Statement of Charles J. Cooper

Hearing before the
Senate Judiciary Committee
Subcommittee on the Constitution

"Restoring the Rule of Law"

September 16, 2008

Thank you, Senator Feingold, and members of the Subcommittee, for inviting me to testify today on important issues of separation of powers and, more particularly, the scope and nature of executive power under our Constitution. In holding this hearing, this Committee furthers a debate that began with the Founders and has focused the attention of virtually every President, every Congress, and every generation of Americans since that time. In the past seven years, the debate has taken on a special urgency because the challenges we face in the post-9/11 world are unprecedented and dire, and the need for government action is great.

Before discussing the particular separation-of-powers issues that have been at the forefront of debate, I think that it is important to remember the extraordinary context in which these issues have arisen. Just five days ago we marked the seventh anniversary of the September 11th terrorist attacks and entered into the eighth year of an out-and-out war with those who seek the destruction of our nation and our way of life. We are at war. To be sure it is not the same kind of war this nation has confronted in the past, but it is a war nonetheless. And in times of war there is one constitutional officer charged with day-in, day-out responsibility to protect the lives, liberty, and property of the American people: the Commander-in-Chief. The President is constitutionally obliged to prosecute this war so as to protect our nation and to secure our freedom and way of life.

Daily, then, the war-time President must strive to strike and maintain a delicate balance between ordering measures deemed necessary to protect us from terrorists and keeping faith with the Constitution that grants and cabins his powers, and that guarantees our liberties. The questions of executive power that this Administration has faced, and that we will discuss today, are not academic. The average American is not privy to the threat assessment that the President reads each and every morning, but these reports make the President and his advisors painfully aware of the gravity of their decisions and the urgent circumstances in which they must be made. As each decision comes across the President's desk he is faced with the stark reality that lives—living, breathing, American lives—are genuinely at constant risk. That the questions are difficult does not diminish their imperative nature: the war-time Executive must act, often without the benefit of time for prolonged study and reflection. And there is no denying that his national security decisions sometimes must be shrouded in secrecy, must call for harsh and intrusive measures, and must place American lives at risk. In dangerous

times such as these, with regard to difficult decisions such as these, can the imperative to grant the Executive the benefit of genuine legal doubt be any greater? Like Robert Jackson, the former Attorney General and Supreme Court Justice, I believe the President, especially in time of war, is surely entitled to "the benefit of a reasonable doubt as to the law."[1]

This has traditionally been the view of the President's legal advisors in the Office of Legal Counsel; certainly it was OLC's view during the time when I served in that office in the Reagan Administration. To be sure, the President must be able to rely on OLC for *independent* legal analysis and advice; advocacy in defense of an Administration policy or action is a responsibility that falls on other components of the Department. OLC is obliged to "provide advice based on its best understanding of what the law requires," and the office's faithful performance of that function will at times require it to advise that "the law precludes an action that [the] President strongly desires to take."[2] But OLC is not a court, and its independence does not entail the neutrality that is the hallmark of judicial independence. "OLC differs from a court in that its responsibilities include *facilitating* the work of the Executive Branch and the *objectives* of the President, consistent with the requirements of the law."[3] Indeed, "OLC must take account of the administration's goals and assist their accomplishment within the law."[4] Thus, OLC should maintain a relationship of what I call "friendly independence" to the Administration and the President it serves.

OLC often confronts legal issues that do not have black or white answers; many are close and difficult questions of law, and the answer is sufficiently uncertain—sufficiently gray—that OLC cannot properly, conscientiously say that the proposed Executive Branch action is legally precluded. If the answer falls in the gray area—it is neither yes or no, but maybe yes and maybe no—then the action is not controlled by law, and the President is free to choose the course that best serves his purpose and goals, in full view of the legal risks.

Before leaving the subject of OLC, I feel bound also to say this: I cannot imagine a more important, yet more difficult, more trying, more thankless, and, indeed, more perilous job for a lawyer than being a legal advisor to the President and the Administration in the weeks and months following 9-11. I give thanks that I was not confronted with so grave and difficult a responsibility during my time at OLC, and I am grateful to the men and women who have served their country in that office in these awful circumstances.

---

[1] *See* JACK L. GOLDSMITH, THE TERROR PRESIDENCY 35 (2007) (quoting EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 221-22 (1958)).

