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Key Note Address

The United States Constitution and the Ethos of Prosecutorial Independence

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Let me begin by telling you how delighted I was to receive the kind invitation of the Portuguese Prosecutors Association to give the keynote address this morning. This conference deals with issues that are dear to my heart, and I am honored to think that professionals from the Portuguese criminal justice system would feel that I have something to add to their store of knowledge. I have been fortunate in having Doctors Palma and Ribeiro de Almeida as my tutors – they have given me a crash course on the Portuguese constitution and law – and if I have made mistakes in my understanding of your system, it is the fault of the student, not of the teachers. I would also like to express my admiration for the skill of the translators who have the difficult task of translating into Portuguese both contemporary American colloquial language and the archaic language of the American constitution and US Supreme Court decisions.

As I have worked with prosecutors in democracies from around the world, one of the things that I have discovered is that it does not matter what language they speak, whether their skin is brown, white, yellow or some shade in-between, whether they are atheists or believers, worship in a church or wear a burkha, they have the same objective – they want to be able to do the right thing in their cases.

What do I mean by the right thing? They want crime to be investigated effectively. They, and the investigators that they work with, want to follow the leads wherever they take them. They want to charge the guilty (not the innocent!). They want to obtain convictions fairly, and they want judges to impose sentences that fit the crime and the criminal.

In short, they want to do justice and this is also what the public wants.

I have also discovered that, to a greater or lesser degree, all prosecutors in democracies confront the same five inter-related obstacles.

1. Insufficient funding;
2. Inadequate legal tools;
3. Cumbersome rules of criminal procedure that unreasonably delay the disposition of cases;
4. Difficulties in recruiting and retaining the best investigators and lawyers; and, last but not least,
5. Lack of support for prosecutorial independence.

Today I will be talking to you chiefly about how the American system deals with these obstacles, with passing reference to the prosecution systems of England and Wales and Britain's former Latin American colony, the Republic of Guyana.

I will touch upon the first four obstacles but mostly, I will be talking about the all important principle of prosecutorial independence.

The constitutional law scholars in this room today are likely to be familiar with the American system of prosecution, but for those who are not specialists in this field, it requires some explaining. My British colleagues find the American system particularly confusing because, although it is based on English common law, American justice institutions radically departed from the English institutional model after independence. Whereas England built a strong independent police force that also prosecuted, its former colony built a strong, independent prosecution service that also investigated.

America, as you know, is a federation of 50 states and each state has its governor, legislature, and judiciary (including its own Supreme Court). State law is enforced by District Attorneys (known as local prosecutors), who are elected officials that represent counties. New York City is made up of five counties, so it has five District Attorneys.

The most important local prosecutor's office in the United States is the Manhattan DA's Office; it has over 450 lawyers and more than 1000 support staff, including specialist crime investigators. Because of its location in the nation's financial centre, it has very substantial experience of conducting complex cross-border investigations and prosecutions. In a moment, I will be talking about funding issues and you will see how the Manhattan DA's Office has used a new legal tool to substantially self-finance its complex white collar crime and organized crime caseload.

The federal government has separate laws and a slightly different justice system. Federal law is enforced by 93 US Attorneys, each of whom represents a district that may be all or part of a state. For example, in addition to its five District Attorneys, New York City has two US Attorneys. The US Attorneys report to the Attorney General, an important member of the President's cabinet, who heads the Justice Department, a federal agency that combines the functions of a justice and an interior ministry and has over 100,000 employees and a $46 billion annual budget.

Unlike District Attorneys, US Attorneys and the Attorney General are appointed by the President, with the advice and consent of the Senate. This system of appointment was established by the Constitution; it is critical to prosecutorial independence; and I will be talking to you today about how the Bush Administration tried to alter this system as part of a scheme to undermine the independence of the Justice Department.

I have no doubt that every prosecutor in this room knows the extent to which lack of resource ties their hands. I suspect that many of you think that this not an issue for American

prosecutors because the US is such a wealthy country. In fact, American prosecutors also struggle with resource issues. As in any other country, their budgets go up and down depending on the economy. In the mid- 1970's, New York City – like Greece today – was on the verge of bankruptcy but, unlike Greece, it had no white knight. The President (a Republican) would not bail it out because New York City is a Democratic stronghold. Every city agency had to pull in its belt and the Manhattan DA's Office was no exception. Basic supplies – paper, pens, photocopying machines – were rationed and because there was little money to pay for the accommodation and transportation costs of out-of-state witnesses, cases involving serious crimes were dismissed.

