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S. HRG. 109–840

DEPARTMENT OF JUSTICE OVERSIGHT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

JULY 18, 2006

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DEPARTMENT OF JUSTICE OVERSIGHT

TUESDAY, JULY 18, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 9:35 a.m., in room SH–219, Hart Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Hatch, Grassley, Kyl, DeWine, Sessions, Cornyn, Leahy, Kennedy, Kohl, Feinstein, Feingold, Schumer, and Durbin.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. The Senate Judiciary Committee will now proceed with this oversight hearing on the Department of Justice. We welcome the Attorney General of the United States to this hearing.

After consultation with the distinguished Ranking Member, it has been decided to have 10-minute rounds because of the many issues which we are reviewing here today.

We will be taking a close look at what the administration intends to do following the historic decision in *Hamdan* v. *Rumsfeld*; what kinds of proceedings will be in order for those accused of war crimes; what the proceedings will be for those who are detained as enemy combatants with respect to periodic review; and what is the situation with respect to rendition, which is the next cutting-edge question in our handling of the detainees in the war against terror.

We will be asking the Attorney General this morning to elaborate on his comments on ABC Television on May 21st that the Department of Justice is considering the prosecution of newspapers and journalists for the disclosure of classified information.

We will want to know his interpretation of what statute would authorize that. We will be asking the Attorney General for the specifics on what happened with respect to the Administration's efforts to persuade the newspapers not to publish the program relating to bank records. We will be asking the Attorney General about the situation with respect to telephone company records.

So far, the Administration has been unwilling to confirm or deny the existence of that program, and I will be pursuing the conversations which I have already had with Attorney General Gonzales on the question of what court clearance there was on such a program, with the Attorney General having said that the only program

which does not have judicial authorization is the electronic surveillance program.

So it raises the inference that if there is an administration program to get telephone records, there has been judicial clearance. And that is a question, I think, of importance, and from a practical point of view, it has been so widely publicized there seems to be hardly any point in not discussing it if, in fact, it does exist.

We will be discussing with the Attorney General the issue about the electronic surveillance program and what factors are operative to determine whether or not the President has Article II powers. There is a great deal of discussion about the Foreign Intelligence Surveillance Act, but the administration has, in effect, declared that Act inoperative.

A lot of talk about the Act's exclusive authority to authorize wiretaps, but in the context where the administration claims that there are Article II powers which supersede the statute, those provisions for an exclusive remedy have, in effect, been discarded.

There is no doubt that the President does not have a blank check. We know that from the Supreme Court. But the Supreme Court has never ruled on the question as to whether the President has inherent power to go after materials on foreign agents like terrorists without a warrant. Three Federal appellate courts have ruled that the President does have such inherent power, and that is the essential claim which the administration is now making.

There have been strenuous efforts to find some way to submit the electronic surveillance program to judicial review, and there has been a compromise reached, subject to congressional approval, where the President has stated that he will submit his program to the Foreign Intelligence Surveillance Court if the negotiated legislation is enacted by Congress, with the President getting certain flexibility: the 3 day period for emergency warrants will be extended to 7 days and the Attorney General would have the authority to delegate the application for emergency warrants.

Where both ends of the call are overseas but have a terminal in the United States, the statute would not apply. If there is a better way to obtain judicial review, I for one would be anxious to hear about it.

I can say that the negotiations were very, very difficult, really fierce, and it was a major breakthrough when the President did agree to send the matter to the Foreign Intelligence Surveillance Court, but it raises a lot of questions which will have to be addressed and have to be answered.

We will also be reviewing with the Attorney General the legal foundation for the President's assertion of authority to issue signing statements in which he declares which parts of legislation he will enforce and which parts he will disregard.

The Constitution is explicit in providing for a Presidential veto if the President disagrees with a piece of legislation. We have seen the practice evolve under this President with greater breadth and greater intensity than with any President in the past.

We will also be inquiring of the Attorney General the administration's position on the Lugar shield law, whether it is the administration's position that it is appropriate to jail reporters, like Judith

Miller, in cases which do not involve national security. That investigation started off as a national security matter.

When the national security aspect was over and it was an investigation in to only obstruction of justice or perjury, they proceeded, nonetheless, with the jailing. We will want to inquire of the Attorney General the administration's position on that issue.

