Remarks of U.S. Senator Sheldon Whitehouse
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Ladies and Gentlemen, I have been lots of different kinds of lawyer in my life, but nothing quite matches standing up in court to say: "Your Honor, I represent the United States of America."

As United States Attorneys, we all saw first-hand the devotion of the men and women of the Department to their mission, and how deeply ingrained are Justice Sutherland's words: that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." We each experienced the esprit de corps that came with this great responsibility, a memory AUSAs and former U.S. Attorneys of all denominations carry for their lifetime.

And we shared deep frustration and dismay last year, as each day brought a new story of politics infecting the Department at its highest levels; of the Department's protective armature of longstanding norms, policies, and procedures being disassembled; and of incompetence so stunning, it made you wince.

This evening I will touch on what the new leadership at the Department has done to right the ship; the newest Inspector General report; and the hard work that lies ahead.

I remember when I took my oath as Attorney General of little Rhode Island, how strongly I felt the responsibility and honor of that office. I don't think Attorney General Gonzales ever felt that way; I think this simple failure, to respect the institution he served, set him apart from his predecessors – Democratic and Republican; and explains his disastrous disregard for time-honored traditions and practices of the Department.

What do I mean by "time-honored traditions and practices"?

I mean the unwritten rule that U.S. Attorneys were expected to be homegrown – so that they knew and understood and were accountable to their Districts, and not just envoys of a distant Department, with their allegiance all to its faraway command; I mean

the statutory requirement that U.S. Attorneys must be put up for Senate confirmation, to trim away ideological extremes, and raise the bar of the candidates' credentials.

I mean the restriction of communications between the White House and the Department on case-specific matters, to erect a firewall between our great institution and its likeliest vector of improper influence.

I mean the notion that career attorneys are hired, fired, and work free from partisan influence; and of course that U.S. Attorneys are free to do their important work above politics.

As the Inspector General report notes:

> Once U.S. Attorneys assume office, they are obligated to put political considerations aside when making prosecutive judgments on individual cases. Inevitably, their decisions may displease the political officials who initially supported them. If a U.S. Attorney must maintain the confidence of home-state political

> officials to avoid removal, regardless of the merits of the U.S. Attorney's prosecutorial decisions, respect for the Department of Justice's independence and integrity will be severely damaged and every U.S. Attorney's prosecutorial decisions will be suspect.

And then there were memoranda approving interrogation methods long understood to be illegal, the tainting of the famous Honors Program, and the disarray of the Office of Legal Counsel that led to that late night visit to Attorney General Ashcroft's hospital room – a sorry litany.

That is the situation that Attorney General Mukasey inherited. How has the recovery proceeded?

First, Attorney General Mukasey has overhauled almost the entire senior leadership at the Department. He has replaced a disgraced group with strong replacements – people such as Deputy Attorney General Mark Filip, who is highly qualified and, just as important, who feels in his

heart and in his gut the vital governmental role of this great institution.

Second, I give Attorney General Mukasey great credit for sharply restricting the White House and Department officials who can discuss ongoing cases and investigations. When I was a U.S. Attorney, it was only four White House officials and three Department officials. The Bush Administration broke down this firewall to permit up to 417 White House officials, including Karl Rove and other political advisers, to have case-specific conversations with up to 42 Department officials, and then broke it down further to include Vice President Cheney's Counsel David Addington. Attorney General Mukasey, true to his word at his confirmation hearing, rebuilt that firewall – to permit only the Attorney General, Deputy Attorney General, White House Counsel and Deputy White House Counsel to have initial contacts regarding criminal cases. This is a healthy and wise protection.

But much remains undone.

I am still concerned about the state of the Office of Legal Counsel. As you know, OLC's authority to determine the legality of Executive Branch actions gives it tremendous power – particularly since its decisions are viewed to have the force of law; since the office is subject to little (if any) oversight; since there is limited transparency, particularly into its classified, secret opinions; and since it is insulated from the healthy and illuminating play of separated powers of government.

As former OLC head Jack Goldsmith noted in his book "The Terror Presidency," generations of OLC attorneys understood that great power and, in his words, "developed powerful cultural norms about the importance of providing the President with detached, apolitical legal advice, as if OLC were an independent court inside the executive branch."

Thanks in part to Goldsmith but also from the OLC's own deeds, we now know the degree to which those norms were trampled. One example is a

2002 OLC memo drafted by attorney John Yoo, which defines torture as follows:

> *Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.*

As lawyers, you might inquire: Where does this definition come from? What was the source of the "organ failure, impairment of bodily function, or even death" language? I direct you to 42 U.S.C. § 1395w-22, a Medicare reimbursement statute. Go figure the relevance of that.

This definition was then used to approve a coercive interrogation technique now regrettably familiar to us all, "water-boarding." Water-boarding had a long and sordid history; used by the Spanish Inquisition, by the Khmer Rouge in Cambodia, by the French in Algeria, by the Japanese in World War II, and by military dictators of Latin America. Senator John McCain, who was held captive for more than five years by the North Vietnamese, has said of water-

boarding: "It is not a complicated procedure. It is torture."

The United States government long agreed. Americans, on behalf of military tribunals, initiated war crimes prosecutions against Japanese soldiers who water-boarded American aviators in World War II, charging them with torture.

The United States government itself brought a civil rights prosecution against a Texas sheriff who water-boarded prisoners. The indictment in United States v. Lee charged that the defendants conspired to "subject prisoners to a suffocating 'water torture' ordeal in order to coerce confessions." The sheriff and his deputies were convicted by a federal jury and the United States Court of Appeals for the Fifth Circuit affirmed. At sentencing, the presiding judge admonished the former sheriff that "[t]he operation down there would embarrass the dictator of a primitive country."

