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"POLITICS AND THE HOLDER JUSTICE DEPARTMENT: RULE OF LAW AT RISK?"

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MR. TOM FITTON: Judicial Watch is a conservative, nonpartisan, educational foundation dedicated to promoting transparency, accountability, and integrity in government, politics, and the law. And through our educational activities, Judicial Watch advocates high standards of ethics and morality in our nation's public life and seeks to ensure that political and judicial officials obey the law and don't abuse the powers entrusted to them by the American people. We don't endorse candidates for public office and we don't oppose them.

A number of recent controversies have raised serious issues about the direction of the Department of Justice under the leadership of Attorney General Eric Holder. Not that Judicial Watch is surprised. From day one, Judicial Watch vigorously opposed the Holder nomination to the attorney generalship due to his corrupt record in the Clinton administration as deputy attorney general under Janet Reno. We knew Holder would be a disaster as attorney general, but even I could not have predicted just how bad the situation would get on his watch. A review of Holder's record so far makes one wonder how he remains attorney general.

Judicial Watch uncovered explosive evidence that contrary to sworn testimony in public statements by justice officials that top political appointees at the Holder Justice Department were intimately involved in decisions to dismiss the voter-intimidation case against the New Black Panther Party for self defense, so-called civil rights group that brandished weapons, blocked a polling station, and hurled racial insults at voters on Election Day, 2008.

This is part of the story of improper racism and affects the decision making and the Civil Rights Division at the Holder Justice Department as disclosed by the U.S. Commission on Civil Rights, among others.

So as unbelievable as it seems, we need a civil rights investigation of the Civil Rights Division of the Justice Department.

And then there's immigration. While failing to protect the country from the surge of rampant illegal immigration, the Holder Justice Department made matters worse by suing the State of Arizona for implementing a new get tough illegal immigration law, S.B. 1070. I should say we're trying to defend that with elected officials in Arizona, including the Arizona State legislature.

Judicial Watch recently received documents from the Department of Justice that shows Holder's DOJ work hand in hand with the radical leftist ACLU in mounting their respective legal challenges to S.B. 1070. In one email exchange uncovered by Judicial Watch, a Justice Department official expressed joy at being on the same side as the ACLU.

The Justice Department is supposed to be an independent law enforcement agency, not a mouthpiece for the radical left. And sure enough, just one week after suing Arizona, Holder's Justice Department announced would not prosecute sanctuary cities that flout federal immigration laws, disobey them.

To this day, Eric Holder refuses to initiate any investigation also of the corrupt enterprise known as ACORN, despite the organization's long sorted history of voter registration fraud and other improprieties.

In fact, while noting that ACORN had engaged in questionable hiring and training practices, it was the Holder Justice Department that actually closed down one ACORN voter legislation fraud investigation in March, 2009, claiming ACORN broke no laws.

Holder's unwillingness to prosecute ACORN or Project Vote calls into question his impartiality, considering the fact that President Obama previously worked with the organizations.

Holder's record on national security is also abysmal. Not only is he leading the Obama administration's ridiculous on again, off again campaign to close Guantanamo Bay, but it was Attorney General Holder who made the disastrous initial decision to grant a civilian trial, criminal trial to 9/11 terrorist mastermind Khalid Sheikh Mohammed and other 9/11 terrorists in New York City. The decision prompted a massive public backlash and the plan is on hold, if that's the way you want to describe it. I don't know if there is a plan anymore.

And then there is the decision by President Obama with the Attorney General to refuse to defend the Defense of Marriage Act, which had breezed through Congress with a vote of 85 to14 in the Senate and a vote of 342 to 67 in the House before being signed into law by President Clinton on September of 1996. It has been the law of the land now for almost 15 years, but, perhaps, not anymore. President Obama and his pliant Attorney General Eric Holder thought it was more important to throw a bone to their leftist supporters than enforce the laws of the land again. Sure enough, the *Washington Post* reported how Valerie Jarrett, Obama's White House liaison to the homosexual lobby, was involved in the decision. The idea you have aides in the white House of Valerie Jarrett's low caliber being involved in legal decisions of this nature by the Justice Department, to me, is rather extraordinary and on it's face improper.

In fact, the Justice has already defended this law's constitutionality in court and is now changing its position mid-stream.

Is the rule of law risked as a result of a politicized Justice Department? Well, you can guess my answer, but let's hear, though, from our esteemed panelists who have expert insights into these matters.

Joining me is Debra Burlingame, who is sister of Chic Burlingame, who was the pilot of American Airlines flight 77, which was hijacked and crashed into Pentagon on

9/11. She is co-founder of 9/11 Families for a Safe and Strong America and director of the – and servers on the board of the National September 11 Memorial and Museum Foundation at the World Trade Center. She's also co-founder, along with Liz Cheney and Bill Kristol of Keep America Safe, a grassroots public advocacy group focused on national security. A former producer at Court TV, she is well acquainted with the legal system and she is perhaps the leading activist in the battle to secure our country from the jihadist terrorist threat.

Also joining us on the end here is Hans von Spakovsky, who's a senior legal fellow and manager of the Civil Justice Reform initiative in the Center for Legal and Judicial Studies at the Heritage Foundation, where he concentrating on voting, election campaign finance, civil justice, and tort reform.

Hans was a commissioner at the Federal Election Commission, which is the agency responsible federal campaign finance laws for all congressional and presidential elections, including the Presidential Public Funding Program. And importantly, he also served as counsel to the assistant attorney general for civil rights at the Justice Department, where he provided expertise and advice on voting and election issues, including enforcement of the Voting Rights Act.

Also joining us is Austin Nimocks – I pronounced your last name correctly – who serves as senior legal counsel for the Alliance Defense Fund at its Washington, D.C., Regional Service Center, where he litigates as a member of the marriage litigation team that seeks to protect in court the traditional definition of marriage. Since joining ADF in 2007, Austin has focused his professional efforts on cases involving same sex marriage and divorce, parental rights, voters' rights, and other matters relating to religious freedom. His extensive trial and appellate court record includes involvement in several religious liberty and family values cases across the nation. He's authored several pieces of pro-family legislation and testified before various legislative bodies in different states. He regularly works with lawmakers across the country in terms of designing initiatives and legislation. And he served as official spokesperson for Prop 102 in Arizona, which was Arizona's marriage amendment in November of 2008.

So we have a good mix of subject areas to cover here the way this will proceed is our panelists will make some opening remarks however long they need within reason, and then I'll get the discussion going a little bit among our panelists an then we'll open it up to questions. And if you could be sure to turn off your cell phones as we begin, I'd appreciate it.

So I'm going to start with Hans at the end of the table. Thank you.

MR. HANS VON SPAKOVSKY: Thank you, Tom. If you go to the Supreme Court and you look above the classical Corinthian columns there, you'll find an inscription that's carved into the marble. It says "equal justice under the law." That's a simple concept, but it's one that is very basic to the kind of country we are and republic that we are. That's why you see pictures of the statue of Lady Justice blindfolded. And

what that means to us is that all Americans and all litigants, regardless of their skin color, their gender, their social status, or otherwise deserve to be treated fairly and equally under the laws. That's a view that we have, but sadly it is not the view of the current leadership of Justice Department.

