who are younger than he is, or a lot of his predecessors. They didn't see it the same way he did.

I still remember when he finally came to closure on Haiti, that the thing that he had resisted all along was not that we need to do something—if you recall the boats sinking off the Florida shore and we didn't have any place to put anybody—but he just wanted to make sure we had some kind of an exit policy. He didn't see it turning into an instant success.

MK: Did he talk about his experiences as governor during the Mariel boat lift?

AM: A little bit. It clearly had affected him. What I remember mostly, though, about his—. First of all, he gave incredible amounts of time to Tony Lake. Tony would have, most days, an hour to an hour-and-a-half with the President and National Security Council. I thought Tony ran a pretty good operation. But, in addition, part of it was that the President wanted to be exposed to every possible nuance of every possible decision he had to make. I remember seeing the decisional process on Haiti and seeing the decisional process on the Balkans. You were not going to get this President to move any faster than he thought was safe to move.

MK: What kind of discussions were there of the War Powers Act?

AM: Semi-facetiously I say, mostly they were time-wasting because, by definition, the War Powers Act is something that a president doesn't like—almost by this visceral reaction. I used to complain—in fact, when I taught at Georgetown I gave it as an exam question from time to time: how to write a War Powers Act that did something? I realized that it isn't the fault of the language. The language is a little bit tepid and a little bit confusing, but you couldn't write a War Powers Act that really separated out this deliberate vagueness that there is in the Constitution between the powers of the President and the powers of Congress. Justice Jackson said, much more eloquently, that the President's powers as Commander-in-Chief are very great, but they are not unlimited. They are at their strongest when he has the backing and support of the Congress. The converse of that is: the power of Congress to cut off the president at the legs, in terms of his War Powers, is complete. There is no way the president has the key to the Treasury. Only the Congress has it.

But, having said that, that's sort of an academic discussion. What usually happens is that the two of them are sort of lurching generally in the same direction and it's very seldom that a Congress will tell a president: "No, no more money." It happened in Vietnam but it was a very stormy night and all the terrible things that [Henry] Kissinger predicted were going to happen, happened. And you don't frequently have a president doing—I was going to say what [Lyndon] Johnson did in Vietnam on the Gulf of Tonkin, but I don't know if that's really fair. That wasn't Johnson, anymore than it was [John F.] Kennedy, anymore than it was [Dwight D.] Eisenhower. There was sort of a lurching into our exposure in Vietnam, and Congress never really stopped it. They may have never really stopped it until that time in 1975 when the House of Representatives said "No!" to \$600 million. It was the end of the war.

Anyway, so the War Powers Act discussions were very desultory. I think I saw my role, and most of the lawyers involved in the process saw their role, and the political people involved saw their role, as: trying to make sure that we did the minimum necessary to comply with the notice provisions and other provisions the Act required of us, so we didn't give Congress a free hit.

MK: Did you use language that was developed in earlier administrations? There seem to be some boiler plates for that.

AM: I've always thought, and I don't know this for sure—I should know because they're under the Presidential Records Act. But I've always thought that the National Security Council has more of an institutional memory than the White House. Do they?

MK: Yes.

AM: I assume that that's where it came from.

MK: Although Culvahouse, I know, had left it. In looking at how the office was—.

[Interruption]

MK: In the way the office was set up, you had deputy counsel, and maybe associate counsel, special counsel. What did each of the titles involve?

AM: Well, deputy counsel was a meaningful one. I had two, and one of them almost kept me from taking the job in the first place, because—when I came in there—I had been told by the President there would be no interference in the way I ran my office as the White House lawyer. And that was it. I thought, "Fine, that's what I want to do." About two days before I started, Panetta said, "By the way, Bruce Lindsay's going to be your deputy." At that point that was as close as I came to leaving in a huff. I didn't know Bruce that well. I knew him slightly. I thought, "This isn't going to work. I don't want a political deputy who is going to undercut my decisions, who is going to be somebody everybody else on the staff can run to. When they don't like what I tell them, they'll go get it countermanded by Bruce." Leon and I hollered at each [other] and he said the President insists he wants Bruce there—not to watch you but because that's a good place for Bruce. "You can have your own deputy [i.e. a second one]." That mollified me. I ended up with two deputies. But I have to say that I could not have asked for a more loyal deputy than Bruce Lindsay. When they came to him, and they did, he said, "If that's what Ab said, that's it." If they went over his head, they went to the President.

MK: What kinds of things did [Bruce Lindsay] do?

