

## P R E F A C E

I t is customary for senior officials in the Department of Justice to hang portraits of former Attorneys General in their office. I qualified for the portrait privilege as the head of the Justice Department's Office of Legal Counsel (OLC), a job I held from the fall of 2003 until I resigned, less than ten months later, in July of 2004. Though little known outside the government, OLC holds an exalted status within it as the chief advisor to the President and the Attorney General about the legality of presidential actions. This small office of twenty-two lawyers determines whether the government's most important and sensitive plans are lawful, and thus whether they can be implemented.

When I came to OLC three years into President Bush's first term, the most popular Attorney General portraits had been taken. On the wall across from my desk in my OLC office hung a painting that no one else wanted: that of Elliot Richardson, Richard Nixon's third Attorney General. Richardson was a distinguished lawyer who served as Attorney General for five months before resign-

ing as part of Watergate's "Saturday Night Massacre." On Saturday, October 20, 1973, Nixon ordered Richardson to fire Watergate Special Prosecutor Archibald Cox, who had subpoenaed Nixon for tapes of conversations made in the Oval Office. But Richardson had promised the Senate during his confirmation hearings that he would "not countermand, nor interfere with the special prosecutor's decisions." So he told Nixon that he would quit rather than carry out his order. "I'm sorry that you insist on putting your personal commitments ahead of the public interest," Nixon angrily told Richardson in the Oval Office. "I can only say that I believe my resignation *is* in the public interest," Richardson responded, during his last meeting ever with Nixon.<sup>1</sup>

At first, I paid little attention to the beady stare from behind the oversized eyeglasses in Richardson's portrait. Two months into my job, however, I had thought a lot about the sixty-ninth Attorney General. During those eight weeks, I was briefed on some of the most sensitive counterterrorism operations in the government. Each of these operations was supported by OLC opinions written by my predecessors. As I absorbed the opinions, I concluded that some were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President. I was astonished, and immensely worried, to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations. It began to dawn on me that I could not—as I thought I would eventually be asked to do—stand by or reaffirm these opinions.

My first reaction to the opinions was to draft a resignation letter—the first of three such letters I would draft during my nine and a half months of service. I did so mainly because I didn't think the

White House or the Attorney General would appreciate the new OLC boss questioning the legal framework for their important counterterrorism work of the past two years. I also worried, more selfishly, that dirtying my hands with this mess would stain my professional reputation no matter how I acted. But I soon realized I could not quit. We were in the midst of a war in which many had lost their lives and scores had risked professional reputations by making thorny wartime decisions. I had knowingly taken a difficult job at a difficult time, and had promised to uphold the laws of the United States. I couldn't just run away at the first sign of trouble. So I decided to try to fix the opinions to save as many of the policies that a sound legal analysis would support. I was pretty sure, in December 2003, that this decision would put me on a collision course with my superiors. But I figured it was more consistent with my oath of office and professional responsibilities, and that my superiors would let me know when I should leave.

Seven months and many confrontations later, I was gone. This book is about what I learned in my short time as the head of OLC, what I wish I had known when I began the job, and what my reflections have taught me since I resigned in the summer of 2004. It is also about the unprecedented and still-unappreciated challenges that Islamist terrorists pose to the institution of the presidency. Everyone in the administration with access to highly classified intelligence on threats to the homeland was scared of another deadly attack, and of not knowing how to prevent it. This fear created enormous pressure to stretch the law to its limits in order to give the President the powers he thought necessary to prevent a second 9/11. Such pressures are not new. Some of our greatest presidents—including Thomas Jefferson, Abraham Lincoln, and

Franklin D. Roosevelt—bent the law in times of crisis. But unlike these other presidents, President Bush acted in an era in which many aspects of presidential war power had become encumbered by elaborate criminal restrictions, and in which government officials seriously worried that their heat-of-battle judgment calls would result in prosecution by independent counsels, Justice Departments of future administrations, or foreign or international courts.

These twin pressures—fear of not doing enough to stop the next attack, and an equally present fear of doing too much and ending up before a court or grand jury—lie behind the Bush administration's controversial legal policy decisions about the Terrorist Surveillance Program, the Geneva Conventions, military commissions, interrogation techniques, Guantanamo Bay, and more. In defending some of these decisions and criticizing others, this book examines the surprisingly central and sometimes unfortunate role that lawyers played in determining counterterrorism policy. It also tries to give a sympathetic account of the unusual psychological pressures on executive branch officials who are personally responsible for preventing hard-to-fathom terrorist attacks that could kill thousands. And it seeks to put the Bush administration's responses to these pressures in historical perspective, comparing the first presidency in the post-9/11 era with other crisis presidencies, especially those of Franklin D. Roosevelt and Abraham Lincoln.

I cannot speak about many of my experiences in government. Much of what I learned must remain hidden behind thick walls of classified information, and cannot be written about for years, if ever. Despite this limitation, I believe I can illuminate important themes, debates, and pathologies that have dominated the executive branch since 9/11 and that will continue to dominate it for

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the foreseeable future. In doing so, this book follows in a long tradition of Justice Department officials and other executive branch lawyers who have felt it important for the American people to understand how and why critical decisions were made during their service in government.<sup>2</sup>