Something else that it's hard to realize from outside the Department, but it's something that you come to understand when you work there, as I did for 40 years, is that the Justice Department is probably one of the most powerful executive branch agencies. When individuals who work there abuse the power of the Justice Department, using that power for political and ideological reasons and do not enforce the law as it is written, it poses a great danger to our liberty and to the rule of law.

Now, for the last two years, there is, quite frankly, overwhelming evidence about the fact that politics is driving law enforcement decisions at the Justice Department. I'm going to concentrate on the Civil Rights Division, where I used to work.

John Adams once said, of course, "facts are stubborn things," so let me lay out a few facts for you.

Now, I'm going to start with a case which I know you're going to sit here and you're going to listen to this and think why is it relevant today, but I'll explain why. There was a case filed during the Clinton administration called *Miller v. Johnson*. It was a redistricting case rising out of Georgia. Not only did the Justice Department lose the case, but the court was appalled at the way the case was handled, not only at the behavior of the lawyers in the case, who basically the court accused of lying under oath because they had convenient lapses of memory throughout their testimony, but also because the Justice Department pushed a racially discriminatory policy on the State of Georgia or tried to.

The court threw the case out. This went all the way to the U.S. Supreme Court. The Justice Department ended up having to pay almost $600,000 in attorneys' fees and other costs that were assessed against them. The district court said the actions of the lawyers in the case were disturbing and an embarrassment and also pointed out that they seemed to be taking their orders directly from the ACLU. The court expressed it's surprise profound disappointment that, quote, "the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."

Now, why is this important? Well, because if you look at the court decision, at the district court level, you will find that the counsel of record, one of them was a woman named Loretta King. As soon as the Obama administration came in, they made her the acting head of the Civil Rights Division.

She didn't get fired for filing a frivolous lawsuit and unwarranted lawsuit, she got promoted. She's also one of the key people who ordered the dismissal of the voter-intimidation case against the New Black Panther Party a case that the Department had

already won. And in fact, there is sworn testimony before the U.S. Commission on Civil Rights that she had such a discriminatory attitude that in fact she called the chief of the Voting Section, a career lawyer, into her office, extremely angry because she had discovered that when he was interviewing new applicants for jobs in this administration for career positions at the Voting Section, he was specifically asking them whether or not they believed in the race-neutral enforcement of the Voting Rights Act. And when she discovered that he was doing that, she called him into her office and told him he had better not ever ask another question like that again.

By the way, another lawyer that you'll find in the listed court decision of *Miller v. Johnson* case, another supervisor who basically helped present false testimony to a federal district court is a woman named Donna Murphy, who's still a current employee in the Civil Rights Division, but who has been nominated by the president to a superior court judgeship in the District of Columbia.

Now, the Justice Department, the Civil Rights Division specifically was hit with sanctions in January of last year for not responding to interrogatories in a housing discrimination case filed in Kansas. So the same kind of sanctions that were awarded during the Clinton administration – but the way, there're almost a dozen cases, over $4 million in attorneys' fees and costs that were against the Department, and now we see the same behavior again in this administration.

Now, they also appointed another Clinton-era attorney named Julie Fernandes. We have sworn testimony before the U.S. Commission on Civil Rights that she opposes the race-neutral of the Voter Rights Act and told lawyers there, there would be no more cases filed like either the New Black Panther case or the *U.S. v. Ike Brown* case, which was a case filed by the Bush administration against a black defendant in Mississippi, who was found guilty by a federal district judge of engaging in blatant racial discrimination in the voting area.

Just a couple of months after the Obama administration came in, they dismissed without explanation and without issuing a press release, which they do almost any time they take action in a case, a lawsuit that'd been filed during the bush administration against the secretary of state in Missouri for not complying with a provision of a National Voter Registration Act, Motor Voter, which requires states to periodically clean up their voter registration lists by removing voters who have died and otherwise moved away. Now, this happens by coincidence to be just a month after the secretary of state against whom a lawsuit had been filed, Robin Carnahan, announced that she was going to run for the Senate as a Democrat. Why is that significant? Because we have sworn testimony, again, before the U.S. Commission on Civil Rights by the career chief of the Voting Section, someone who, by the way, received an award from the NAACP in Georgia, back when he was in private practice in filing voting rights suits that last year, he recommended eight states for investigation for not complying with this particular provision of Motor Voter. Those recommendations were not acted on. We know that nothing has been done about that because in the two years, the administration have not filed a single case to enforce this provision of the law, and in fact, again, we have sworn

testimony that again Julie Fernandes, political appointee and deputy assistant attorney general's Civil Rights Division told the lawyers in the Voting Section that that particular provision of the NVRA would not be enforced by this administration.

We have another instance of using the Voting Rights Act to achieve political partisan purposes. This was clearly done last year in a case involving Kingston, North Carolina, is a small town. It's a majority black town, majority black voters. They voted in a referendum to change their town council elections from partisan to not partisan. A majority of the black voters there agreed with this and yet the Justice Department, using the Voting Rights Act, objected to this change saying that if voters could not see the partisan affiliation next to candidates' names, they wouldn't know who to vote for. Who did this benefit? Well, it benefited the Democratic Party, which of course is a majority in this particular town.

Now, if you also want to see how these kind of things are done in other areas, all you have to do is look at the fact that the Civil Rights Division is also pushing far beyond what the law says with regard to the Civil Rights Act of 1964. For example, they launched investigations against two school districts because they have dress codes which do not allow boys to dress like girls. And after reports surfaced that there have been discipline against two boys who'd shown up at school in stiletto heels, make up, and a wig, they opened an investigation saying that that was sex discrimination and that that violated the law, which is just ludicrous under the existing law.

They've also recently filed a lawsuit against a school district in Illinois, Berkeley School District, claiming that because the school district was not willing to give three weeks off to a new teacher at a crucial end of the semester time period to go on a pilgrimage to Mecca that they were engaging in religious discrimination. The case law does not support their decision. In fact, there are cases going completely the other way. The politics of this was made clear by the fact that the head of the Civil Rights Division, Tom Perez, said that they had had to file the suit because this was blatant discrimination, intentional discrimination by the school district against Muslims, when there is not one iota of evidence of that whatsoever.

Now, this administration came in saying it will be the most transparent administration in history. We now have evidence – this has been reported on – a lot of reports about it – that a FOIA log from the Civil Rights Division has been obtained by Congressman Issa and others and it clearly shows that in responding to FOIA request, this division does so on a political bases.

FOIA requests that have come in from liberal organizations an news outlets that are perceived by them as being liberal – and I will say one way or another, I think that's true, but the important is perceptions there – get their FOIA responses within a couple of days, whereas identical requests coming from conservative organizations, conservative media like the *Washington Times*, either don't get responded to or get responded to months later.