We have another very important line of inquiry on why the Office of Professional Responsibility was not permitted to carry forward the investigation which it began as to the propriety of the legal advice given by the Department of Justice approving the electronic surveillance program.

Forty Members of the House of Representatives asked for that investigation. It was underway, and then it was stymied when there were repeated requests by the Office of Professional Responsibility for clearance, and they were all denied.

The Office of Professional Responsibility noted that the Criminal Division was given clearance when it was looking at potential prosecutions. The Civil Division had many lawyers given clearance when it was defending civil cases.

But for some reason, OPR was not given clearance when they were charged with the responsibility of conducting on investigation, which they began to see if professional standards were met when the Department of Justice cleared the electronic surveillance program.

With so many other lawyers in the Department of Justice being granted clearance, it raises the obvious question of whether there was some interest on the part of the administration in not having that opinion given.

We will also be asking the Attorney General for the administration's position on House Resolution 890 and Senate Resolution 524, which, in effect, condemn the newspapers for disclosing classified information.

This is a long litany, but there is a great deal to be covered on what the Department of Justice has done.

Let me say in conclusion, Mr. Attorney General, that the Committee is very disturbed by your failure to comply with our rules in submitting your statement on time. It was not submitted until late yesterday afternoon, early evening.

There has not been an opportunity to review it, and serious consideration has been given to not permitting you to make an opening statement because of your failure to comply with the rules. And let me say if there is a repetition, we will do just that.

But out of respect for your office and for you, we will permit you to give an opening statement, but we think that we are entitled to some respect reciprocally.

Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. And I concur with the Chairman. It is extremely difficult. It is so rare that we have the Attorney General here, certainly less appearances than most of his predecessors of either party. When he does come—and at times

actually several weeks later than he had first offered to come—we should have the statement.

I will put my full statement in the record, but a couple of points I would like to make so we can get on with the hearing.

Three weeks ago, in *Hamdan*, the Supreme Court ruled that the President is bound to comply with the rule of law. In effect, they said he cannot continue to break the law. Three years ago, in *Hamdi,* the Supreme Court held that war is not a blank check for the President when it comes to the rights of the Nation's citizens and said even the President has follow the law. These are two remarkable statements coming from the Nation's highest Court.

Now, they are not remarkable in one area—for the propositions they state. The rule of law was the basic premise on which this Republic was founded 230 years ago. They are remarkable instead for the fact that this administration's unprecedented record of complete disregard for the rule of law, coupled with its arrogance and secrecy, coupled with its continued breaking of the law by the President, made it necessary to say these things.

In *Hamdi,* the Court rejected the administration's unprecedented claim—unprecedented claim—that an American citizen could be stripped of the constitutional right to due process simply on the say-so of the President, that the President can say, "Well, I know that is the law, but you do not have to follow it in this case or that case." The Court held instead what I suspect every first-year constitutional law student would say they would hold, that Mr. Hamdi was entitled to a fair hearing on the legality of his detention.

In *Rasul,* the Court rejected the legal premise upon which the Guantanamo Detention Center was built. The Bush-Cheney administration chose to hold prisoners captured in Afghanistan on the island of Cuba as a means of avoiding the jurisdiction of the United States court. And the Court held that the writ of habeas corpus cannot be suspended by housing prisoners offshore.

And so we come up to last month's setback in *Hamdan*—a setback to the administration, a victory for the rights of Americans. The path to the latest setback to the administration begins with a memorandum written by today's witness.

In January 2002, then-White House Counsel Gonzales advised President Bush that he need not and should not comply with the Geneva Conventions, even though they are the rule—they have become the rule of law because we accepted them.

And that was contrary to the advice of Secretary of State Colin Powell, a man who had served in the military, had served in combat and knew what the Geneva Convention was about. But the President chose to take Mr. Gonzales' advice rather than listen to General Powell.

In *Hamdan*, the Court held that the President is bound by the Geneva Conventions and that the President's military commissions are illegal. So basically the administration is batting 0 for 3 in the Supreme Court—and, interestingly enough, a Supreme Court where seven of the nine members were appointed by Republicans.