[2] *Guildelines for the President's Legal Advisors*, 81 INDIANA L. J. 1345, 1348-49 (2006).

[3] *Id.*

[4] *Id.*

I turn now to the bill of particulars that the Administration's harshest critics have offered in support of the charge that this Administration has abandoned the rule of law. At least four areas appear to the be focus of their concern: (1) the manner of detention and prosecution of foreign terrorists and enemy combatants held at Guantanamo Bay, (2) the use of aggressive interrogation techniques on high-value terrorist detainees, (3) the reworking of our intelligence and investigatory apparatus in the wake of the failures demonstrated by 9/11, including the PATRIOT Act and the use of warrantless electronic surveillance, and (4) the "politicizing" of the Department of Justice—that is, the President's exercise of his prerogative in the hiring, firing, and direction of subordinates, including U.S. Attorneys.

The truth is that each of these areas present close and difficult questions. I am a Republican and, in general, a supporter of President Bush's policies, but on occasion I too have been among the critics of this Administration's positions concerning the scope of executive authority. For example, the President's attempt to direct state courts to "give effect" to a ruling of the International Court of Justice was, to my mind, well beyond the scope of his powers under the Constitution and the relevant treaty.[5] Similarly, I believe that the President's directive to Harriet Miers and Joshua Bolten not to appear before Congress pursuant to a valid subpoena goes beyond the proper scope of the executive privilege.[6] Even the President's closest advisors must, I believe, appear in obedience to a congressional subpoena and assert any appropriate privilege on a question-by-question basis. But my disagreement with the Administration on these issues does not bring me to the conclusion that the President has forsaken the rule of law.[7] To the contrary, these are not easy questions, and the President presents reasoned and reasonable arguments in support of his positions. One of these issues—whether the President has authority to direct state courts to obey a judgment of the ICJ—was resolved by the Supreme Court just last Term, and while the President's position was rejected by a majority of the Court, three Justices dissented and one concurred only in the Court's judgment. It cannot reasonably be said, therefore, that the President's legal position was unreasonable.[8]

So while the Bush Administration, in my view, may have erred in its answer to certain separation-of-powers questions, it is entirely proper and natural for the Administration generally to favor, and to jealously protect, the powers and prerogatives of the office of the Presidency. That each branch of government will be alert to and guard against encroachment by the others is a fundamental premise on which the separation of powers is based. Indeed, the Clinton Administration was itself sharply criticized for its "absolutist pretensions" in military matters, and his Office of Legal

---

[5] *See Medellin v. Texas*, 128 S. Ct. 1346, 1355 (2008).

[6] *See Committee on the Judiciary v. Miers*, 558 F.Supp.2d 53 (D.D.C. 2008).

[7] I have studied these two issues deeply enough to have formed an opinion on them; I have not done so on any other issue discussed in this testimony.

[8] The question whether the executive privilege exempts close White House advisors from the compulsion of a lawful congressional subpoena is pending before the Court of Appeals for the District of Columbia Circuit.

Counsel was no shrinking violet when it came to enunciating a robust vision of executive power.[9] During the Clinton Administration, OLC approved the CIA's original rendition program,[10] the attempted assassination of Osama bin Laden,[11] the use of presidential signing statements,[12] and presidential override of statutes impinging on what might be called unitary executive powers.[13]

The closeness of the questions that have confronted this Administration in the War on Terror is perhaps best reflected in the recent cases dealing with the detention and prosecution of foreign terrorists and enemy combatants. The debate over these issues, more than any other separation-of-powers issue in the last eight years, has been settled in our courts. And in the federal courts of appeals—that is, in the courts that are bound to follow faithfully Supreme Court precedent—the Administration is *undefeated* in the major War on Terror Cases. In those cases—*Rasul*,[14] *Hamdi*,[15] *Hamdan*,[16] and *Boumediene*[17]—of the twelve votes cast by courts of appeals judges, eleven of them came down on the side of the Administration. That striking judicial endorsement of the Administration's positions surely establishes that they were well grounded in Supreme Court precedent and fell squarely within the mainstream of constitutional thought on these issues.

---

[9] GOLDSMITH, *supra* note 1, at 36-37 & nn. 20-22 (citing David Gray Adler, *Clinton, the Constitution, and the War Power*, in THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY 46 (David Gray Adler & Michael A. Genovese eds., 2002)).