There's a lawsuit going on right now, which there's been almost no media attention to. Now, all of you know that there accusations that during the Bush administration there was hiring into the career ranks based on political considerations. Now, I've written as to why I think that's incorrect and why the Office of Professional Responsibility Report was a biased report that was done about that. But the point that you take away about that is this. That whole investigation got started because Charlie Savage, reporter for the *Boston Globe*, sent a FOIA request to the Bush administration, to the Civil Rights Division, asking for the résumés of all individuals who'd been hired into the career ranks of Civil Rights Division. That was responded to almost immediately and those résumés were all provided to *Boston Globe*.

Pajamas Media, which is a news and opinion website, served exactly the same FOIA request on the Obama administration, asking for exactly the same thing, the résumés of all individuals hired into the career ranks of the Civil Rights Division. Not only did the Obama administration refuse to respond, but Pajamas Media, on January 22nd of this year, was forced to file a federal lawsuit in the District of Columbia over their refusal to respond to this FOIA request. And the Department, instead of responding to the lawsuit by providing the résumés, which they are supposed to do under the applicable law, they instead filed a complaint – an answer saying they would provide it.

Now, why is that? Well, I can tell you why it is because I know this from sources inside the Department. It's because they have engaged in blatant political hiring into the career ranks. All of the individuals they've been hiring have been from liberal advocacy groups like the NAACP Legal Defense Fund, the Lawyers Committee for Civil Rights, the ACLU Voting Rights Project, Americans United for Separation of Church and State. There isn't a single individual who's been hired into the career ranks that is not a liberal, loyal Democrat. And that is the kind of politicalization. That's much worse than anything that was – any accusation made during the prior administration.

Now, the other thing that they've done that's important for you to know, and then I'll try to end quickly is they've done something else that is just unprecedented. And that is they have used federal lawsuits to set up slush funds to reward liberal organizations. Byron York first reported on this last year. He mentioned two specific cases, and again, there's been almost no attention paid to this. There was a lawsuit filed by the Civil Rights Division against AIG. AIG agreed to settle it without admitting they've done anything wrong for $6.1 million. Now, the claim was that their wholesale mortgage brokers had charged black borrowers higher broker fees than other borrowers.

Now, anyone knows who knows that size of the mortgage business that AIG was in knows that settling a case for $6.1 million means that AIG settled this for nuisance value and that the Department had no real proof that any kind of discrimination had occurred, but part of that $6.1 million settlement – you can read this in the settlement agreement – was that AIG agreed to set up a $1 million fund, not to compensate actual borrowers who might have been injured, but to provide funds to qualified organizations, as picked by the Civil Rights Division to provide credit counseling, financial literacy, and other related educational programs. That is a slush fund to fund advocacy organizations

that the division wants to help, particularly allies of the administration. And they set up exactly the same kind of slush fund in another case, *U.S. v. Sterling* settled in November, 2009, a $2.6 million settlement. And if there aren't enough actual victims to be compensated for the injuries, then all the rest of that money will be distributed by the U.S., again, to qualified organizations picked by this administration.

The federal laws enforced by the Justice Department were intended to protect all Americans regardless of color. I never assumed, when I worked there, as the Obama administration did, that I could ignore my duty to enforce the law. And whatever you've heard in the media about the Civil Rights Division during the Bush administration, I'll just give you two facts which can be easily proven from looking at their website. First of all, if you look at the Voting Section, which is where I did my work, you'll find that Bush administration filed about twice as many lawsuits as the Clinton administration did to enforce the various federal voting rights law. Second, if you look at those lawsuits, you will find that the administration filed suits on behalf of just about every American racial and ethnic group you can imagine. That is not true of this administration and you can see that in the cases that they have filed and the cases they have not filed.

Thanks.

MR. FITTON: Thank you, Hans. Austin – it occurred to me I did not describe what the Alliance Defense Fund does – (inaudible) – that in your remarks as well.

MR. AUSTIN NIMOCKS: I'll be happy to, Tom, and thank you very much for inviting us to be here. The Alliance Defense Fund is a national legal alliance. We litigate cases across the country, involving religious freedom, the sanctity of human life and marriage, and the family. And as Tom mentioned earlier, I have the privilege of being a litigator on the marriage litigation team, and that's where my professional emphasis with ADF has focused. And so my remarks today will be tailored towards the Obama administration's refusal now to defend federal DOMA.

As many of you are aware, on February 23rd of this year, Attorney General Holder sent a letter to Speaker Boehner, advising him, quote, "the president of the United States has made the determination that Section 3 of the Defense of Marriage Act, DOMA, violates the equal protection component of the Fifth Amendment," unquote, and he was writing to advise Speaker Boehner of, quote, "the executive branch's determination," unquote. Section 3 of federal DOMA is the section that defines marriage as the union of one man and one woman for all purposes under federal law. That's generally describing it. More specifically, it defines the terms "marriage" and "spouse" in federal law.

What's significant about this is this has often been cast as the DOJ's determination not to defend federal DOMA, but that's actually a misstatement was actually occurring here. This is a presidential determination to not defend DOMA and it applies to the entirety of the executive branch. So it's not a situation where the attorney general is saying "we don't believe this is constitutional. We don't want to defend it." And another federal agency, in an appropriate lawsuit, could take up the defense of the

act. That's not it at all. This is a presidential mandate. So it necessarily excludes the entirety of the executive branch.

And we understand that marriage impacts federal law in over 1,100 places, so the variety of lawsuits that have been filed – there pending lawsuits that we're aware of and can be filed – can impact numerous different federal agencies, but by virtue of this proclamation, the INS, the IRS, the Department of Defense, so on and so forth, would not be allowed to pick up the defense of federal DOMA. So this is a complete executive lay down.

Now, historically, this is not unprecedented, but it is in only a rare and handful of cases where the executive branch refuses to defend an act of Congress. One of the sources cited by General Holder in his letter was an article written by former Solicitor General Seth Waxman that he wrote in 2001, entitled "Defending Congress." And General Waxman, in that article makes some good points that the general rule of thumb is to defend the law because defending the law serves the Constitution. A, it allows the judiciary to do its job to ultimately determine the constitutionality, so you can only have that by contested advocacy in court. And secondly, it upholds the principle that at one point in time the executive and legislative branches believed that the law was good policy because it was enacted by the legislature and put into law by the executive, excepting the rare instance where there's a legislative override of a presidential veto. And number two, it acknowledges the fact that both legislative and executive, in enacting the law, believed at a minimum that it was constitutional. So by defending the law, you uphold all three branches of government and the design of the constitutional system. And only in the rare instance where the administration is confronted with a clearly unconstitutional law should they not defend it. But it's not unprecedented. As a matter of fact, the last four presidents before President Obama, W. Bush, Clinton, H.W. Bush, and Reagan, all the departments of justice have at least one instance where they refuse to defend an act of Congress.

So when you consider the history and you look at the letter that General Holder sent to Speaker Boehner, on the surface, it appears to be a rational, reasonable decision. But as the title of this seminar is "the rule of law at risk, are we politicizing the Department of Justice," when you look at the analysis applied by General Holder and compared to the history of instances where the executive branch has refused to defend Congress, and in the specific legal analysis of this instance, you can see that this is really a highway of politicized circumstance.