Unlike Portuguese prosecutors, American prosecutors, subject to various accountability mechanisms, have unfettered discretion over whom to charge with what crimes and they use this discretion to shape law enforcement policy, including establishing prosecution priorities.

During the fiscal crisis, the Manhattan DA's Office put public safety first and focused on violent crimes – murder, rape, robbery, assault, street drug dealing – to the detriment of financial crime, public corruption and organized crime, which are resource intensive because of their complexity. This changed in the 1990's partly because the City was prospering, which meant that the DA's budget went up; partly because violent crime dropped drastically, which freed up money for other purposes; but largely because the Manhattan DA's Office had a new legal tool – asset forfeiture – which effectively is both a punishment and a tax on criminals. Asset forfeiture gives prosecutors the power to freeze a defendant's assets when an indictment is filed, and seize them post conviction. After paying back victims, prosecutors are allowed to retain a percentage of what they have seized to plough back into more investigations and prosecutions.

Asset forfeiture has enabled American prosecutors to self-finance complex specialist casework to a substantial degree. For example, last year, the Manhattan DA's Office prosecuted two of Europe's major banks, Lloyds Bank and Credit Suisse, for falsifying business records in order to help Iran avoid US sanctions. These prosecutions netted $500 million in fines and forfeiture. The DA's Office took $50 million for itself, which is roughly equivalent to the DA's annual budget. The rest was divided between New York City and New York State.

But even in prosperous times, and even with the self-funding available from asset forfeiture, and even in a wealthy country like the US, there will always be more crime than there are investigators, prosecutors and judges, which brings us to the third obstacle: cumbersome rules of criminal procedure that unreasonably delay the disposition of cases.

Governments, and criminal justice professionals, have a responsibility to the public to ensure that criminal procedure rules are both fair **and efficient**. Indeed, I do not think you can have fairness without efficiency. Fairness means fairness to crime victims and the public as well as those accused of crime. If your methods for achieving fairness consume disproportionate resources to achieve their objective, then fewer cases will be investigated and prosecuted, which is unfair to crime victims and the public. If it takes years for cases to result in indictments

and trials, the only beneficiaries are guilty defendants who will be able to postpone their day of reckoning and may never be punished because witnesses are no longer available or time has faded their memories.

Defense lawyers tend to shout foul whenever prosecutors want to streamline the rules of criminal procedure but another thing that I have learned from working in different systems is that notions of fairness are constantly being updated and fairness can be achieved in different ways.

Let me give you one example. I know that everyone in this room would agree that it is important to have a fair accusation procedure because the consequences of indictment are so serious. The UK, the US and Guyana are all Common Law countries but each has a different accusation system. Guyana's is the least fair because it is the most cumbersome. It dates back to the colonial period when England ruled Guyana. It requires a preliminary hearing before a magistrate where the prosecutor is required to call all of the witnesses that will eventually have to testify at the trial. Defense counsel has the right to cross-examine them. After listening to their testimony, the magistrate decides whether to send the case to the Director of Public Prosecutions who reviews the transcript of the evidence and decides whether there should be an indictment. If an element of the crime has not been proved, the hearing is re-opened for further testimony. At trial, the witnesses have to testify again. This system is one of the reasons that it can take as long as seven years to bring a case to trial, and also helps to explain Guyana's low conviction rate – only 30% for murder, rape, robbery in contrast to over 90% for these crimes in Manhattan.

Meanwhile, England has replaced preliminary hearings with a much simpler system called "sending." When a defendant is charged with a serious offence, the case is sent directly to the court where it will be tried and the prosecution is given 45 days to prepare what is called a trial bundle, which consists of the indictment, the written statements of witnesses, and documentary evidence. The defence can make a motion to dismiss the indictment after reading the trial bundle, and the prosecution has a right to either amend the indictment or obtain additional witness statements. Witnesses only testify when the case is actually tried.

In the US federal system, an FBI agent summarizes the evidence for a Grand Jury, which hands down an indictment based on hearsay.