[10] *See id.*

[11] *See id.* at 36, 104, 106.

[12] Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993).

[13] *See, e.g.*, Memorandum from Walter Dellinger, Assistant Attorney General, to Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes, (Nov. 2, 1994) ("Let me start with a general proposition that I believe to be uncontroversial: there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."); *id.* ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Memorandum from Walter Dellinger, Assistant Attorney General, to Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, Placing of United States Armed Forces under United Nations Operational or Tactical Control (May 8, 1996) ("The proposed amendment unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief. Further, it undermines his constitutional role as the United States' representative in foreign relations.").

[14] *Rasul v. Bush*, 542 U.S. 466 (2004).

[15] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[16] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[17] *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

One can hardly fault the Administration, for example, for failing to predict the *Boumediene* Court's abandonment of a venerable case like *Eisentrager*.[18] As Justice Scalia explained:

> The President relied on our settled precedent in *Johnson v. Eisentrager* . . . when he established the prison at Guantanamo Bay for enemy aliens. Citing that case, the President's Office of Legal Counsel advised him "that the great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay]." . . . Had the law been otherwise, the military surely would not have transported prisoners there, but would have kept them in Afghanistan, transferred them to another of our foreign military bases, or turned them over to allies for detention. Those other facilities might well have been worse for the detainees themselves.[19]

Justice Scalia also explained, convincingly I think, why *Eisentrager* was faithful to the Constitution and the *Boumediene* majority was not.[20] But quite apart from the merits of the *Boumediene* decision, as a policy matter it represents a clear and present threat to our military's effectiveness in fighting the War on Terror. As Chief Justice Roberts asked, who wins with the Court's usurpation of the political branches' prerogative of "control over the conduct of this Nation's foreign policy?"[21] The Chief Justice offered an answer that is appropriate to the title of today's hearing: "Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in shaping policy for alien enemy combatants."[22] Indeed, in the vacuum created by the Court's decision, it is not at all clear what law applies to the detainees, what rights they have, or how our military personnel may conduct captures and detentions anywhere in the world. As Justice Jackson aptly explained in *Eisentrager*: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States."[23]

The *Boumediene* case also demonstrates another critical point: the Supreme Court overturned the Military Commission Act of 2006, which was *Congress's* carefully considered statutory framework for prosecuting the Guantanamo detainees. In other

---

[18] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[19] 128 S. Ct. at 2294 (Scalia, J., dissenting).

[20] *See id.* at 2303-06.

[21] *Id.* at 2293 (Roberts, C.J., dissenting).

[22] *Id. See also id.* at 2302 (Scalia, J., dissenting) ("It is a sad day for the rule of law when such an important constitutional precedent is discarded without an *apologia*, much less an apology.").

[23] *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

words, *both* political branches made a constitutional determination regarding a proper course of action with regard to the detainees, only to have it, in the words of Chief Justice Roberts, "unceremoniously brushed aside"[24] by five Justices who no longer thought a well-settled World-War-II-era decision was worthy of respect. Worse still is that the statute eviscerated by *Boumediene* resulted from the precise legislative process that four members of the *Boumediene* majority had recommended just two years earlier in Justice Breyer's *Hamdan* concurrence, which stated that "nothing prevents the President from returning to Congress to seek the authority [for the trial by military commissions] he believes necessary."[25] Thus, the *Boumediene* majority essentially ignored Justice Jackson's famous formulation in the *Steel Seizure Case* that when the President acts pursuant an act of Congress his authority is "at its maximum" and should be accorded "the strongest of presumptions and the widest latitude of judicial interpretation."[26]

Indeed, prior to the War on Terror cases, the Supreme Court had uniformly accorded the President great deference in the area of national security and foreign and military affairs. This bedrock constitutional principle was recognized by Alexander Hamilton in The Federalist,[27] and has been respected by Justices of all eras and ideological stripes, from Chief Justice Marshall during his congressional career,[28] to Justice Story in his famous Commentaries,[29] to Justice Grier in *The Prize Cases*,[30] to

---

[24] 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

[25] *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

[26] *Youngstoun Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

[27] THE FEDERALIST NO. 74 (Hamilton) at 446 (1788) (Clinton Rossiter ed., 1961) ("Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.").