But the result of this series of blunders is not merely a strikeout. With respect to Mr. Hamdi, after nearly 3 years of incarceration during which the administration insisted American security would be seriously prejudiced by even affording him a lawyer, they said,

"Oh, all right, we will just turn him free. We will turn him free in the Middle East."

If he is that much of a threat, we should have tried him. Four years after the administration began transporting prisoners to Guantanamo, that detention center has become an embarrassment, an international embarrassment, which everyone from Tony Blair to Colin Powell said it should be closed immediately.

And more than 4 years after initiating a military commissions program, which Attorney General Gonzales told us was designed to ensure swift justice close to the battlefield, the administration, out of those hundreds and hundreds of people, has only charged ten, they have convicted zero, and they are now back to square one. Some swift justice.

Perhaps the only lesson that this administration learns from its mistakes is not to get caught next time. The administration is allergic to accountability, whether in the form of judicial review or in the form of Congressional oversight. And the attempt to evade habeas review by holding detainees at Guantanamo is just one of a series of measures the administration has taken to shield its actions from the courts.

The *Hamdan* case addresses another. In one of those hundreds upon hundreds of notorious signing statements issued after Congress passed the Detainee Treatment Act of 2005, the President asserted that the Act retroactively stripped the courts of jurisdiction over pending cases—when, of course, it did nothing of that nature at all.

The Court rejected his claim and instead followed the plain language of the Act, informed by the legislative history that was actually available to members before they voted on the Act.

The case of Jose Padilla presents another example. Three and a half years after detaining Padilla as an unlawful combatant, but on the eve of another Supreme Court review of whether what they were doing was legal or not, the administration moved to have his case dismissed by transferring him from military to civilian custody. In other words, if you are going to tell us to obey the law in one place, we will move him to a different place.

In a unanimous decision, the very conservative Fourth Circuit rejected the administration's motion. Judge Luttig pointedly noted that the motion appeared to be an attempt to evade Supreme Court review and, thus, they have damaged the Government's credibility.

Meanwhile, the Chairman has mentioned the secret domestic wiretapping program. The administration has for nearly 5 years evaded even the limited judicial review afforded by the Foreign Intelligence Surveillance Act. In fact, in just a few months since the Republican Congress first learned of NSA's warrantless wiretapping program, the Justice Department has asserted the state secrets privilege in at least 19 different court cases challenging that program.

And last week, we learned in closed-door negotiations with Senator Specter that the administration made a conditional offer to submit one of its domestic spying programs to secret review by a single FISA judge.

As I understand the administration's offer, Congress must first agree to completely gut FISA and deprive American citizens of the

right to challenge domestic wiretapping in open court. It would change nothing more than the ratification of the administration's actions after the fact, even if they had acted illegally.

So when the President tells this Committee that he is agreeable to judicial review of that program and his other actions, I hope you understand why some of us are a bit wary. I agree with President Reagan, who said, "Trust, but verify." This administration asks an enormous amount of trust from us, but they do not give much in the way of verification.

We in Congress have a responsibility not just to punt to the courts, but do our job of holding the administration accountable. Congressional oversight is the ultimate democratic antidote to executive overreaching. Oversight makes Government more accountable and more effective. So it is time for Congress to fulfill its constitutional duty by acting as a real check on the executive branch.

A Congress that defers to the President and ratifies his continuing illegal actions is no better than a President who seeks to immunize or ignore illegal conduct of those under his command.

Congress needs to act. Congress needs to be an independent branch of the Government. Congress has to stop acting as a rubber stamp for this President and start its real oversight.

Mr. Chairman, I will put my full statement in the record.

Chairman SPECTER. Without objection, the balance of your statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Senator Hatch has asked that his statement be made part of the record, which will be done.

Just a word or two about scheduling and timing. We are going to have 10-minute rounds, as I announced earlier, so that Senators will have enough time to get into the subject matter in some detail. We are going to be voting on the stem cell bills in the range of 3:30 to 3:45.

It would be my hope that we could limit our lunch hour to an hour. This is a day where we have caucuses, so it poses some difficulty. But that is what I would like to do so we can have plenty of time to ask the questions and give the Attorney General an opportunity to respond.

Mr. Attorney General, would you rise to take the oath, please? Do you solemnly swear that the testimony you will give before the Judiciary Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Attorney General GONZALES. I do.