AM: We used to have a staff meeting every morning. I'm talking about in the White House Counsel's Office. We had a staff meeting every morning right after the senior staff meeting. He always felt that—he helped us shape the agenda about things that we were doing, by making us more aware of what it was that was on the President's plate, and what we needed to know about where the President was going on something. He never violated confidences of the President. On the other hand, if the President was about to get heavily involved in some executive order—that was one we happened to hear about first through Bruce. He raised it at the staff meeting: "What do we know about strike-breaking?" That was a very important one.

He had a very active role in the judicial appointments process, again, mainly to make sure that when there was a political process nominee, that the political process was being observed. That we weren't nominating somebody who was supposed to be coming through the political process, when—in fact—the nominee was in a pissing contest with the state chairman. He was very much involved in the vetting of other nominees. The vetting operation was technically in the White House counsel. I'm drawing a blank on his name.

MK: Mark Childress?

AM: No. The guy who got us in all that trouble with the army, of his buddy of his, sat there in the bottom of the White House—.

MK: Craig Livingstone.

AM: Bruce knew more about that. I still don't know how it ended up in the White House Counsel's Office, but Bruce knew more about that than I did. He would make sure that—even though most of the nominees weren't technically within our domain, but because they were going to be vetted through our office—we would be aware of it.

MK: Part of it is through the FBI, having the FBI report and then taking that report up to the Hill.

AM: But there was no reason why it had to be the White House counsel. It could have been domestic policy, chief of staff. I would have wished it on lots of people.

MK: Or personnel, right?

AM: Personnel would have been a good one.

MK: Of course, Bruce Lindsay had been personnel—

AM: He had.

MK: —so that's a continuity there.

AM: And then Bruce was—there was always a special project he was involved in, either for the President, or because the President would indicate to me or Leon that he wanted somebody that could really use his clout effectively. For instance, Bruce was the point man on the baseball strike. I don't think I—I think it was just a fait accompli. I don't think I said, "Bruce, go do the baseball strike." It was known that we needed somebody who could go in

there and say, “The President really thinks this ought to be done, or that ought to be done, and nobody could do that like Bruce. So he spent a lot of time on things like that.

Then, of course, unfortunately, by the time I got there, after about six months, he was spending an awful lot of time just protecting his and the President’s flank on Whitewater.

MK: One of the things during 1996 that you did was write the memo on the campaign: What people could do and what they couldn’t do. Where did that come from? Where did the idea come from?

AM: The idea came from the fact that that kind of memo had been written every four years since anybody could remember. I think we even had a copy of the memo that, not Gray, but one of the predecessors had sent out—maybe Fielding; it may have been Fielding—sent out during his [tenure]. And we had two very active ethicists in the office. One of them was Beth Nolan and the other was Cheryl Mills. Both of them, that was their field. Beth was in charge of ethics in the White House and Cheryl was her deputy. So the driving force was that the Hatch Act had just been amended and it had caused some changes. It now allowed people to get more involved than they had been previously. As I recall, it was Beth, probably, who said: “We really need to get a memo out to everybody, telling them what they can, and can’t, do, and not to over-read the Hatch Act changes, thinking they can do more than they should.”

As with most things that happen in the White House when you do it, you haven’t a clue as to what the consequences are going to be. There was no way that I envisioned that memo having anything to do with anything the President or Vice President would ever do. You don’t write a memo to the president or the vice president in the same vein and in the same consideration that you do to Article II political appointees. Had either of them asked me what I thought a good policy would have been, I would have given them all kinds of free advice. But I would not have—I don’t think there’s any way that you can cabin the President’s activities. In the first place, I don’t know how you’d physically do it. How does the President get out of tax-supported facilities ever? He’s always in the bubble and when he’s home at night he’s in the White House; when he’s driving around he’s driving around in a tax-paid limousine. When he goes to a baseball game he’s surrounded by Secret Service and all kinds of other tax-paid personnel.

So there’s no way I think that you can practically say the president can’t do these things from a public facility because he’s always in a public facility. That’s where he lives. I’m not sure that Congress has the power to limit what the president can and can’t do. The president is the whole second branch of government. That’s almost as true about the vice president. It’s also a constitutional office. So legally there’s no way that memo could have applied to them.

MK: Still, in a way, it’s a warning that certainly was ignored.