[28] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting Annals, 6th Cong., col. 613) ("'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.'").

[29] 3 J. STORY, COMMENTARIES ON U.S. CONSTITUTION §1485 ("The command and application of the public force, to execute the laws, to maintain peace, and to resist foreign invasion, are powers so obviously of an executive nature, and require the exercise of qualities so peculiarly adapted to this department, that a well-organized government can scarcely exist, when they are taken away from it."); *id.* ("Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand."); *id.* ("Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.").

[30] 67 U.S. (2 Black) 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-[C]hief, in suppressing an insurrection, has met with such

Justice Sutherland in the *Curtiss-Wright* opinion,[31] to Justice Douglas in *Pink v. New York*,[32] to Justice Jackson in the *Steel Seizure Cases*[33] and *Eisentrager*,[34] to Justice Blackmun in *Department of the Navy v. Egan*,[35] to Chief Justice Rehnquist in *Regan v. Wald*.[36] As Justice Sutherland explained, the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."[37] Perhaps the most striking, and alarming, feature of the majority opinions in the recent War on Terror cases is that they either entirely ignore, or only faintly hint at, this canonical separation of powers principle. That a bare majority of the Supreme Court has now effectively cast aside this long history of deference in an area so critical to our national security is, I submit, the most significant development in the separation-of-powers area to come out of the last eight years. If you want to know my advice on what the next President and Congress should do to ensure that the rule of law as embodied in our Constitution will be respected, it is this: appoint and confirm judges and Justices who will respect the rule of law and the constitutional prerogatives of the other branches of government.

One last point while we are on the subject of the Supreme Court. A large majority of the Court's decisions reverse the opinions of lower court judges, and the Court invalidates congressional statutes virtually every Term. In other words, every

---

armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.").

[31] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

[32] 315 U.S. 203, 229-30 (1942) (noting that the President "is the sole organ of the federal government in the field of international relations" and that "[e]ffectiveness in handling the delicate problems of foreign relations requires no less") (quotations marks omitted).

[33] 343 U.S. at 645 (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

[34] *See, e.g.*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

[35] 484 U.S. 518, 529-30 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

[36] 468 U.S. 222, 243 (1984).

[37] *Curtiss-Wright Export Corp.*, 299 U.S. at 320; *see also id.* ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.").

Term, the Supreme Court declares that Congress and dozens of lower court judges got the law wrong. Yet where are the hearings asking how we can restore the rule of law in Congress and the lower courts? Where are the accusations that members of Congress who vote for unconstitutional statutes, and lower court judges who uphold them, have demonstrated contempt for the rule of law? Where are the calls for investigations of these public officials? The answer is obvious: these judges and members of Congress are presumed to make good faith efforts to interpret the law honorably and to the best of their abilities. The rule of law necessarily involves interpretation—by members of all three branches. Disagreement is inevitable. Why, then, the hue and cry when it is the President, rather than the Congress or a judge, who is alleged to get it wrong?

The second item in the bill of particulars against the Bush Administration—the use of aggressive interrogation techniques on high-value terrorist detainees—has not been litigated by the courts, but has understandably been the subject of intense controversy and congressional scrutiny. Indeed, it is in this area that the Administration and its lawyers have faced the harshest criticism, with the most pointed vitriol directed at Professor John Yoo, the author of the August 2002 and March 2003 OLC opinions on this subject. Some of the criticism of the analysis in those opinions appears to me to be well taken, and the OLC itself—prior to any public disclosure of the memoranda—developed misgivings about the reasoning in the opinions and rightly set about the process of modifying them. Thus, while the Yoo memoranda do represent an instance of the Executive Branch erring in its legal analysis, the full story of these memoranda reflects legal advisors of the Executive Branch making difficult and close legal calls under exigent circumstances, continually reassessing those decisions with the benefit of further study and experience, and then making any corrections that are warranted. This is respect for the rule of law at work.