Chairman SPECTER. Attorney General Gonzales has held the position since the beginning of President Bush's second term. We had the confirmation hearings on January 6th, and the Attorney General was confirmed not long thereafter. He comes to this important office with a very distinguished background. He is a Harvard Law School graduate. He received his bachelor's degree from Rice University.

Before becoming Attorney General, he served President Bush for 4 years as White House Counsel and had extensive contacts with this Committee. He had been a Justice on the Texas Supreme Court. He was Texas Secretary of State, served as general counsel

to Governor Bush, partner of a major, prestigious firm, Vincent and Elkins, and served in the United States Air Force.

We welcome you here, Mr. Attorney General, and we are setting the clock at 10 minutes. If you can stay within that parameter, it would be appreciated. You may proceed.

STATEMENT OF ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Attorney General GONZALES. Good morning. Chairman Specter and Ranking Member Leahy, thank you for having me here today.

The Department of Justice's first priority remains protecting America from terrorist attacks. Immediately after 9/11, the President asked us to do everything we could within the law to protect the American people. Those were intense, purposeful times, as we all remember. We were anxious about the possibility of more attacks, and we were committed to preventing another deadly attack.

In Congress, you acted quickly to pass the PATRIOT Act. In the executive branch, we increased our efforts to investigate and prosecute terrorists before they could kill again and bring to justice those who were responsible for 9/11.

When the war in Afghanistan began, we asked, How can terrorists and unlawful combatants be tried for their war crimes? And that is how the military commission process was born in this current conflict.

Since the Revolutionary War, the United States has employed military commissions in times of armed conflict to bring unlawful combatants to justice. The process of convening military commissions traditionally has been left to the President. Thus, following the precedent established by prior administrations, the President established fair and thoughtful commission procedures.

Of course, the Supreme Court has now spoken. Under the Court's reasoning in the *Hamdan* case, the most obvious and feasible way to ensure that military commissions remain available as a tool to protect America and bring terrorists to justice is for Congress to establish the commissions' procedures. And so we now look forward to working with Congress on this issue.

As we work together to establish a statutory basis and new procedures for military commissions, I would like to offer a few specific concepts for you to consider.

First, the military commission procedures devised by the Department of Defense, as well as the Uniform Code of Military Justice, are useful resources to consider. DOD's current procedures currently address in a balanced fashion specific concerns.

For example, no one can expect members of our military to read *Miranda* warnings to terrorists captured on the battlefield or provide terrorists on the battlefield immediate access to counsel or maintain a strict chain of custody for evidence. Nor should terrorists' trials compromise sources and methods for gathering intelligence or prohibit the admission of probative hearsay evidence.

The current DOD military commissions take into account these situational difficulties and, thus, provide a useful basis for Congress's consideration of modified procedures.

The procedures Congress adopts must be fair, but also must reflect that we are still at war and that our men and women on the front lines operate in a war zone, not in a controlled environment of an FBI forensics lab.

Second, we must eliminate the hundreds of lawsuits from Guantanamo detainees that are clogging our court system. In many instances, military commissions, not our civilian courts, are the appropriate place to try terrorists.

In the Detainee Treatment Act, Congress recognized the need for balance in this area. It afforded detainees the opportunity to appeal military commission decisions and Combatant Status Review Tribunal rulings to the D.C. Circuit, as well as to the Supreme Court of the United States—something never before provided to enemy combatants in a time of war.

At the same time, the DTA precluded Guantanamo detainees from undertaking other litigation, including class actions, tort suits, and conditions of confinement challenges. The DTA struck an appropriate balance. I ask Congress to confirm that it intended these provisions for limited and appropriate judicial review to apply to all of the existing Guantanamo detainee lawsuits.

Third, the application of Common Article 3 of the Geneva Conventions must be defined. In *Hamdan*, the Supreme Court held that because a war with al Qaeda is not of an international character, Common Article 3 applies to our conflict with al Qaeda, notwithstanding the fact that al Qaeda is not a signatory to Geneva and does not abide by its strictures.