The president is admittedly dealing with two provisions of the Constitution. First and foremost, he has the oath to defend the Constitution of the United States, and then he has to deal with what's called the Take Care Clause, where he has to take care to faithfully execute the laws. And it seems like he's trying to have his constitutional Kagan – (inaudible) – two if you will, when he says – and this is another important part of what he says he's going to do – he's not going to defend the law in court. So we have 10 existing lawsuits plus however many other lawsuits may be filed between now until the end of this administration against federal DOMA in a variety of jurisdictions. But at the

same time, he's going to enforce a law that he believes is clearly unconstitutional. And I'll address that a little bit later.

So he's trying to say, "I'm going to defend the Constitution by not defending the law in court, but I'm going to faithfully execute the laws by enforcing the law in our administration, which they're not really doing.

First most significant that just stands out like a serious sore, red thumb in this, the letter from General Holder to Speaker Boehner, is the absence of controlling Supreme Court precedent. And I'm referring to *Baker v. Nelson*, in 1972, where the United States Supreme Court dismissed for want of a substantial federal question a claim regarding same sex marriage, making all the claims that are being made, for example, in the Proposition 8 case, Perry *v. Schwarzenegger*, now *Perry v. Brown* with the change of governors there in California, the claims that are being made in a variety of federal DOMA cases.

This is controlling Supreme Court precedent. It has not been overruled, not has the Supreme Court ever at any point in time alluded that this was no longer the law of the land. It's been acknowledged by other federal district courts, but it's one thing to take a stance of disagreeing with that precedent or saying "we think it has been eroded." But it's another thing to completely leave it out of your analysis and completely pretend like it doesn't exist.

None of the previous administrations, from what I've seen, circumstances where they have refused to defend a law of Congress, has there been a spot on point of Supreme Court precedent that says this is how it's decided under the U.S. Constitution.

So this is a clear deviation and ignoring of controlling Supreme Court precedent.

Secondly, he states that the Department of Justice has determined that the primary argument for marriage – and that's the responsible procreation argument – they "do not find to be reasonable," quote, unquote, but they don't articulate why, in fact, that argument is not reasonable, why the idea that mothers and fathers are necessary for the home and the children are entitled to a mom and a dad. And then moms and dads make differences in the lives and development of children, the reason we have marriage laws. Why that is inherently unreasonable?

And it reminds me of December 6, 2010, when I was sitting in the Ninth Circuit, in San Francisco, listening to former Solicitor General Ted Olson tell the Ninth Circuit that it is a rational as a matter of constitutional law and the use of constitution for Americans to believe that moms and dads are necessary for the home and it's a rational to define marriage in that ways. And so it's just really absolutely outstanding to see the General say, "we don't find it to be reasonable, but there's no explanation behind that."

He then goes on to say that they believe that sexual orientation is entitled to heightened scrutiny, although he doesn't state which level of heightened scrutiny. And if

you understand constitutional law, there are three general levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. He uses the language of intermediate scrutiny and cites an intermediate scrutiny case, but he doesn't actually come out and say, "we believe it should be intermediate scrutiny or strict scrutiny." But again, he ignores Supreme Court precedent. He cites the *Lawrence v. Texas* case and also *Romer v. Evans* from 1996, but neglects to mention that those cases, to the extent that they address sexual orientation, are rational basis cases, and pretends like – and he says, "the Supreme Court has yet to decide the appropriate standard of review," but then do you have those two cases staring him in the face. But even if Lawrence and Romer didn't exist, you have 11 of the 14 federal circuit courts that have all decided this issue and said "rational basis is appropriate." The only two circuits that have not been involved yet or had a decision on that point are the Second and Third Circuits. He says that the decisions all relied on Bowers, which is overruled by Lawrence, but that's not true. Several of them were before bowers, and so could not have possibly relied upon Bowers. And then a substantial majority of them are after the Romer case. And so the idea that all that circuit precedent doesn't matter, doesn't exist has been overruled, even though it's never been directly addressed is absolutely legally unsupportable.

Then – and then you have the analysis of heightened scrutiny and the amenability question. He acknowledges that there's no visible badge of such orientation. At the same time, he's saying that he believes that sexual orientation qualifies under a heightened scrutiny analysis. And then most startling to me is the political power analysis that's required under a heightened scrutiny analysis.

So at the same time, we have the president of the United States and the attorney general saying, "we're not going to defend federal DOMA." He's asserting that those who want to redefine marriage have no political power in the country whatsoever, and he dismisses as insignificant the recent acts of Congress repealing the military policy regarding homosexual behavior, the Matthew Sheppard Hate Crimes Act. And understand, those were the only two enactments maybe he has a point, but he doesn't look into state level legislation spanning back decades, municipal level legislation, nondiscrimination statutes that are in a majority of states, or same sex had been enacted in several states. And the political power, the idea – and the standard constitutional political power is to be able to catch the attention of the lawmakers – the idea that those who believe in same sex marriage in this country are unable to catch the attention of lawmakers, whether it'd be on Capitol Hill or other legislative bodies, is absolutely atrocious.

And then finally, as I mentioned earlier, it's curious that the same constitution, which, in the opinion of the president and the attorney general, makes so clear that federal DOMA is unconstitutional and therefore they can't defend it in court, it's the same constitution that requires him to enforce it and says he's going to continue to enforce it. I have not – in looking at past instances where the executive has not defended acts of Congress – have not seen that dynamic either, where we're going to enforce the law that we implicitly believe is constitutional, otherwise we wouldn't enforce it because

we have a duty under the Constitution to enforce it, but we think it's unconstitutional and we're not going to defend it in a court of law.

And so when you look at the whole ball of wax and the legal analysis, it seems very clear that the decision here is not one based necessarily on the rule of law, but it's more of a politically or ideologically driven decision, which puts the rule of law at risk. And I will conclude my opening remarks with that.

MR. FITTON: Thank you. I certainly appreciate an excellent presentation. And from civil rights and racism and same sex marriage to the importance of often overlooked issue of national security. I'm sure you will agree with me.

MS. DEBRA BURLINGAME: All right. I don't know if this is on.

MR. FITTON: I think it is.

MS. BURLINGAME: It is? Okay. Thanks, Tom, for the introduction and for including me in this discussion. I'm not a practicing lawyer at this table, so I won't have the detailed –

MR. FITTON: Nor am I.

MS. BURLINGAME: – analysis that you just heard.

I'd like to begin by sharing with you a number that I got on Tuesday from the Department of Defense. It is a number that they publish every week and unfortunately it's a number that changes every week. That is the number of our men and women who have been killed in action since the start of Operation Enduring Freedom in October of 2001. On Tuesday, that number was 5,949. And I'd like to point out that that is twice the number of people who were killed on 9/11. These men and women were dispatched to two wars – wars on two fronts under the authority that was promulgated by Congress as a result of my brother's death and the death of so many others of our fellow citizens.

It's important to remember that number because that is the backdrop with which we live today when we analyze these national security issues, but domestic ones very much have an effect on what goes on in the battlefield. And by the way, it isn't just Iraq and Afghanistan. There is a thing called Operation New Dawn, and that is putting our men and women in uniform on the Arabian Sea, in Bahrain, Somalia, and other dangerous places that Americans never hear about. And they're dying there.