And let me reemphasize that the Executive Branch lawyers who worked on this issue, both in the immediate aftermath of 9/11 and beyond, acted under some of the most trying circumstances imaginable for a lawyer. As Professor Jack Goldsmith, the Assistant Attorney General who withdrew the Yoo memoranda, explained: "When the original opinion was written in the weeks before the first anniversary of 9/11, threat reports were pulsing as they hadn't since 9/11."[38] And while some of the reasoning of Professor Yoo's memoranda has been officially repudiated by OLC, I am aware of no evidence that he, or any of the other lawyers in the Justice Department who were involved in preparing the memoranda, acted in bad faith in performing their duties. Indeed, the initial decisions made by the Bush Administration with regard to specific interrogation techniques have withstood the further legal scrutiny of three successive generations of leadership in OLC.

Which brings me to something that the next administration and Congress, in my opinion, most assuredly should not do: threaten well-meaning Executive Branch officials from the prior administration with ethical inquiries and criminal investigations. I can offer no better advice on this front than that of Professor Alan Dershowitz, who just last week

[38] GOLDSMITH, *supra* note 1, at 165.

said this: "The real question is whether investigating one's political opponents poses too great a risk of criminalizing policy differences—especially when these differences are highly emotional and contentious, as they are with regard to Iraq, terrorism and the like. The fear of being criminally prosecuted by one's political adversaries has a chilling effect on creative policy making and implementation."[39] The notion that Executive Branch lawyers are open to ethical investigation and criminal prosecution whenever their advice sparks controversy and disagreement is a recipe for denuding the Justice Department and other agencies of the best and brightest in the legal profession. Even tranquil times, let alone times of war and national peril, engender serious debate and vigorous disagreement over matters of policy and law. If disagreement between lawyers is sufficient to provoke criminal investigation or bar discipline proceedings, why would anyone—of either party or no party—elect to serve as a lawyer for the government?

Lastly on the subject of harsh interrogation techniques, let me say a bit about the substance. Senator Schumer had this to say in 2004:

> I think there are probably very few people in this room or in America who would say that torture should never, ever be used, particularly if thousands of lives are at stake. Take the hypothetical: If we knew that there was a nuclear bomb hidden in an American city and we believed that some kind of torture, fairly severe maybe, would give us a chance of finding that bomb before it went off, my guess is most Americans and most senators, maybe all, would say, "Do what you have to do." [I]t's easy to sit back in the armchair and say that torture can never be used. But when you're in the foxhole, it's a very different deal. And I respect—I think we all respect the fact that the President's in the foxhole every day.[40]

Senator Schumer's forthright observations on this issue underscore just how difficult these decisions are for the President, sometimes even in the face of statutory prohibitions. Congress has now outlawed any "cruel, inhuman, or degrading treatment,"[41] apparently including waterboarding, but suppose a situation arose in which a detainee had information that might prevent a nuclear attack in this city. And suppose further that the President was told that waterboarding the detainee would probably prove effective in immediately eliciting the information? Should the President reject the tactic in unblinking obedience to the statute, at the risk of catastrophic loss to our Nation? Or do his powers as Commander-in-Chief exempt him from the requirements of the statute in such a dire emergency? This was certainly President Lincoln's view,

---

[39] Alan M. Dershowitz, *Indictments Are Not the Best Revenge*, WALL STREET JOURNAL, Sept. 12, 2008, at A17, *available at* http://online.wsj.com/article/SB122117524229925725.html?mod=opinion_main_commentaries.

[40] Hearing Before the Senate Judiciary Committee, 108th Cong. 33-34 (June 8, 2004) (Statement of Charles E. Schumer).

[41] 42 U.S.C. § 2000dd.

and he famously defended his suspension of the writ of habeas corpus by asking whether we should allow "all the laws but one to go unexecuted and the Government itself go to pieces lest that one be violated."[42] Yet there are some today who argue that the Constitution does not grant the President this power; that he acts at his peril if he elects to order measures that would violate the law. I am not certain that this view is wrong, but I am certain that it is not self-evidently correct, and anyone who says it is displays far more constitutional hubris than the lawyers in this Administration. In any event, the notion that executive officials ought to be prosecuted, held liable in a civil court, or face bar discipline proceedings for venturing to answer such questions is indeed chilling, and misguided.