Because Common Article 3 applies to our conflict with al Qaeda, it is imperative that we as a Nation are clear about exactly what that requires of our men and women on the front lines. After all, a proven violation of Common Article 3 could serve as the basis for potential prosecution under the Federal War Crimes Act.

Article 3 uses terms like "outrages upon personal dignity" that are susceptible to different interpretations. Making matters more unpredictable still, the Supreme Court has stated in other contexts that American courts, when interpreting a treaty, should give consideration to the way foreign courts have interpreted that treaty. And that degree of uncertainty is unfair to our men and women on the front lines, and I encourage you to clarify the law in this area.

Now, let me say a few words on another subject related to the war on terror. Recently, the media has published details of classified intelligence programs that are vital to our National security. It is wrong that someone would reveal intelligence activities that are helping to prevent another terrorist attack on America. American lives are potentially endangered by such conduct.

The programs that have been disclosed are vital. Imagine, for example, what a program like the President's terrorist surveillance program might have accomplished before 9/11. Terrorists were clustered throughout the United States, preparing their assault, communicating with their superiors abroad.

What might our world look like today if we had intercepted a communication revealing their plans or tracked the flow of money among the plotters? General Hayden has testified that the terrorist surveillance program has helped us detect and prevent terror plots in the United States and abroad. And Treasury Under Secretary

Stuart Levey has testified that the terrorist finance tracking program has helped to identify, track, and pursue suspected foreign terrorists, including members of al Qaeda, Hamas, and Hezbollah.

Mr. Chairman, at my last appearance before the Committee, you indicated that you wanted the terrorist surveillance program briefed to every member of the Intelligence Committees, and you expressed your desire that the program be submitted to the Foreign Intelligence Surveillance Court.

All members of the House and Senate Intelligence Committees have now been briefed, and your new draft legislation provides a way for the program to be submitted to the FISA Court.

I thank you for your work on this matter, and I also thank Senator DeWine for offering legislation on the program. I urge this Committee to report favorably both the Specter and DeWine bills so that they can be considered by the Intelligence Committee.

Finally, I urge the Congress to confirm Ken Wainstein to head the Department's new National Security Division, Alice Fisher to head the Criminal Division, and Steve Bradbury to head the Office of Legal Counsel. The National Security Division, something called for by the WMD Commission, cannot be established until Mr. Wainstein is confirmed.

Congress created the National Security Division in the PATRIOT Act reauthorization bill, but the Senate's delay in confirming Mr. Wainstein is preventing the Department from doing everything that we can to protect the American people from another terrorist attack. Similarly, we need Ms. Fisher confirmed.

To have the Criminal Division, which is devoted to disrupting terrorism, fighting corporate and public corruption, and fighting child exploitation, operate without a confirmed leader is unacceptable. She is doing an outstanding job, and she deserves swift confirmation.

I thank the Committee for reporting favorably the Wainstein and Fisher nominations, and I ask for your help in obtaining the full Senate's confirmation of these stellar individuals. Finally, I respectfully request that the Committee move promptly to report favorably Steve Bradbury's nomination to be Assistant Attorney General for the Office of Legal Counsel. Mr. Bradbury's work is critical, and I know that the executive branch and the Congress have benefited from his extraordinary talents.

Mr. Chairman, today is September 12th for the people of the Department of Justice, and tomorrow will be September 12th again. We are fighting every single day for the security and safety of Americans. We appreciate your support and the support of this Committee. Thank you.

Chairman SPECTER. Thank you very much, Attorney General Gonzales.

I begin with the issue on the Office of Professional Responsibility, OPR, being compelled to discontinue its investigation into the propriety of the legal advice given by the Department of Justice approving the electronic surveillance program. Note that I wrote to you about this subject on May the 10th and did not get an answer until late yesterday.

Without objection, your reply and all the attachments will be made a part of the record.

It is very difficult to understand why OPR was not given clearance so that they could conduct their investigation as to the propriety of the Department of Justice action in approving the electronic surveillance program in a context in which many lawyers in the DOJ Criminal Division and Civil Division were given clearance.

I think that in part this is a mark of the difficulty in getting the administration to submit the surveillance program to the FISA Court for judicial review. That legislation, which was agreed upon last week subject to approval by the Congress, is going to have quite a route to follow.