When I conducted the SFO Review, I interviewed the Chief Justice of the Court of Appeal of England and Wales, Sir Igor Judge. One of the things we discussed was the English system of disclosure, the procedure whereby the prosecutor notifies the defence of any information that tends to exonerate the defendant. Compared to the US, the English system is bureaucratic and expensive. The Lord Chief Justice's conclusion was that you don't need a Rolls Royce to get you from London to Birmingham. You can make the same trip just as safely in a Mini provided you've got a good driver.

Which bring us to people. When I conducted the SFO Review, I discovered that the SFO was struggling because it had human capital issues. Complex specialist case work requires experienced and well trained investigators and lawyers of high integrity. We all know that public sector lawyers cannot earn as much as private sector lawyers. To attract the best professionals, prosecution agencies must offer something more than money. In the US, "something more" is the great discretion given to prosecutors; the knowledge that their only job is to do what is right in each case; and the public respect and recognition that prosecutors receive when they do their job well.

But all of this "something more" cannot exist unless a society respects and supports the principle of prosecutorial independence. Prosecutorial independence is not only the foundation stone of an effective prosecution system. It is also the foundation of rule of law, which is the ultimate source of fairness in a society. Because prosecutorial independence is so important, I will spend the rest of the time allotted to me this morning discussing this issue.

Prosecutorial independence is both difficult to establish and difficult to maintain. It is under greatest threat when civil society is weak, justice institutions fragile, when countries are experiencing or emerging from security crises, when a single political party is dominant, when a country is poor, jobs are few, out-migration high, when a free media is suppressed, or when prosecutors target the top tier of economic or organized crime and there is a nexus to members of the political elite.

Arguably, prosecutors in the United States have more power, influence, respect and independence than any other country in the world. But even in the United States, their independence cannot be taken for granted. During the Bush Administration, there was a systematic attempt to undermine the independence of the Justice Department.

The actions of the Bush Administration – and how they were resisted – are an important chapter in American history. This chapter is not as widely known as it should be – either inside or outside the US – and yet it is an important story, which bears telling and re-telling.

Every democracy has its own ways of insulating prosecutors from political pressure. For those accustomed to the Portuguese model, the American system may seem peculiar. It derives from the US Constitution, ratified in 1789. The US Constitution is the oldest written constitution in use today and also the shortest – it has only 4543 words. The best way to understand it is as a collection of beliefs and principles that were wildly radical in their day but are now so deeply engrained in American institutions and the national character that Americans act out these beliefs and principles, often without being aware of them.

The foundation belief is that any person vested with power is apt to abuse it, which means that a democracy always has the potential to degenerate into authoritarianism. To prevent this, the Constitution used the principle of separation of powers and checks and balances, first articulated by the French political philosopher Montesquieu in the mid 18th century.

In the US, there are three branches of government – a bi-cameral legislature consisting of the Senate and House of Representatives (together called the Congress), the executive headed by the President, and the judiciary headed by the Supreme Court. Each branch of government has separate but overlapping powers so that power checks power to prevent abuse of power.

The Constitution delegates to the President the power to "take Care that the Laws be faithfully executed." As a result, federal prosecutors are part of the executive branch of government. This is very different from the primary European model where prosecutors are a branch of an autonomous judiciary, which may cause you to wonder, "How can federal prosecutors be independent if they are appointed members of the executive?"

The answer lies partly in the appointment process, which I mentioned earlier. To prevent the President from stocking the Justice Department with unqualified political cronies who can be bent to his will, the Constitution gives the President and Congress **shared** responsibility for appointing the Attorney General, his executive staff, and the US Attorneys. Under what is called the "advice and consent" clause of the Constitution, the Senate must confirm the President's appointments. Although the Senate tends to defer to the President, it is not a rubber stamp. It has a standing subcommittee called the Senate Judiciary Committee, composed of 19 Senators from both political parties and staffed by lawyers. The Senate Judiciary Committee, which is an old and very powerful institution, holds hearings on the qualifications of the President's candidates and related matters. The Senate Judiciary Committee can compel witnesses to testify under oath and grant immunity from prosecution, and also recommend prosecution for contempt, perjury, or other crimes.

Later, I will explain the role of the Senate Judiciary Committee in blocking the Bush Administration's efforts to undermine prosecutorial independence.