AM: I don’t know that either of them ever saw the memo. Probably not. They wouldn’t normally see them. They would be sent a copy. I don’t know that anybody—this is perhaps a failing I have to take the rap for, along with other people—none of us saw fit to raise a warning flag for the President. Frankly, more so even than the Vice President—as I saw, I take part of the blame myself. I had seen what goes on in state politics. I’d been a state legislator for ten years. I know governors in Illinois pick up the phone when they’re sitting in the governor’s office and lean on people to give money to their campaign and the Party. It’s just a fact of life, and I suspect it goes on in most states. I’m sure it went on in Arkansas. I think this government came into the White House not very sensitive to the fact that the White House

and the Federal government is a different place. So I should have warned the President. I should have recognized this was troublesome. I never would have thought to say anything to the Vice President, because he came off the Hill. I would have thought that he'd remembered. We never used our offices for any of those things. We all had bucket shops down the street.

Do you remember who Phil Burton was?

MK: Yes.

AM: Phil was probably the most effective political mentor I ever had. I remember one time we were in the Rayburn Room and a couple of labor lobbyists came in to talk to us about a piece of legislation. And one of them said, "By the way, Phil, I have something for you." And Phil said, "You idiot, not here. Come with me." And we went outside and, outside walking around the Capitol, then he felt free to take the check. But even a smart political animal like Phil Burton understood that you don't get involved in fund-raising or the trappings of fund-raising in a Federal building. I would have thought that Al Gore remembered that from his own experiences on the Hill.

MK: And, strangely, it just wasn't something that came out, either. There were all these people that came in. I was looking at some of the video tapes that WHCA [White House Communications Agency] had and there clearly were so many meetings that were in the Map Room and elsewhere, and yet you didn't see the people come in. You don't know where they came in. And, usually, reporters would be able to sniff it out and would send up a flag about it.

AM: That's interesting.

MK: McCurry's theory is that, if [deceased *Washington Post* reporter] Ann Devroy had lived, had she been reporting then—she was very ill at the time—she would have sensed right off what was going on and would have written about it—which would raise the issue.

AM: Part of it, of course, was I always found this amazing: I got Ken Starr [Independent Counsel] in and out of the White House—twice—and the press didn't have a clue he was there. And I could never figure out why they didn't at least try to cover the back entrance. You can't get out onto the street without going through some gate. They'd cover the front and they'd cover the regular entrance, they'd cover the West Wing entrance but we'd usher them in through that side gate near the Treasury. He was in and out and nobody even knew he was there. He was there for several hours.

MK: There was one time he came in, it was definitely a marked event. When he came in to question Clinton, he came in that gate.

AM: Well, later on [inaudible] as far as I'm concerned because, mainly, he knew there that at the courthouse there was no way of keeping photographers and everything else away from her when she was going in and coming out. But I'm talking about during the days when he was still a caring human being.

MK: In thinking about executive orders, executive orders have been an important part of this Administration. Were there discussions with the President within the office about executive orders and the use of them?

AM: The two that I remember were—one [was] the strike breakers' executive order which is still tied up in court, I think. That was something he wanted to do for the unions. There was obviously no way we could get it through the Congress. We tried. And this was something I think he felt was a matter of fairness and something that ought to be done. He was not as sanguine about the minimum wage increases, for instance. [Inaudible]. The strike breaker thing, Bob Reich was pushing it, but I think the President genuinely wanted to do it. I remember we spent a lot of time with the Pentagon and others on how to fashion one that had some teeth in it and still would have a chance of getting upheld in court. Of course, the other was tobacco. There the question was: was there something he needed to do by executive order?, or was it merely to sign off on the FDA [Food and Drug Administration] doing it? We went back and forth. I'm trying to remember. When I left I don't think he had signed an executive order. I guess he has since. But at that time it was merely just turning to FDA.

I'm fascinated by the—a couple of these I heard from Walter Dellinger. The first thing he worked on when he got to the White House was an executive order—I can't remember what it did—changing the executive order that had been in existence on abortion. But he described in great detail to me how fascinating it was to see the White House as a source of lawmaking. It's just begun to be used by recent presidents.

MK: He talked about it recently, in a meeting at Planned Parenthood, and was talking about the collapsed time, how quickly they had to come up with something. And they wanted a whole group of orders that dealt with reproductive rights.

AM: Abortion and gays and all kinds of things.

MK: As difficult as it was to come up with, at the same time it was what they were there for.

AM: Yes. I'm in the process of learning just how far-flung the President's power is. I'm going to teach a course next year in Chicago on "The Executive Branch as a Source of Law." But, clearly, recent administrations have gone pretty far on the reach of an executive order as a way of making laws.