The third item in the bill of particulars—the reworking of our intelligence and investigatory apparatus in the wake of the failures demonstrated by 9/11—encompasses a range of critiques that have been leveled over the past eight years, but I would like to focus on two. First, the PATRIOT Act, which corrected for some of the problems that hampered our investigative and intelligence agencies prior to 9/11, has often been cited as a favorite example of the Administration's overreaching. But the Administration's support for that measure was hardly outside the constitutional mainstream. Ninety-eight members of this body voted for the first version of that Act, and eighty-nine members voted in favor of its reauthorization. Senators who cast their "aye" votes presumably did so in fidelity to their view of what is both wise as a matter of policy and permissible as a matter of constitutional law.

Second, the Terrorist Surveillance Program has often been cited by the Administration's critics as a prime example of executive lawlessness. Under this program, as I understand it, the NSA intercepted international communications into and out of the United States for which there was probable cause (or at least a reasonable basis) to believe that at least one party to the communication was a member or agent of al Qaeda or associated terrorist organizations. From the outset, this program was apparently briefed to key members of Congress and to the full membership of the Intelligence Committees of both Houses. Later, Congress temporarily approved the surveillance program, thus qualifying it for the "strongest of presumptions" of constitutionality. But even absent that congressional authorization, there are plausible, even if debatable, legal arguments to be made in favor of the program, both statutory and constitutional.[43] Given the obvious importance of the program to vital national security interests, this surely must be a decision on which the President is entitled to the benefit of reasonable legal doubt. Moreover, while many of the details surrounding this program and its authorization are still unknown, what has come to light shows the Justice Department constantly reevaluating its decisions: when serious concerns were

---

[42] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE, CIVIL LIBERTIES IN WARTIME, at 38 (1998) (quoting President Abraham Lincoln, Message to a Special Session of Congress (July 4, 1861)).

[43] *See* United States Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.

raised within the Justice Department about the legality of the program, Attorney General Ashcroft and his subordinates apparently insisted that it be modified to place it on firmer constitutional footing. Again, this is a virtue to be celebrated, not a vice to be criticized.

The fourth and final particular I would like to address is the charge that the Department of Justice has been "politicized" by this Administration. I am unaware of any Administration, at least during my time in Washington, that has escaped this charge. Quite often this charge is baseless political rhetoric. The Attorney General, along with the Department he leads, sits at the right hand of the President. No Cabinet official, and no department or agency, is more essential to the President's exercise of his constitutional duty to "take care that the laws be faithfully executed." The President is entitled to appoint his supporters in the Department, and to have the Department pursue the policies and initiatives that he deems necessary and proper to execute the law. This includes his ability to set the law-enforcement priorities of the Department. Setting such priorities is why we elect Presidents, and they do not "politicize" the Justice Department when they do so.

Nonetheless, the fact that it is *de rigeur* for the opponents of an Administration to level the "politicization" charge does not mean that it can never have any genuine merit. The Department of Justice was brought low by the U.S. Attorneys fiasco, and I, along with many other former Justice Department officials, were deeply saddened to witness the spectacle unfold. Again, I believe that a President is entitled to appoint his supporters to the key positions in Executive Branch departments and agencies, including key positions in the Justice Department. And it is in the very nature of such "at-will" positions that the President is free to replace incumbents, even those who are serving honorably and well, and that he need not provide his reasons for his decision. But if his subordinates do provide reasons to a congressional committee for a decision to replace an incumbent appointee, they are not entitled to dissemble and to mislead, and if there is credible evidence that an incumbent appointee has been removed for a corrupt reason—say, for refusing to corrupt the prosecutorial process with partisan political considerations—that evidence should be investigated and followed wherever it may lead.

In sum, this Administration's record on separation-of-powers must be reviewed and judged in the context of the extraordinarily difficult and perilous times in which it was made. While I readily admit that this Administration, like *all* administrations, has made some errors, the record simply does not support the charge that the Administration has been indifferent to, let alone contemptuous of, the rule of law. To the contrary, I submit that it is the Administration's harshest critics who have advanced a vision of Executive powers that falls outside our constitutional norms and historical traditions. They advance an "internationalist" theory of separation of powers that relies on the political and legal norms of a carefully-selected cadre of western European countries, not a theory rooted in our Constitution, our Nation's history, our Supreme Court's precedent, and the political sentiments of our people. They advance a theory of executive minimalism never accepted by *any* administration, Republican or Democrat,

and one that I strongly suspect, and hope, will not be accepted by the next Administration, be it the McCain or the Obama White House.