Another important constitutional principle is that the United States is a government of law, not of men. When federal prosecutors are appointed, they take an oath office in which they pledge "to support and defend" and "bear true faith and allegiance" to the Constitution. This means that, even though prosecutors are part of the executive and appointed by the President, their first duty is to the law, not to the President.

A third important constitutional principal is that the purpose of government is to serve the people, not vice versa. The US government has a civil service but prosecutors are not part of it. Instead, they are called public servants, which means literally what it says – their duty is to serve the public. Public service is a high calling in the US, which is one of the reasons that good lawyers with integrity become federal prosecutors. Men and women of integrity want to do what is right and the institutional culture of the federal prosecution encourages them to do this. From the day that they join, it is drummed into their heads that, in the words of the US Supreme Court:

> *"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all."* US v Berger, 295 U. S. 78 (1935).

A fourth important constitutional principle is that a government can only serve its people if it secures their liberties. Thus, the preamble to the Constitution states,

> *"We the People of the US, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and **secure the Blessings of Liberty to ourselves and our Posterity** do ordain and establish this Constitution of the United States of America."*

Americans take the "Blessings of Liberty" very seriously, especially liberty of conscience, which is enshrined in the First Amendment.

> *"Congress **shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

This stringent prohibition of government interference with liberty of conscience has resulted in exceptional freedom for the media, which in the US acts as a Fourth Branch of government. The media played a vital role in exposing the White House attack on prosecutorial independence and prodding Congress into action.

When George W. Bush began his first term of office in January 2001, he understandably chose as his Attorney General a person whose political ideology was akin to his own. John Ashcroft, who headed the Justice Department from 2001 to 2004, was a conservative Republican from the southern state of Missouri, where he had served as State Attorney General, Governor and US Senator. Like the President, he was an evangelical Christian who opposed abortion and favoured the death penalty. He was also his own man.

George W.Bush's first term got off to a rocky start. The 2000 election was so close that for the first time in American history, the US Supreme Court effectively decided who would become president. Many Democratic voters were angry and critical of the Supreme Court decision. If 9/11 had not happened, it is by no means certain that George W. Bush would have been elected to a second term. But the mass terrorism attacks on US soil created an opportunity for the President to consolidate power. Under the Constitution, the President is commander in chief of the military. Bush used this role to arrogate to himself the authority to interpret the constitutionality of laws enacted by Congress and to ignore laws passed by Congress if he saw fit. In other words, he took for himself powers that the Constitution gives to the Supreme Court and to Congress. One of the institutions that blocked his extreme theories of executive power was the Justice Department under John Ashcroft.

When Ashcroft resigned at the end of Bush's first four year term, the President replaced him with someone more pliant—his counsel, Alberto Gonzales. (A counsel is a chief legal advisor.) Gonzales owed his career to the President. He had served as Bush's counsel when the President was Governor of Texas and Bush had rewarded his loyalty by appointing him to the Texas Supreme Court. When Bush went to Washington, Gonzales followed.

The Justice Department has 39 subdivisions but for the purpose of this story, only four are relevant.

The Deputy Attorney General. The most important thing to know about the Deputy Attorney General is that he is second in command and becomes Acting Attorney General if the Attorney General is incapacitated.

The Office of Legal Policy. This unit provides authoritative advice to the White House on the legality of executive actions. Its advice is meant to be balanced, candid, independent and principled and the product of a careful and deliberate process that includes rigorous peer review. It is rare for Office of Legal Policy opinions to be withdrawn.

When this story begins, the Office of Legal Policy was headed by Jay Bybee, a conservative law school professor, who had served in the government of George Bush Sr., but real power lay with Bybee's subordinate, a mid-level staff member named John Yoo. Although Yoo's chain of command was to Bybee, the Deputy Attorney General, and the Attorney General, he bypassed his superiors and worked directly with the White House. It was John Yoo who, in 2002, produced the legal justifications used by the White House to legitimize torture.

Because John Yoo's actions lie at the heart of this story, it is natural to wonder what kind of man was he and what kind of a lawyer? He was the son of immigrants – his parents had been born in South Korea – but this description applies to tens of millions of Americans. He had a brilliant academic record – he graduated at the top of his class from two of America's best universities – Harvard and Yale – and had clerked with the US Supreme Court after leaving law school.