It's important to remember these numbers because – or these people because I believe the Holder Justice Department, which is ideologically married to the policies of his boss, the Obama administration itself, to demilitarize this wall. And a lot of the policies that are coming out of the Justice Department are aimed at doing just that. And we're seeing that, first, when the administration eliminated the RDI program, Rendition Detention Interrogation, they put nothing in place. They're saying Army Field Manual.

But there is no formal interrogation policy, what to do, and you saw that play out with the Christmas Day bomber, where you have Eric Holder, after the fact, trying to defend, putting this guy who was sent by al Qaeda in Yemen to kill Americans on another aircraft – they still are obsessed with aviation – Mirandizing this guy, citing the Quarles exception. All that means is FBI agents were able to press him about other confederates that might be involved in the – in an imminent threat. They put nothing in place. And I've talked to the new chairman of the House Intelligence Committee, Mike Rogers, a former FBI agent, who was very disturbed by this.

He was also the man who uncovered the fact that when he was on a CODEL to Afghanistan that they were in fact Mirandizing high-value battlefield captures. This is another example of demilitarizing the war and turning it instead from a military action into a civil action in which lawyers are calling the shots.

Now, a lot of the habeas lawsuits that resulted in a line of cases, the detainee cases, obviously they happened under a previous administration. But what's important to remember is that, like the Civil Rights Division, Eric Holder hired what we at Keep America Safe called "al Qaeda lawyers." We got a lot of flack for that. But the fact to the matter is these were not lawyers who were in the spirit of John Adams doing patriotic duty to make sure that the government wasn't overstepping with hapless captures in the fog of war. These were lawyers who went to war against the government itself, slandering the commander in chief, calling him outright a criminal, filing a lawsuit, while we're at war with 200,000 men and women on the field, against the secretary of defense. And then after Holder became the attorney general and the issue was put to rest about the office – lawyers from the Office of Legal Counsel and their memos on enhanced interrogation, the so-called "torture memos," he still persisted in pursuing criminal inquiries against these career attorneys. And it is a – it is shocking to me to have met with attorney general in the Justice Department with other 9/11 family members and other victims of overseas terrorism, the Bali bombings, the embassy bombings, some family members were there, to find out that in fact one of the senior attorneys from Human Rights Watch that called military commissions "kangaroo courts" and posted on the *Huffington Post* – wrote articles deploring our Nazi military soldiers at Guantanamo was hired security clear to work on the Detainee Policy Task Force, and in fact was sitting in the room when family members were sharing deeply personal stories about what they've gone through and why it mattered very much for them which legal jurisdiction these men were tried in. I'm referring to Jennifer Daskal, who Tom Joscelyn, a prolific writer now with *Weekly Standard* and also who does incredible work at a blog called – or website called The Long War Journal. We believe that Jennifer Daskal was involved with a former Human Rights Watch investigator named John Sifton in outing the identities of CIA case officers who were involved in interrogating some of the high-value detainees.

These men were stalked in their homes, in their communities. Their pictures were taken outside their homes, at the local shopping mall. Those pictures were provided by the John Adams Project to defense attorneys for the high-value detainees, for one of the

high-value detainees.

That is an investigation that we don't know what's happening with it. These are attorneys who clearly violated the protective order on what could and could be not be given to these detainees. It is a problem that was happening during the previous administration with these – these Guantanamo detainee lawyers. And not – to my mind, I don't know what has happened with that investigation or whether it is even residing at the Justice Department, whether it's been pushed off to the Department of Defense, but nothing is done.

And the final act in terms of – that I object to with what is happening with this attorney general and this Justice Department is the demonizing of Americans who were concerned about radicalizing – Islamic radicalizing in our communities. You saw this play out at the King hearing. And Congressman King had what I consider to be a very apt phrase. He used the phrase "the craven surrender to political correctness." That is indeed what happened, is what is happening, where you had two gentlemen, one from the Somali American community, come to Capitol Hill, essentially pleading – pleading with lawmakers to help him to protect his community because these children are being targeted, teenagers. Another man, Melvin Bledsoe, whose son Carlos was recruited out of Yemen – or recruited when he went to school in Tennessee College and was sent to Yemen, further radicalized, came back, and then attacked a Marine recruiting office in Middle Rock, Arkansas, killing one man – one marine and injuring another. This man described a very tragic story, a very ordinary normal happy kid, who helped in the family business and went off to college, wanted to get a degree in business. He said, in this hearing, that these men are hunters. They target – particularly in the African-American community, they target young men who come from single mother homes. He pleaded with the committee to help his community to stop this and he was ignored, even rebuffed.

And the Holder Justice Department encourages this attitude when it – when you see Eric Holder, under oath, before a committee is refusing to answer the question about Islamic radicalization and homegrown terrorism. He will furl his brows and tilt his head and profess not to know what the members of Congress are talking about.

This is part and parcel of the political correctness we're seeing with respect to the – with respect to the KSM case, the Khalid Sheikh Mohammed 9/11 cases – we are seeing that now – was completely stalled out. Recently, one of the defense attorneys, one of the uniformed defense attorneys for one of the high-value detainees, one of the 9/11 conspirators, said in an interview that these cases have been politicized, that they are stalled. And the politicization of these cases is because Congress on a bipartisan basis has come forward now and said "these men will not be brought to U.S. soil and we will not fund the effort to bring them to U.S. soil and to house them anywhere and try them in the United States."

And so what we have is a complete stalemate, 10 years after 9/11. And we know because Senator Durbin confirmed that in an interview with Politico that politics is driving that. In fact, on the same day that the Department of Defense put out the latest

number for those who have been killed in action in the war on terrorism, Senator Durbin held his anti-King hearing to talk about how the Muslim community has been victimized. And so that is what we're seeing the trend at the Justice Department, the victimization of Muslims in this country. And the fact to the matter is the FBI keeps close statistics on hate crimes among religious communities. And in fact 9/11 – it was very, very small then. It's gotten even smaller. That in fact the hate crimes in the targeted communities, anti-Semitic crimes, those have shut up. And that's never mentioned.

I would just like to say that it is this attitude where we cannot name the enemy that we have a protected community that is being urged by its own leaders not to assist the government in protecting members of their own community and fellow citizens that is sapping the national will and that is chipping away at our ability to protect ourselves.

And I will leave you with the words of Zacharias Mousawi, the last words he uttered when he left the courtroom, back in 2006, he said, "our children will finish this fight." They're in it for the long haul, a generational long haul, and that is why we must remain vigilant and agitate against our own attorney general. Thanks.

MR. FITTON: Thank you, Debra. Let me ask you a question, first. A casual consumer of the news might have looked at the recent headlines that the president was reopening the military commission process at Gitmo that Khalid Sheikh Mohammed and the other top conspirators that were supposed to be tried in New York City will be part of that process. So you're suggesting that's not necessarily the case.

