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Assistant Attorney General

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MEMORANDUM TO THE ATTORNEY GENERAL

Re: The Role of the Attorney General in the Government of the United States

At your request, I have attempted to synthesize the many facets of the relationship in our constitutional government between the Attorney General and the President and to describe in a few words the responsibilities of the Attorney General to the Constitution and laws of the United States as well as to the Executive Branch and the President. The following few paragraphs represent my effort to distill a very complex subject into its essence.

The responsibilities of the Attorney General are unique within the Executive Branch. While he is a policy adviser and servant of the President like other cabinet members, his peculiar role as a lawyer - the lawyer for the United States - adds a significant additional dimension to his relationship to the President, the balance of the government and to its citizens. While the Attorney General functions as the lawyer for the President and the Executive Branch, he is also charged with representing the government of the United States as a whole, including the Legislative Branch. Furthermore, he is subject to the ethical standards of his profession and he is an officer of the Supreme Court. Finally, he is the Administration official with the paramount responsibility for guiding the President in the performance of the President's foremost duty under the Constitution - to take care that the laws be faithfully executed.

The role of the Attorney General is complicated by the structure of our government into separated powers and by the system of checks on each branch by the other two. It is further complicated by the tendency of each branch to attempt to enlarge its powers at the expense of the other two branches and the Attorney General's responsibility to act as a restraining influence within the Executive Branch.

Generally, our system of separated powers contemplates that policy decisions are vested in Congress. Execution of these frequently broad policy choices is a responsibility lodged with the Executive Branch. The adjudication of disputes and the interpretation of laws is left to the Judiciary. It is a function of human nature and an outgrowth of the flexible lines which divide the separated powers, that each branch tends to encroach upon the powers and functions of others. The occupants of each sphere, in their desire to achieve objectives which they may regard as proper and necessary, will occasionally reach out to perform all of those acts necessary to attain a goal, even though much of the power necessary to do so may be lodged elsewhere.

While some such tension between the branches is salutary and some blending of power is permissible, excessive encroachments, overreaching, and insufficient regard for the limits of power will generate strong resistance and reaction by the branches of government whose responsibilities are being invaded as well as by the citizenry who are ultimately affected by such actions. This is illustrated by the intense adverse reaction to judicial policy-making or judicial usurpation of executive functions. Such instances have inspired efforts to discipline or punish the courts or to reduce their power. The same phenomenon explains the manifest distress of the legislature to broad policy-making by the Executive Branch and Congress' persistent efforts to add to its controls over the President notwithstanding the fact that the blame for excessively broad delegation of powers must rest in the first instance with the Congress.

Such intrusions virtually always produce undesirable results in the form of poor or unworkable decisions, ultimately popular disapproval, and finally, political overreaction in the form of retaliation against the individuals responsible or institutional shifts of power.

A proper exercise of separated powers must be characterized by respect for the exercise of coordinate powers, faithful performance of the responsibilities vested by the Constitution and required by law and careful adherence to the limits in the scope of those powers and specific legal requirements. The Attorney General has an important place in this process in the Executive Branch.

The Attorney General is properly perceived by the people as the official charged with ensuring that the Executive Branch observes constitutional limits and that the laws enacted by Congress are faithfully executed. He represents both the people and the Congress as well as the Executive when he appears in court and his goal is to assist in the preservation of justice before the attainment of any particular policy. The first objective described in the preamble to the Constitution, after the desire to attain a more perfect union, was to establish justice. There is no more important goal in the Constitution or in the minds of the citizens of this nation.

From the Judiciary Act of 1789, when the Attorney General's qualifications were first described as someone learned in the law, he has had a responsibility to provide advice to the President and to represent the United States in court on the basis of law. He must do so, however, within constraints which do not encumber a private advocate, for the Attorney General must seek and urge a result which is first of all just and in conformance with the law. While the President and his advisers are expected to reflect and advance both policy views and partisan instincts, the Attorney General is exected to provide a degree of independence from partisanship in order to maintain not only the ability to represent the Congress and the people as well as the Executive, but also to provide an internal check within the Executive Branch on the partisan and policy impulses of the remainder of the Administration.

Whenever the independence* and integrity of the Attorney General has been compromised or eroded by the President, his Administration or his political advisers, the consequences to the President as well as the Attorney General

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*The word "independence" is not used here in its absolute sense because the Attorney General is a member of the President's Administration, serves at his pleasure, and may, of course, be overruled by the President.

have been calamitous. The people will not long tolerate politics or partisanship in the administration of justice and will not respect a President who allows it to occur. The Congress and the people will swiftly and certainly punish those who tamper with or debase the integrity of this element of the American system. Even those who vigorously champion a certain course in a particular matter will ultimately not respect those who succumb to expediency in the exercise of the Attorney General's functions. By the same token, even those who disagree with a particular decision will ultimately respect it and the author of it if it is perceived to be based upon careful and faithful adherence to legal principle.

In order to preserve the integrity of the Office of the Attorney General and his decisions, as well as the reputation of the President for commitment to Constitutional principles, the Attorney General has the difficult burden of constant vigilence against efforts to influence his legal decisions by extra-legal considerations. In the nature of things, those who do not have the same unique and paramount responsibility to the law and the Constitution will often entreat and implore the Attorney General to make decisions which may reflect policy objectives which, however legitimate as policy, will not be squarely within and faithful to legal principles. The Attorney General must resist even the most reasonable and minor deviations from his legal obligations. History is littered with the tragedies of those whose first sacrifice of principle was minor and well intentioned. The path, once taken, leads inexorably to misfortune and it is far easier to take the second step than to retreat from the first.

The personal burden on the Attorney General to discharge this responsibility is enhanced because the restraints which he must impose will be perceived as unnecessary or unreasonable obstacles to the attainment of Administration objectives. The pressure to yield in order to advance the policies of his colleagues can be manifold and intense. This is particularly painful if those blandishments come from those who clearly support the President or from the Office of the President itself. The Attorney General has the difficult responsibility of resisting those with whom

he has the closest personal and political kinship. Ultimately, however there is no policy which is more important than our commitment to the law and no measure more destructive to the ability to implement sound policy than the selection of improper means to accomplish desirable ends.

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