I do not know John Yoo personally and so hesitate to draw any firm conclusions. Perhaps he was seduced by power, perhaps intimidated but, after reading some of his writings, it also occurred to me that Yoo was as much a polemicist as a lawyer. You cannot be a polemicist without believing in your own rightness, which means that you will lack the two most important qualities for a prosecutor – a sense of humility that will temper the exercise of a prosecutor's great power and an open-mind that enables you to see all sides of an issue. These qualities are essential to impartiality and prosecutors cannot be independent without being impartial.

Office of Intelligence Policy and Review. This unit handles all Justice Department requests for electronic surveillance warrants under the Foreign Intelligence Surveillance Act (FISA). Congress enacted this statute in 1978 to correct abuses by the FBI and intelligence services under Richard Nixon (President, 1969-1974) who, in the name of national security, had

authorized unlawful wiretapping of Civil Rights leaders, opponents of the Vietnam War, and political rivals.

FISA created a special court to provide independent judicial review of wiretap warrants. (A warrant is an authorization to the police to conduct a wiretap.) Its specialist judges are appointed on a rotating basis by the Chief Justice of the US Supreme Court. Conducting a wiretap without statutory authorization is a crime punishable by up to five years in prison. The Federal Bureau of Investigation (FBI). This is the investigative arm of the Justice Department whose responsibilities include preparing affidavits of fact in support of FISA warrant applications. Since 2001, it director has been Robert Mueller III, a lawyer with a post-graduate degree in international relations who fought in the Vietnam War as a marine, winning five medals. Before becoming director, he had been a US Attorney and a partner in a major law firm. Senate confirmation hearings for top Justice Department positions can be contentious affairs. The vote for Ashcroft, for example, split along party lines. In Mueller's case, the Senate vote was unanimous.

The US Attorneys. Because the US is a vast and diverse country, with a long tradition of local government, the 93 US Attorneys have considerable discretion over how to implement policies and priorities set by the Justice Department as well as discretion in deciding which cases to investigate and who to charge. Justice Department rules require that US Attorneys make decisions impartially without reference to improper considerations such as a target's race, sex, religion, social, business or political connections or the possible impact of a decision on a prosecutor's professional or personal circumstances.

A frequent media comment after 9/11 was that the terrorist attacks changed America forever. I disagree with this analysis. What 9/11 proved was the foresight and wisdom of America's founding fathers – the men who wrote the Constitution.

George W. Bush's administration is often described as an Imperial Presidency. A more apt term would be the Imperial Vice-Presidency. The Constitution gives the Vice President a narrow role so what the Vice-President actually does depends on the man and the President. Dick Cheney, Bush's Vice-President, exercised exceptional power. In John Ashcroft's words, when Cheney "talked, everybody would listen… He compelled everyone to think carefully about whatever he mentioned." Cheney's right hand was his equally intimidating counsel, David Addington. According to John Yoo, it was Addington who first advocated that the President could use his constitutional power as commander in chief of the military to authorise torture even if this violated US law and the Geneva Convention.

After 9/11, Dick Cheney, assisted by Addington, took control of national security decisions. They created a "War Council"; this was a small and like-minded group of government lawyers who advised on the legality of executive actions. It included the President's counsel, Alberto Gonzalez, and John Yoo, but not the Attorney General.

In 2002, Cheney's War Council established a top-secret program – later called the President's Surveillance Program – that authorised, without court orders, electronic surveillance of communications between people based in the US and suspected foreign terrorists. This was exactly the ill that Congress had tried to cure when it enacted FISA. I remain puzzled about why the Bush Administration decided to bypass FISA, whose mechanisms are flexible, or why, if circumstances showed that it needed greater flexibility, the White House did not ask Congress to amend the statute since Congress, at this point in time, was bending over backwards to provide the President with the legal tools required to protect the country against another terrorist attack.

John Yoo provided the White House War Council with a Justice Department opinion that "legalised" this unlawful program. He was able to avoid rigorous peer review of his written advice because he was the only person in the Office of Legal Counsel that was given a security clearance for the program. When Ashcroft sought security clearances for his Deputy Attorney General and his Chief of Staff, he was turned down by the White House. Later, Ashcroft would say that the White House had closed the circle so tight, he could not get the advice he needed.