MS. BURLINGAME: No. The administration, as you all know, cam in with the objective of closing Guantanamo, and anything associated with that objective was put in service of that. And so the first thing he did because of the 9/11 cases obviously are detainees at Guantanamo was he put a hold on all of those cases. The fact to the matter is I believe that there was never any serious intention to review those cases. We met with the Detainee Task Force – family members met with the Detainee Task Force in June of 2009. We asked them what their protocol and guidelines were for reviewing the cases. This is in June, six months after the executive orders to create these task forces. They had no guidelines. They were supposed to have them in July. They still didn't have them. Finally, nine months after the executive order was – had been issued, they came up with guidelines for how to determine whether they would be in military commissions, Article III courts, or simply in preventative detention indefinitely. When a decision was made in November of 2009 to put Khalid Sheikh Mohammed and four of his co-conspirators in the federal civil system, the stated reason that made these cases distinct from other al Qaeda operatives who had been sent out by the same leaders, sometimes from the same exact area to do the same thing, the justification was that the status of the victims justified Article III courts, the status of the victims being mostly civilians. That didn't make sense on a number of grounds. First, 55 of the people who were killed on 9/11 were uniformed officers at the Pentagon. And secondly, we create law of war, a body of laws on law of war and international law to discourage bad actors and war criminals actually targeting civilians. We create heightened penalties meant to deter and discourage from targeting civilian populations. And so here you had an attorney general

who came up with a protocol that did the exact opposite. You rewarded men who had the most blood on their hands for going after innocent men, women, and 11 children were killed on 9/11.

So I think this was all a theater and in fact the announcement earlier this month about the resumption of military commissions was simply, I believe, stalling for time in the face of bipartisan and strong opposition to bringing these men to America for civilian trials. Notice that they didn't even announce any of the military commissions. They did hold conference calls with victims' families. They had a conference call out of the Office of Public Engagement for 9/11 Families. And by the way, this is checking the box. We were told – imagine how big the 9/11 family community is. It's huge. We got an email through strange sources, a couple of hours before the conference called which was to commence. That should tell you that they weren't serious about really telling us anything. And in fact, they didn't. They had a White House Office of Legal Counsel lawyer, refused to answer questions about the 9/11 cases other than to say that the president and the attorney general are committed to federal trials for these defendants and they're going to work with Congress to repeal the measures to defund them.

So that isn't going to happen any day soon and they know it. The defense attorneys know it. And so we're at a stalemate. And I think the reason why they didn't want to name the military commissions is because they don't want military commissions to upstage or get too much attention before they're able to put forward the 9/11 cases. And we are told, and it's been confirmed from unnamed sources, that they're going to wait till after the 2012 election. That is damn politics. Thanks.

MR. FITTON: Thank you, Debra. A question for you, Austin, just to clarify – although I'm a non-lawyer, I've been around Judicial Watch long enough to know the difference between strict scrutiny and heightened scrutiny, or at least I think I have a running knowledge of it. But could you explain a little bit more about what – the rational basis test and all that because your discussion – you've highlighted that important point, but for a lay audience – we're on the internet as well – explain why it's extraordinary to suggest that there are different scrutiny standards with relation to homosexuality.

MR. NIMOCKS: Sure. The rational basis test is the most commonly employed test in constitutional analysis of whether a law passes constitutional muster. Every single law enacted by Congress must, as a matter of constitutional law, have a rational basis. And in performing that analysis a court is not necessarily limited to what Congress may articulate in the legislative record as its national for enacting the law. The rational basis record available to a court is any conceivable rational basis for that law that that law has some rational basis in it, whatever it could be. It's a very wide latitude.

MR. FITTON: So the position of the Obama Justice Department that there is no conceivable rational basis for defining marriage as being between a man and woman only.

MR. NIMOCKS: Right. I mean, in other words stated, if there's no rational basis, it is, as a matter of constitutional law – in other words, when the founders wrote the Constitution, the idea that it is irrational in the Constitution, fundamentally in there, implicit within the concept of ordered liberty, that marriage would be defined as one man and one woman.

Now, it's one thing for us to have a debate about how marriage should be defined. It's another thing entirely to say that you were irrational, to say that tens of millions of Americans across this country that have voted on the question of marriage – 31 different jurisdictions have had votes – that the majority of Americans in this country are irrational as a matter of constitutional law because they believe marriage is one man and woman. That is astounding, an astounding statement. It's one thing to disagree, but to say that you are irrational – and that's why I mentioned earlier the oral argument on December 6. Ted Olson is standing right here. I could kick him if I wanted to. That's how close I'm standing to him during the course of the oral argument on the Prop 8 Perry case. And he was asked a question directly by Judge Smith. Is it irrational, all things being equal, children do better when raised by the mother and father that brought them into this world that it is irrational to define marriage one man, one woman? And he gave a one-word answer. And that's "yes." And I about fell out of my chair because this is a former solicitor general of the United States for George W. Bush – and General Olson became famous – going against David Boies, in 2000, in *Bush v. Gore*, in the case that propelled George W. Bush to the White House, and now Olson and Boies are teamed up in this case, to sit there and say that Americans, tens of millions of Americans are irrational under the Constitution. So it's just amazing that the Justice Department now adopts that stance.

MR. FITTON: That's right. It's one thing for a private lawyer to have that view on behalf of his clients. It's another thing to have the attorney general of the United States state that. Well, I'm going to open it up to questions from the audience. If you could – I believe there is a microphone – no there isn't a microphone. So I will restate the question if you could speak clearly and tell us where you're from, I appreciate it, or your name. Any other questions, comments?

While people think about questions, the news yesterday was – Hans, for you – was the Office of Professional Responsibility, which is the office in the Department of Justice tasked with making sure that lawyers are professionally responsible in the way they handle cases and perform their duties, supposedly gave the Obama administration a pass on the Black Panther case. And what struck me about it, looking at the final report not too closely was how narrowly and carefully it was written. Do you have any thoughts on that because obviously that's going to be used as a – to beat you back with as you raise issues about the way that case and other cases are being handled by the Civil Rights Division.

MR. SPAKOVSKY: Sure. I'd make a couple of points about it. First of all, even former Attorney General Michael Mukasey was astonished that Eric Holder basically told the Office of Professional Responsibility what the conclusion of their report should be in

December, before their report was concluded, because remember, in December, he was interviewed by the *New York Times*. He was specifically asked about the New Black Panther case. And he specifically said and answered the questions that essentially there was nothing wrong with what had been done. I frankly think it was unethical and unprofessional for the head of the Department to tell basically people working for him how they should come out in an open investigation of the behavior of attorneys within the Department. Second, I would point that – and I wrote about this, three years ago, for the *Weekly Standard*, the Office of Professional Responsibility has a history of biased and partisan investigations. And what else did Holder do in December? Well he put in the new head of the Office of Professional Responsibility, a woman named Robin Ashton, who's a Democratic loyalist, who, while working for the Department, during the Bush administration, asked for and requested a detail to the office of Senator Patrick Leahy.

Second, in order to make sure that the Office of Professional Responsibility would come out the right way and I think further would be done with that report, in December, Holder also announced something else, which was quite a change and no one noticed at the time. He set up a new unit within the Justice Department. He calls it the Professional Misconduct Review Panel. And this new unit is charged with taking any OPR report that cites any misconduct by lawyers within the Department and deciding what to do with it. And who did he put in as the head of that unit? Well, he put in his former chief of staff, Kevin Ohlson.