MK: Do you think it's divided government that had done that, or do you think there are other things—?

AM: Partly. It's not even divided government. It's that there is so much tension between the first branch and the second branch. I served under Republican presidents during most of the time I was in Congress and we controlled the House for that whole period and the Senate during a good piece of that period. A substantial part of the executive's legislative agenda went through. We passed laws that Nixon wanted and we passed laws that Ford wanted. This president finds it very hard getting much legislation through but it's not because it's—and I don't want that to sound like a Democratic partisan comment. I think it's just that antagonism is much more the order of the day as far as the Congress and the President are concerned, than used to be the case. This President, what he gets through Congress, if it's not on the Republican agenda, it's usually because he scares them around election time. They're afraid to take him on.

MK: Do you think part of it is the criminalization of politics?

AM: Apparently. Every two years I come up with a candidate for the worst law that I voted for, but these last few years it has been voting for the independent counsel law. The idea of

setting up a full-time, totally free of fetters, prosecutor, who is doing nothing but looking for politicians to prosecute, is awful. Partly it's because—I don't know which is the chicken and which is the egg—but the less trust the people have in their government, the less confidence they have, the easier it is to denounce your opposition as a bunch of crooks, and go after them internally.

MK: Do you think that the partisanship will be ratcheted down with the lapse of the act?

AM: I hope so. I keep looking for what kind of event will cause it to happen. If Ken Starr's excesses didn't do it—and I don't think they have, so far—I'm not sure that anything is going to do it. But I think it will get ratcheted down, simply because I don't think the American people can stay that angry that long. It's the only government they have.

TS: You talked about Bruce Lindsay as one of your aides, but you had two deputies. What did the other one do?

AM: James Castello was the deputy who really was my person [alter ego], and managed the staff, and was at the second meeting I couldn't be at if I was at the first one. [He] probably had the most to do with the legislative agenda. He met regularly with the legislative office and made sure that there weren't any surprises on the Hill that the President didn't know about or [that] what was going up as our core legislation didn't have any pitfalls in it. Do you know who he is, James Castello? I think, to the extent that the Elian thing has come out well, I give him credit.

TS: Were there jobs that you gave to him that you didn't want to do?

AM: No. I would have loved to have given him Whitewater. I didn't.

TS: Were there parts of the Counsel's job that you didn't find particularly worth focusing on? There were things that you said earlier you liked doing. Were there things that you thought were necessary but you didn't really want to do?

AM: Yes. I would have loved to have given him some of the Congressional investigations. For instance, I thought that the travel records thing was blown out of all proportion for its importance. I would have loved to have turned that over to him. I would have loved to have turned over the Waco investigation to him. But it just didn't seem right since I had more congressional experience than he did. [Inaudible] nowhere the in-depth exposure that I had. So I stayed with them. I think that those were the things I disliked the most: that and dealing with personnel, other than judges. We had a proposed nominee to head up the CIA [Central Intelligence Agency] that we had to pull back. It was very hard. He was strongly supported by the President. It leaked out that we were going to appoint this man and then it turned out there were some real blemishes on him. I was the one who got to stand there and explain to the President: as painful as it was to change our mind—we tried to explain it—but we couldn't really explain it. But that was still easier than sending the name up and having him shot down.

I didn't like those personnel decisions. My first firing was the Secretary of Agriculture. I had come in that week, and the White House Counsel's Office had been taking part in the internal investigation. I presented the memo, mostly done by people in the White House Counsel's Office. Lloyd Cutler had probably been involved. But I had to present it to Panetta and tell him he really had to turn this guy loose; he was indefensible. That was no

fun. Having him called in, having the Chief of Staff tell him he had to have his resignation Monday—or else.

MK: He must have known it was coming, though.

AM: I would think so. But I don't know. I have not had that much conversation with him since and I don't know what he expected. But I know he was not a willing sacrifice.

MK: When you left, you said that the job was for a younger person.

AM: It was. It is.

MK: What do you mean?

AM: Well, I was the oldest person in the White House. I came in at sixty-nine and I was actually seventy by the time I left, and the physical schedule was just more than I could handle. I would come in at six-thirty in the morning and leave at nine at night. I was the first one out of the White House! They were all still doing scheduling meetings and all kinds of things. I'd never served a president younger than I was, and I realized that maybe if I'd had the personal relationship with him beforehand, which I didn't, maybe I could have played the nice graybeard that would be called in once in a while to consult. But to run the kind of schedule that the rest of the senior staff was running—and that he had every reason to expect out of a White House Counsel—was way beyond me. I walked out totally exhausted. It turned out I had pneumonia. I didn't realize that until after I left. I just realized it was fun and I like him and I like working in the Executive Branch, but I should have done that twenty years ago, not at sixty-nine.