I once asked a CIA station chief, "What changed between the Gulf War and the Iraq War that justified the US decision to depose Saddam Hussain?" He replied, "Nothing changed on the ground. It was the decision makers who changed."

In January 2004, Ashcroft obtained a new Deputy Attorney General. His name was James Comey and he was a career prosecutor who had previously been the US Attorney for the Southern District of New York. Comey was highly regarded by Justice Department professionals. One young prosecutor of my acquaintance, who had worked for Comey in New York, described him as having Arete, a Greek word meaning a person with the quality of virtue, goodness, and excellence. In Comey, Ashcroft found a strong right arm.

In the Office of Legal Counsel, there were also new faces. Jay Bybee had left to become a judge. The White House wanted Yoo to take Bybee's place but Ashcroft refused. Instead, Bybee was replaced by Jack Goldsmith, a University of Chicago Law School professor, and when Yoo resigned, his shoes were filled by a junior Office of Legal Counsel lawyer named Patrick Philbin.

Although Goldsmith was a friend of Yoo's, with an almost identical curriculum vitae, he was cut from a different cloth.

On Goldsmith's first day on the job, he was thrown in at the deep end. The White House wanted to know whether the Fourth Geneva Convention covered insurgents and terrorists as well as civilians in Iraq. Goldsmith concluded that it did. As he and Philbin were en route to the White House to give the War Council his analysis, Philbin warned him: *"They're going to be really mad. They're not going to understand our decision. They've never been told no."*

With Comey and Goldsmith in situ, things began to change. The White House finally agreed to give them security clearances for the President's Surveillance Program. When they reviewed Yoo's legal advice, they found that Yoo had made serious– and basic – errors of fact and law. For example, Yoo had ignored the leading Supreme Court decision on the extent of a President's war time powers.

During the Korean War in the early 1950's, a national strike of steel workers had threatened to close down the steel industry. Relying on his power as commander in chief of the military, President Truman issued an executive order nationalizing the steel industry. The Supreme Court voided the executive order because it violated the separation of powers principle. President Truman could only nationalize private property if Congress had enacted a law enabling him to do so, which it had not.

One of the Supreme Court justices hearing this case was Robert Jackson, a lawyer of near mythic status who had served as Attorney General during the Second World War and had become the first US prosecutor during the Nuremberg war crime trials of Nazi leaders. Justice Jackson wrote,

> *That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety... The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies -- such as wages or stabilization -- and lose sight of enduring consequences upon the balanced power structure of our Republic.* Youngstown Sheet and Tube Co. v Sawyer, 343 U. S. 579 (1952)

On March 4 2004, Comey met with the Attorney General to explain his and Goldsmith's concerns about the legality of the President's Surveillance Program. Ashcroft agreed that the Justice Department could not continue to authorize the program in its current form. That afternoon, the Attorney General was rushed to hospital with a life threatening attack of severe pancreatitis. It was up to Comey, as Acting Attorney General, to inform the White House of the Justice Department's decision. Over the course of the next week, there were numerous meetings with the War Council. This included a showdown with Vice-President Cheney in which Comey was told that his actions could lead to the deaths of tens of thousands of innocent people. (This was all happening the week of the Madrid training bombings.) Comey would later say that the pressure was so intense, it felt like he was being squeezed like a grape.

When Comey refused to bend, President Bush decided to go over his head. He called the intensive care unit where the Attorney General was recovering from surgery. The Attorney General's wife told the President her husband was too ill to speak. The President said it was a matter of urgent national security, and that he was sending his Counsel, Alberto Gonzalez, and his chief of staff, Andrew Card, to the hospital. Mrs. Ashcroft called the Attorney General's

chief of staff, who called Comey. Comey, Goldsmith and Philbin raced to the hospital. They arrived in just enough time to brief the Attorney General. Later, Goldsmith would give the following account of the Attorney General's reaction when Gonzales presented him with documents to sign.