Now, why is that significant? Well, it's significant because if you know the internal workings of the Justice Department, you know that normally what happens when OPR comes out with a report is it reviewed by a guy named David Margolis. David Margolis is the senior career lawyer within the Justice Department. He's been there for decades. He's worked for many different administrations. And obviously Holder did not want – if the OPR report had not come out the way he wanted it to, which it did, he clearly wanted to be sure that with this new unit, what happened before did not happen again, and that is, if you all recall, when the Office of Professional Responsibility came out with its report on John Yoo and Mr. Bybee for the illegal opinions they had rendered on the interrogation techniques that could be used by the Bush administration, Margolis issued a scathing report, criticizing OPR for many mistakes, for basically making up the law, for making huge errors in its substantive legal opinions. And now Margolis has basically been taken out. The senior career person has been taken out of this and instead we have a different unit reviewing this.

Finally, I would point out a couple of – three things. The letter sent by Ms. Ashton to Congress says very specifically at the end that they did not look at the relative merits of the legal positions of the individuals involved. Now, the whole crux of this case is the dream team of four career lawyers, who investigated this case and litigated it, said that there was no substantive legal reason for their supervisor to tell them to dismiss the case.

Now, if they did not look at LPR, did not look at the relative merits of the legal issues of the case, how in the world then they come out and say that when the orders

came down to dismiss the case, there were no political or racial or other reasons for that? They also say in the letter very carefully that they only spoke to current and former Department of Justice officials.

Now, I wrote an article a year ago – and *Washington Times* also covered this – pointing out that the visitors' logs released by the White House indicate that key individuals in the political leadership on the Department, including Associate Attorney General Thomas Perrelli, who the logs that I believe that Judicial Watch obtained, the privilege logs showed that he had been consulted in the dismissal of the New Black Panther voter-intimidation case, and in fact, the Justice Department refused to provide the email and other communications of Mr. Perrelli because they said they were privileged. Well, the only way you can use the privilege doctrine to not give documents is if there were legal opinions rendered and legal communications made, which meant that Mr. Perrelli and others at the top political leadership were making decisions on this case. Well, the visitors' logs show that Mr. Perrelli had meetings with the White House Counsel's Office during key dates in the New Black Panther case, including – I outlined this in great detail – including when the decision was made to dismiss the case. Yet, OPR makes it clear that they didn't interview or talk to a single individual in the White House, into the Counsel's Office there. They also clearly did not investigate the other information that I mentioned before that has come out in the Civil Rights Commission's investigation of the New Black Panther case, which is they did not investigate the sworn testimony that the Civil Rights Division had implemented a policy that there would not be race neutral enforcement of the Voting Rights Act and that there would be no cases filed against defendants who are racial minorities, no matter how they violated the law, and they obviously did not investigate the sworn testimony also which says that, again, Civil Rights Division put in a policy of not enforcing a certain provision of the Motor Voter law, which they are – have the responsibility for enforcing. And they also clearly did not investigate the disciplining and admonition that was given to the career chief of the Voting Section for actually interviewing individuals being hired for jobs, asking them if they would – if they believed in race neutral enforcement of the law.

All of those things are things that they completely ignored in their investigation.

MR. FITTON: Although they confirm, as best I can tell, that higher officials, political officials were involved in the decision making, so it's not just Judicial Watch making the allegation. The OPR has concluded that they were involved in the decision making, but of course it was all appropriate. And whether or not it was appropriate or not is beside the point. The Justice Department sworn under oath and also in public statements that political officials were not involved in the decision making. The OPR report seems to indicate otherwise.

And if I could just add on the issue of the Freedom of Information Act, which Judicial Watch specializes in, the Justice Department is the absolute worst, or one of the absolute worst. With the federal government, you never want to say one agency is the worst. They're all terrible in their own unhappy ways. But the Justice Department almost never gives us documents absent litigation, and even with litigation, getting

documents, or even telling us what documents they don't want to give us is like pulling teeth. So for the Obama administration to have this idea of transparency and pretend to be the most transparent administration in American history to have its Justice Department, which is charged with enforcing and litigating FOIA in the court, fragrantly violate it – you can withhold documents, but you have to withhold them pursuant to the law and you have to respond to re quests. And they don't bother to respond. The most basic question they ignore were certainly about – questions about the NAACP's context with the Justice Department. I don't know if we foiled it, but I'm assuming – I know there have been issues out there and I know they stalled in releasing information about how many lawyers were terrorists' advocates. The crisis in the Justice Department and national security is they hired a series of lawyers who spent part of their professional lives advocating for terrorists. I'm not saying they're terrorists, but they're advocating for the rights of these terrorists.

Attorney general's own law firm was involved, providing free representation to terrorists, but they don't want to disclose that level of information or –

MS. BURLINGAME: Not only that, but when we were talking with representatives from the White House Chief Counsel's Office, one of the founding members asked what cases is the attorney general recusing himself because of conflict of interests and they castigated him. They said it was a disrespectful question to a man who lost his son in the Towers. So, yes.

MR. SPAKOVSKY: I should mention one other thing I forgot to mention, that is – the other thing the OPR report completely stayed away from was investigating the fact that the Department of Justice refused to comply with subpoenas issued by the U.S. Commission on Civil Rights for documents, communications, and witnesses in their investigation of the New Black Panther voter-intimidation case. Now, any lawyer would tell you that when you receive a subpoena, if you believe that it is invalid or that it is seeking information that you do not have to turn over, the only ethical and professional action that you can take is to yourself go to war and file a motion to quash the subpoena and you let a judge, an independent third party, make the decision as to whether or not that subpoena was valid and whether or not it should be responded to. The Department of Justice did not do those things. Now, this is the law enforcement agency of the United States, has thousands of lawyers. They are supposed to comply with the law. And they did not do that. They did not go to court to quash those subpoenas. Instead, they ignored them, and not only ignored them, but they instructed the witnesses who'd been subpoenaed, including the former chief of the Voting Section, Christopher Coates, to ignore the subpoenas. And that to me is unethical and unprofessional behavior. And OPR did not investigate that. And why did they not investigate that? Well, those decisions would not have been made by the career lawyers involved in this case that would have been made only at the highest parts of the Justice Department.

And a final thing and I just – Debra, I have to say this is an area where what you were talking about and what I was talking about coincide – odd coincidence, but the lawyer who signed the complained against the Berkeley School District in Illinois for

supposedly discriminating by not allowing a teacher to go on a three-week pilgrimage is a lawyer named Varda Hussain, who was given an award by her pro bono work by her former law firm for something like 500 hours of volunteer work, representing three Egyptian terrorists detained in Guantanamo.