And it has been pressed by me because of the absence of any other way to get judicial review. And the provisions of the Foreign Intelligence Surveillance Act as the exclusive remedy have been ignored because of the assertion of Article II power. We do not know whether that is correct until there is a balance made between the nature of the threat and the incursion into civil liberties.

Now, when you had the first line of review, Mr. Attorney General, by OPR, why was OPR not given clearance as so many other lawyers in the Department of Justice were given clearance?

Attorney General GONZALES. Mr. Chairman, you and I had lunch several weeks ago, and we had a discussion about this, and during the luncheon I did inform you that the terrorist survival program is a highly classified program. It is a very important program for the national security of this country and—

Chairman SPECTER. Highly classified, very important. Many other lawyers in the Department of Justice had clearance. Why not OPR?

Attorney General GONZALES. And the President of the United States makes decisions about who is ultimately given access—

Chairman SPECTER. Did the President make the decision not to clear OPR?

Attorney General GONZALES. As with all decisions that are nonoperational in terms of who has access to the program, the President of the United States makes the decisions, because this is such an important program—

Chairman SPECTER. I want to move on to another subject. The President makes the decision. That is that.

I want to take up the question of rendition now that we have had the Supreme Court of the United States deal with the issues of trials for people charged with war crimes and we are pursuing the issue of detention of enemy combatants. I want to ask you about a specific case which I wrote to you about to be prepared to respond today.

Where the Department of Justice was involved, ordinarily rendition might be said to be a matter for the CIA and under the Intelligence Committee, but the FBI participated in the interrogation of a man named Maher Arar, a Canadian engineer of Syrian descent who was arrested in JFK on September 26, 2002, questioned by the FBI and local police, then was flown to Rome, then to Amman, Jordan, driven across the border to Syria, where he alleges he was repeatedly tortured and forced to sign confessions stating that he attended a training camp in Afghanistan.

Is the Department of Justice involved in the issue of rendition, Mr. Attorney General?

Attorney General GONZALES. Mr. Chairman, with respect to this particular case, let me just say that this is a matter that is currently in litigation, so I am going to be limited about what I can say. This is not a case regarding rendition. This is a case regarding deportation. This particular individual—

Chairman SPECTER. Deportation, but also rendition.

Attorney General GONZALES. He was deported according to our immigration laws. This is what happened —

Chairman SPECTER. Was he then not ultimately rendered to Syria?

Attorney General GONZALES. He was returned. He was a dual citizen of Canada and Syria, and he did request to be returned to Canada. But exercising the discretion under the law, he was returned—

Chairman SPECTER. He did not ask to go to Syria even though he had dual citizenship there.

Attorney General GONZALES. He did not ask to go to Syria.

Chairman SPECTER. Nobody would ask to go to Syria where they might be tortured.

Attorney General GONZALES. But, Senator, as we do in every case where we deport or render, we receive assurances and get assurances that someone will not be tortured. We do have obligations to seek those kind of assurances.

Chairman SPECTER. Attorney General, let me interrupt you because there is so much to cover. Perhaps we will go into closed session on this because you say it is a matter in litigation, and our oversight authority covers matters which are in litigation.

But let me move on to the television interview you had on May 21st where you said the Department of Justice was considering the prosecution of journalists and newspapers, in the context of the New York Times disclosure on December 16th of the electronic surveillance program. Are you considering the prosecution of the author of that article and the newspaper?

Attorney General GONZALES. Senator, I think we have an obligation at the Department to ensure that criminal laws are enforced. With respect to publications by the New York Times and other publications of highly classified programs, our long-standing practice—and it remains so today—is that we pursue the leaker. That is our primary objective, to go after the leakers, quite frankly. We hope to work with responsible journalists and persuade them not to publish the story. With respect to the New York—

Chairman SPECTER. But they did publish the story.

Attorney General GONZALES. They did publish the story.

Chairman SPECTER. And you said on May 21st you were considering a prosecution. Now, we have had June and July. We have had 2 months since then. Are you or are you not considering a prosecution?

Attorney General GONZALES. Mr. Chairman, I will say that we are focused primarily on the leakers, and we continue to work with the media to try to persuade them not to publish stories.