"All of a sudden, energy and color came into his face, and he said that he didn't appreciate them coming to visit him under those circumstances, that he had concerns about the matter they were asking about and that, in any event, he wasn't the attorney general at the moment; Jim Comey was. He actually gave a two-minute speech, and I was sure at the end of it he was going to die. It was the most amazing scene I've ever witnessed… Mrs. Ashcroft, who obviously couldn't believe what she saw happening to her sick husband, looked at Gonzales and Card as they walked out of the room and stuck her tongue out at them. She had no idea what we were discussing, but this sweet-looking woman sticking out her tongue was the ultimate expression of disapproval. It captured the feeling in the room perfectly."

FBI Director Mueller's log for the day shows the following three entries.

Wednesday, 3/10/04:

@1920: Called by DAG while at restaurant with wife and daughter. He is at AG's hospital with Goldsmith and Philbin. Tells me Card and J. Gonzales are on the way to hospital to see the AG, but that AG is in no condition to see them, much less make decision to authorize continuation of the program. Asks me to come to AG's hospital to witness condition of AG.

@1940: At hospital. Card and J. Gonzales have come and gone. Comey tells me that they saw the AG and were told by the AG that he was in no condition to decide issues, and that Comey was the Acting AG. All matters were to be taken to him, but that he supported the Acting AG's position. The AG then reviewed for them the legal concerns relating to the program. The AG also told them that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the WH. Comey asked me to meet briefly with the AG to see his condition. He also asked that I inform the detail that no visitors, other than family, were to be allowed to see the AG without my consent. (I so informed the detail.)

H:\RSM_Docs\Miscellaneous\Program.wpd
March 12, 2004 (4:08PM)

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@2010: Saw AG. Janet Ashcroft in the room. AG in chair, is feeble, barely articulate, clearly stressed.

What impressed me most about Mueller's log was last two sentences of the second entry. Had the President himself gone to the hospital, the FBI agents guarding the Attorney General would have stopped him from speaking to Ashcroft without obtaining Mueller's consent, who would have consulted first with the Acting Attorney General.

The next day, Gonzales told the Justice Department that the White House intended to continue the program without the Justice Department's authorization. Comey, Goldsmith and Mueller prepared resignation letters.

Comey wrote:

> *“Over the last two weeks . . . I and the Department of Justice have been asked to be part of something that is fundamentally wrong. As we have struggled over these last days to do the right thing, I have never been prouder of the Department of Justice or of the Attorney General. Sadly, although I believe this has been one of the institutions finest hours, we have been unable to right that wrong. . . . Therefore, with a heavy heart and undiminished love of my country and my Department, I resign as Deputy Attorney General of the United States, effective immediately."*

FBI Director Mueller’s handwritten draft stated in part:

> *"[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President ... and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program. Further, should the President order the continuation of the FBI's participation in the program, and in the absence of further legal advice from the AG, I would be constrained to resign as Director of the FBI."*

The notes for Goldsmith’s letter (initially drafted the night of the hospital confrontation) cited as his reasons for resigning: the "shoddiness" of the prior Office of Legal Counsel legal review; the "over-secrecy" of the President’s Surveillance Program, and the "shameful" incident at the hospital.

Over the course of the next two days, other senior Justice Department lawyers prepared to hand in their resignations. The Attorney General’s chief of staff asked Comey not to resign until Ashcroft was better because he was sure that Ashcroft would want to resign with him. According to one account, the General Counsels of the CIA and National Security Agency also planned to resign.

Comey was not sure that the President understood the seriousness of the situation. He told one of his former Justice Department colleagues, now working for Condoleezza Rice, that he needed to speak to the President directly. Rice, who also had been cut out of the loop by the Vice President, told the President, Comey is "a reasonable guy. You really need to make sure that you are hearing these folks out."

The following day, the President did speak to Comey, and after him, to Mueller. When the President told Comey, "I decide what the law is for the executive branch," Comey replied, “That’s absolutely true, sir, you do. But I decide what the Department of Justice can certify to and can't certify to, and despite my absolute best efforts, I simply cannot in the circumstances.”

In Mueller’s note of his conversation with the President, he wrote that he explained to the President that he had an "independent obligation to the FBI and to DOJ to assure the legality of actions we undertook, and that a presidential order alone could not do that."

The President backed down, but only temporarily. He agreed to make changes to the program that would align it with the Justice Department's new legal analysis. But when Goldsmith, with Philbin's support, insisted on withdrawing Yoo's torture memos, David Addington told Philbin that he would block his promotion, and, indeed, this happened. Goldsmith resigned after nine months at the Justice Department. Eventually, Ashcroft, Philbin and Comey also left the Justice Department.