MR. FITTON: Well, on that note, unless Austin, you have anything else to add with respect to – my concern generally – and I think the issue raised is where do these interest groups end and the Justice Department begins? Where is the line being drawn? I don't think a line has been drawn. And , Hans, you've been around for a long time, Austin you and I have been – the idea of being able to influence Justice Department decisions, however much we might want to as a nonprofit organization or as an advocacy group – it just doesn't occur to one to be able to do that. But it seems to be hard for the course under this administration. And I'm not aware of that happening in prior administrations, frankly even during the Clinton years. So – they had other influences that were improper, but I didn't see – (inaudible) – run out of the back office of the ACLU or these other organizations, where it was hard to tell who was running the show. And of course, the administration has been very reluctant to disclose their contacts with these third parties about these issues, whether it'd be national security or the involvement of principles in these issues, whether it'd be national security, the civil rights issues, which go beyond the Black Panthers, and I think we haven't begun investigating – I think we have begun investigating, but they ought to be investigated, given the poor analysis that Olson laid out, who's running the show when it came to the Justice Department's legal determination whether or not to defend the Defense of Marriage Act. It sounds to be like it was written by outside groups, as opposed to ethical Justice Department attorneys.

So this raises questions about the future of Eric Holder. I think his future, at least in the government, needs to be cut short. But I think it's an important issue to highlight. It's one that I think it's largely being ignored by Congress and media and even a lot of our friends in the conservative movement who are distracted by a lot of other crises being caused by the Obama administration. And I think – and our purpose here was to highlight the crisis in our Justice Department.

So I appreciate your –

Q: Yes, I'm going to ask your question.

MR. FITTON: – so you weren't going to let me finish, Roger, no. Go ahead. You can ask your question.

Q: (Off mike) – I wanted to ask about the – (off mike) – congressional oversight at this point in each of these three areas. The Republicans have been in charge for the House now for nearly three months. How are they doing as far as subpoenaing White House and the Justice Department on these issues? Has there ever been signs that they're going to go aggressively after these issues? (Off mike.)

MR. FITTON: Well, it looks to me like they're ramping up. The proof is going to be in the end what happens and whether they hold hearings and expose documents and do other things. I think there is an intense interest in figuring out what's been going on. I don't know – Debra do you have – do you have any feel for what at least the House Republicans are doing and the Senate obviously is a closer thing because the president's party controls the Senate.

MS. BURLINGAME: My communications with them have been – I know they're working on the Patriot Act right now, getting up for the reauthorization of that. But with – and they're working on – Mike Rogers, as I said, wants to – they have an agenda and I don't know that it's necessarily going after the Justice Department. I think it's coping and correcting – making some coarse corrections that they're trying to do, rather than see the last of Eric Holder. But – and the last time I was in Washington, it was to consult with members of Congress about the 9/11 trials going forward. But one area that I hope they do go after and I understand that there has been some interest in this from Buck McKeon, the chairman of the House Armed Services Committee, is to investigate the John Adams Project problem that was uncovered in 2009, what I referred to before, chasing down the CIA officers, photographing them paparazzi style, and then giving a boatload of their pictures to one of the 9/11 conspirators. That is – I think that is – I think we're dealing with criminality there and I hope they do go after that.

MR. NIMOCKS: I can speak to that as far as the federal DOMA is concerned. Speaker Boehner has made it publicly known that the House will intervene in the ongoing federal DOMA litigation. The problem for the House is that this is unlike any other circumstance that we've seen, and there're a multitude of circumstances historically where the House and Senate Have intervened in litigation. But there are 10 pending cases federal DOMA wise, plus, like I said, we speculate more will come, especially if the homosexual conduct policy has been repealed for the part of the military is in fact – does become policy, you have an inextricable conflict between the repeal of Don't Ask, Don't Tell and federal DOMA, which will spun more litigation.

The House, as a legislative body, intervenes from time to time in a case, but it is not equipped like the DOJ to handle multiple cases across the country. And so I think that's something the House is grappling with right now in terms of who's going to do the litigation, how are they going to try to manage the 10 cases that exist right now and any other cases. But at a minimum, we're happy to see that the House is going to intervene and because the defense of federal DOMA that the Department of Justice was doing, which if you want to call it a defense, you can, but it wasn't really a defense, you can't get worst than what they were doing. Anything's an improvement in terms of that. And so we're happy to see that at least before the First Circuit were the cases that are first in time on federal DOMA exist, there will be presumably a cogent advocate, making cogent arguments on behalf of federal DOMA. So that's a good thing, to answer your question in terms of what the House has done on federal DOMA, but I think they're still struggling with how exactly are they going to manage this –

MR. FITTON: Isn't it a danger that a federal judge could either not let them intervene or not weight in to say, "hey, the government has caved on the case and DOMA's out?"

MR. NIMOCKS: It's possible, but we think it's highly unlikely because the Department of Justice kind of laid out the red carpet for Congress on federal DOMA. And so we will facilitate the intervention and even the First Circuit issued a sua sponte order saying, "hey guys, we want to know what's going on. Congress, are you coming in? Do we need to reset the briefing schedule?" And so the court kind of indicated its willingness to receive Congress into the cases. And several of the other cases at the lower level – the judges in charge of these cases have actually stayed the case while they wait and see what's going to happen in the First Circuit. So logistically, it may not be as a big of a headache as it appears on the surface, but it could become potentially a headache. And I know that Speaker Boehner Office has at least shared with us at one point in time that that's a concern that they're taking a look at. But the fact that they're stepping up is a good thing as far as we're concerned. Federal DOMA should receive a defense now at least from the First Circuit.

MR. SPAKOVSKY: Yes, but let me make a point about this because this is something that has not come up. And again, this is an example of what I consider to be unprofessional behavior by lawyers at the Justice Department, okay? The first thing you learn in law school and the professional code of ethics is they tell you, you have a duty to vigorously defend your client, even if he was a lawyer, don't like your client. Don't particularly like the things they represent. If you take on that defense, you have to vigorously defend them. And if you read the briefs that were filed in cases in which the Justice Department has been involved, the Obama administration in the DOMA cases and in the Don't Ask, Don't Tell policies, I got to tell you that I think that the work of the lawyers in those cases bordered on unethical. I'll give you one good quick example. As you know, a federal district court in California threw out the military's Don't Ask, Don't Tell policy. And if you read the opinion of the court, the judge makes note of the fact that the Justice Department did not present a single witness, not one to justify for military or other reasons the imposition of the Don't Ask, Don't Tell policy. Now, clearly the Obama administration Justice Department has access to any military expert they want to put on as a witness. The fact that they did not offer a single witness to justify, it meant that they went into the case, even though they're supposed to be defending it, trying to throw the case. That is collusive litigation and that is per se to me unethical behavior by a lawyer. And yet that is how they acted their case and they've acted their way in other cases, too.

And again, that is not the kind of professionalism we want from our Justice Department.

MR. FITTON: Certainly that OPR letter to the – I think it was addressed to Lamar Smith, if I recall – I mean it shows that that letter was designed to throttle off this investigation by Lamar Smith, but the point that it was sent to him shows that he is investigating it. And I believe that to be the case.

Well, I'd like to thank everyone, Debra Burlingame, Austin Nimocks, and Hans von Spakovsky for joining us. Their expertise is invaluable on these various issues of public importance. And for those of you on the internet or elsewhere, we will have a written summary of this presentation eventually available and obviously it will be on the internet for you to share as well. So I appreciate your time and attention and thank you for joining us today. And I think we have something – (inaudible) – afterwards here. So thank you. I appreciate it.

(END)