The Fifth Circuit decision is reported at 744 F.2d 1124. A Westlaw or Lexis query for the term "water torture" brings it up. The technique is called

"torture" 12 times in the opinion. The Department itself brought the charges. The prosecuting Assistant U.S. Attorney is still in the Department. How is it that the Office of Legal Counsel, the elite legal conscience of the Department of Justice, completely missed this case? It is never even mentioned. They found a faraway Medicare reimbursement statute, and missed their own prosecution? Is this an abject failure of legal research and analysis, or something much, much worse?

The torture memo follows a disquieting pattern of secret OLC opinions. As a member of the Senate Intelligence Committee, I could review secret OLC opinions related to the warrantless wiretapping program. Three legal theories contained in those memos so surprised me that I fought to have them declassified and brought to light. Those theories are, as declassified by the Director of National Intelligence:

1) An executive order cannot limit a President. There is no constitutional requirement for a President to issue a new executive order

whenever he wishes to depart from the terms of a previous executive order. Rather than violate an executive order, the President has instead modified or waived it;

2) The President, exercising his constitutional authority under Article II, can determine whether an action is a lawful exercise of the President's authority under Article II; and

3) The Department of Justice is bound by the President's legal determinations.

We are all lawyers here. I do not need to dwell on these propositions. Suffice it simply to say that the first proposition -- that executive compliance with executive orders is optional -- turns the Federal Register into a screen of falsehood, behind which lawless programs can operate in secret, even though, as we all remember, the Supreme Court has held since 1871 that a valid executive order has the force and effect of law.

Contrast the second proposition -- that Article II gives the President the authority to define his Article

II powers -- with the famous language of Marbury v. Madison, that "it is emphatically the province and duty of the Judicial Department to say what the law is."

And apply the third proposition -- that the President tells the Department of Justice what the law is, and not vice versa (consistent with President Bush's own statement, recently reported in the *Washington Post*, that "I decide what the law is for the Executive branch") -- to Richard Nixon's assertion: "If the President does it, that means it is not illegal."

Let me illustrate just one, serious real-world application of these theories. The FISA Act had no statutory limitation – no law of Congress and consequently no oversight by the courts – on the government's ability to spy on Americans traveling abroad, whenever it wanted, for whatever purpose. The only limitation was Executive Order 12333, which requires the Attorney General to determine that an American target is acting as an agent of a foreign power.

Thus, under the OLC Theory of Executive Orders, a soldier serving in Iraq or Afghanistan, or an American visiting family abroad, or a business traveler overseas, could be wiretapped without oversight or limitation, notwithstanding the Executive Order purporting to state the contrary.

I can reassure you that the FISA reform we passed now requires a court to find probable cause before any American overseas may be targeted for intelligence surveillance.

How did we get to this point? Again, I quote Jack Goldsmith, who wrote that Gonzales and Cheney's counsel Addington expressed the view that "OLC's legal reasoning was irrelevant to the authority of an OLC opinion. All that mattered, they believed, was OLC's bottom line approval."

The Office of Professional Responsibility has now opened an investigation into OLC's legal work. OPR doesn't customarily make its findings public, but I hope that here OPR produces a public report that takes a cold, hard look into an office that became a hothouse of legal ideology. Attorney

General Mukasey has taken little visible interest in the problems at OLC. He is clearly determined to do no evil, but his approach to looking back at this is to see no evil.

I have equally mixed views about the Attorney General's response to the recent Inspector General report on the U.S. Attorney firings and the White House refusal to fully cooperate with the OIG/OPR investigation. It is probably good that he appointed a special prosecutor. But it was not necessary that he tolerate non-cooperation from the White House in the first place. The face-off over the warrantless wiretapping program between the White House and the Ashcroft DOJ has been widely reported. Attorney General Ashcroft and Deputy Attorney General Comey and FBI Director Mueller then held firm, and the White House blinked. In this case, it appears that when the White House said no, the Attorney General blinked. I hope to find out more.

Perhaps the special prosecutor will be the long way around to the same point. But will she have the authority to work with the Inspector General and OPR, or to share grand jury evidence with them, or

to disclose her findings outside a criminal prosecution? Is this appointment just a device to shovel the politically damaging parts of this investigation all behind the secrecy of grand jury rule 6(e), at least through November? Again, I hope to find out more.

But we should be supremely conscious of this: a trip by the Attorney General up Pennsylvania Avenue and one tough conversation with the President, and the authority of the Department of Justice to investigate wherever relevant facts may lead – even into the White House – could have been vindicated.

Let me conclude by saying this: During our Senate Judiciary Committee investigation into the U.S. Attorney firings, I was often reminded of Attorney General Jackson's 1940 speech to his assembled United States Attorneys, where he said:

> *"The prosecutor has more control over life, liberty, and reputation than any other person in America . . . While the prosecutor at his best is*

> *one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."*

Jackson's warning rings through the decades: the Department's power is the most solemn and terrible civil power held by government – and it must be used with vigor, but also with wisdom, and restraint, and always to one and only one purpose, consistent with the Department's motto – to "prosecute on behalf of Justice."

I was also comforted by calls and letters from former U.S. Attorneys and Assistant U.S. Attorneys, which glowed with loyalty and affection for our great Department, and with a spirit of common cause, among Democrats and Republicans alike, to protect its independence and its mission. That was deeply reassuring. It convinces me that under the often shabby and divisive politics of these days, there are still currents that run true and clear, and still principles that withstand partisanship.

Thank you.