In the United States, it is difficult for the government to keep secrets from the people because there is a long tradition of whistle blowers, who are often motivated by righteous indignation.

Thomas Tamm was a career prosecutor in the Justice Department, whose father and grandfather had been senior FBI agents. In 2003-4, Tamm was working in the Office of Intelligence Policy and Review. As part of his job, he reviewed FBI applications to obtain FISA warrants for electronic surveillance. He realized that some of the information that he was presenting to the FISA court had been developed by an illegal program whose details he did not know. This meant that he was deceiving a judge – one of the worst professional offences that a prosecutor can commit. He contacted a reporter from the New York Times.

In December 2005, the New York Times broke the story, forcing the President to disclose the illegal program's existence and work with Congress to amend the FISA statute. The story later received the Pulitzer Prize, America's most prestigious journalism award.

But it was not until 2007, when the Senate Judiciary Committee opened hearings into the White House efforts to politicize the Justice Department, that the public learned of the hospital confrontation. One of the witnesses called was James Comey. When Senator Schumer from New York asked him what had happened, Comey replied:

"I've actually thought quite a bit over the last three years about how I would answer that question if it was ever asked, because I assumed that at some point I would have to testify about it."

The Senate Judiciary Committee hearings had been triggered by another Justice Department scandal known as the "US Attorney Purge. " Again, the media played a vital role in forcing Congress into action when in December 2007, local newspapers around the country began reporting that Alberto Gonzales had fired seven well respected US Attorneys.

When Alberto Gonzales took over as Attorney General in 2005, he broke with the Justice Department's long tradition of hiring, retaining and promoting the best people regardless of political persuasion. He promoted a change in the law to permit the White House to appoint interim US Attorneys on an indefinite basis without obtaining the advice and consent of the Senate. The law (which the Senate would rescind) was passed un-noticed, and without debate, because it had been squirreled away in a bigger legislative package. He began a cleansing program to replace US Attorneys that had been confirmed by the Senate with interim US Attorneys that were "loyal Bushies."

Some of the fired US Attorneys had been working on sensitive public corruption investigations. For example, Carol Lam, the US Attorney for the Southern District of California, was about to obtain the indictment of the number three person in the CIA for allegedly receiving kickbacks in exchange for giving out construction contracts. Paul Charlton, the US Attorney for Arizona was fired for insubordination because he wanted to speak to the Attorney General himself about a questionable order to seek the death penalty in a case where the evidence was weak and the government had refused to pay the costs of exhuming the body of the murder victim to obtain DNA samples that might have definitely implicated or exonerated the defendant.

The Senate Judiciary Committee called the Attorney General to testify. Afterwards Senator Schumer said,

> "*The testimony he gave was hard to understand, incredible in a sense -- to say that he was not involved in discussions and not involved in deliberations, when his three top deputies said he was and the documentary evidence supported that. It is the decision of Mr. Gonzales as to whether he stays or goes. But it is hard to see how the Department of Justice can function and perform its important duties with Mr. Gonzales remaining where he is…."*

By July of 2007, Gonzales and all of his top aides had resigned. Using its advice and consent powers, the Senate forced the President to appoint a credible Attorney General, Michael Mukasey, a former US Attorney and Federal Judge who had ruled against the Bush Administration when it had argued that it could detain Jose Padilla, an American citizen who was a terrorist suspect, indefinitely without trial and without giving him access to a lawyer, in violation of the 6th Amendment to the Constitution.

In my telling of this story today, I would not want you to think that this is the first time that the Justice Department has lost its balance. Nor will it be the last. There will always be attempts to subvert prosecutorial independence, and, just as certainly, there will always be men and women who will work to restore it.

It would be natural for participants in this conference to compare their prosecution systems with the American model and to ask, "Could I do what Jack Goldsmith and James Comey did? Would I be supported by my country's laws, by my boss, by the media, by the legal profession, by the courts, by opposition political parties, by my parliament? What would happen to me if I lost my job? What would happen to my family? Could they be hurt? Could I be injured or even worse?"

I do not have answers to those questions. I do know that it takes generations to build a robust and effective prosecution system and that this conference is an important step in that process.