MK: What are the benefits of working in the White House?

AM: It's exciting. You're at the point of some very important decisions. Whether you're making them or not, you're involved in the decisional process. You're dealing with interesting people, interesting situations. There just was not a single boring moment that I had. The job has some bad days to it, being in the White House. I don't think I would have liked it under a president I didn't like. I don't think I would have enjoyed being there under Richard Nixon or Ronald Reagan. But if you like the guy you're working for and there you are working with these other interesting, bright, exciting people—it's fun.

MK: How did it compare with the other branches?

AM: They are all different. They all have a different set of "givens". In the Congress there doesn't have to be any kind of an agenda or game plan. You can go from one alley to another. You lose a bill? Put in another one tomorrow. Don't like the result on a vote? There'll be plenty more votes, and sometimes even the same subject. And, again, the Congress was even a younger genre than the White House, but I was in the Congress when I was very young. The Court was the one place I was, in government, that was older than me. Where you really had a chance to think about what you're doing, contemplate the consequences of the decisions you're making, and try to spin out as far as you can what the right decision is—given the ground rules and other rules that somebody else has given you. As far as I was concerned, my job as a judge mainly was to interpret the laws Congress had passed, and interpret them in a way that carried out the policy that Congress intended. There's lots of think time on the court.

Tip O'Neill had been the Speaker during much of the time I had been in the House. When I went from the House to the court I saw him at a cocktail party a few months later. He said, "How do you like it?" I said, "Tip, it's incredible. It's so orderly. It's so calm. You can plan." I said, "Do you know every month, the Clerk of the Court sends around a memo finding out what days I'm available to sit during the next sitting, and if I want to be out of town or something I just scratch out that day and he puts me on another day." And I said, "All the time I was in the House you never once sent around a note asking me when I was going to be able to vote." He said, snidely, "You son of a bitch. Considering the way you voted sometimes, I wish I had."

MK: Did you have a favorite among the branches?

AM: I am probably more a creature of the Congress than anything else, but I think that's partly because it was my first real exposure to government, and partly because I spent more time in it than any place else—state and Federal—and partly because it really is—of all the branches of government—in many respects the most powerful. I don't mean that it's more powerful than the President, but it's more powerful than working for the President. It's certainly more powerful than the courts, and it's a place where creativity is a plus. You're expected to come up with new ideas. If most of them are bad, it doesn't matter. You take another alley. I was in my twenties, my thirties, and my early forties when I was in the Congress and state legislature. It was very exciting.

MK: Were the collegial relationships different, say, in the Congress, with being in the White House?

AM: They were different, but my experiences in the White House were much more pleasant than antagonizing. With really one exception, maybe two, I found the relationships in the White House very collegial. People really got along with each other. I got along with them. I found there was very little back-stabbing and knife-throwing, and not nearly as much as I expected to believe there was.

MK: What were the exceptions?

AM: I had trouble with one "Whitewater" staffer. In retrospect, I blame myself because—at one point—I was told, "If you don't like her, send her back." And I should have. But then, if I didn't want to do that, then I'd just have to make sure that she was under some kind of controlled supervision. And I didn't. At the time I left, it was too late. Now, my successor also had trouble with her. By that time, she was totally out of any kind [of] orbit [inaudible]. But that was as much a personality problem as anything else.

I was amazed that I found people—George Stephanopoulos, for example. I got along with him incredibly well. Now, I can see where some people could have found him abrasive. I found him interesting and creative. Harold Ickes had his share of idiosyncrasies, but if I were president of the United States, I'd sure want somebody like Harold Ickes.

MK: Or the First Lady, right?

AM: Or the First Lady.

MK: He seems to be doing pretty well by her. Thank you very much.

AM: I enjoyed it. I enjoyed having dinner with you.

[Interruption]

AM: —the awareness of the media. I had to get the White House to send me a copy of it. I didn't even have a copy in my possession.

TS: I was thinking more along the lines of operational things.

AM: I didn't do anything, but I can probably outline some of the things I wish I had done. I'll try and do that.

[End of Disc 1 of 1]