I do think, quite frankly, Mr. Chairman, it is appropriate to have a discussion and a dialog about what do we do when we are in a time of war and we are talking about highly classified programs that may save American lives—

Chairman SPECTER. I am prepared for a discussion of the dialog, but on another day when we have more than 10 minutes. I am going to move on and accept your non- answer because I do not think I am going to get anything more on that subject, and perhaps nothing more on the next subject.

You and I have discussed the issue of the administration's alleged program to get information from telephone records, and you have told me that you are not authorized to say whether there is such a program. But you also told me contemporaneously that there was no program that the administration has except for the terrorist surveillance program which operates without a court order.

Question: Is it true that it is only the terrorist surveillance program, also known as the electronic surveillance program, is the only program that the administration has which is not functioning under a court order?

Attorney General GONZALES. Mr. Chairman, you and I did have a conversation. What I can say is that what you are asking about, the program's activities, to the extent that they exist, they would be highly classified; to the extent they exist, they have been and would be fully briefed to the Intelligence Committees.

I can also tell you that we are currently having discussions within the administration to see what additional information we can provide to this Committee about any additional activities.

Chairman SPECTER. But you can confirm your statement to me that the only program which is not subject to judicial authorization is the electronic surveillance program? You told me that, did you not?

Attorney General GONZALES. Mr. Chairman, I believe what I said—well, here is what I would like to be on record. To my knowledge—

Chairman SPECTER. No, no. Answer if you told me that. Then you can go on the record.

Attorney General GONZALES. I am not sure that those are the words that I used, Mr. Chairman.

Chairman SPECTER. Well, the substance of the words you used?

Attorney General GONZALES. Those are the substance of the words I used, but those are not the exact words that I used.

Chairman SPECTER. All right. On to the next subject.

We have asked the administration for a position on the Reporter's Shield bill. Senator Lugar has proposed legislation that has been modified, and we have come down to a point where we think it is appropriate to insist on not having the shield apply if there is a genuine, serious national security interest involved. We have the Judith Miller case, 85 days in jail; not very pleasant circumstances, because I visited her there, as many other people did.

If you have an investigation on national security, Reporter's Shield may not apply. But should Reporter's Shield be available if it turns out to be a perjury or obstruction of justice issue?

Attorney General GONZALES. What happened in that particular case is one that I would view as a last resort, quite frankly, Mr. Chairman. We explore every other way we possibly can to get information that we believe is absolutely essential in connection with a criminal investigation.

This is information that we need to move forward to prosecute a crime. We understand the importance of confidential sources to the media, and for that reason we make accommodations, we have procedures in place that reflect that particular concern.

But I think it is important. I do not think a media shield, quite frankly, is necessary. I do not think it is appropriate. I think if you look at our record, quite frankly we have gone after confidential sources, I think, 13 times in the last 15 years.

I do not see, as I read the papers today, any reluctance of the media to publicize stories, even of the most confidential and classified nature. I do not think the legislation is necessary. I think we have acted in a responsible way. We have got good procedures in place, and I think we should continue on that route.

Chairman SPECTER. We will pick up your statement on last resort in round two. The red light went on just as I had finished the question.

Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. And I would ask that the statement that Attorney General Gonzales gave us late last night be also put in the record because it varies in some areas—many areas—from his opening statement.

Chairman SPECTER. Without objection, it will be made a part of the record.

[The prepared statement of Attorney General Gonzales appears as a submission for the record.]

Senator LEAHY. At our hearing last week, Mr. Attorney General, one of your assistants testified, in effect, that we in Congress should simply ratify the military commission procedures that the President designed and that the Supreme Court criticized and struck down as illegal. Is that, in fact, the administration's position?

Attorney General GONZALES. Senator Leahy, I think our position is we care less about where we began; we care more about where we end up, and we would like to—

Senator LEAHY. No, no. The question is very specific. Is it the administration's position, as one of your assistants suggested, that we should simply ratify the military commission procedures that the President designed and the Supreme Court struck down in *Hamdan*?

Attorney General GONZALES. That would certainly be one alternative that Congress could consider, Senator Leahy.

Senator LEAHY. That was the alternative that the one person we had from the administration to testify suggested. Is that the administration's position? Yes or no.

Attorney General GONZALES. I do not believe the administration has a position as to where Congress should begin its deliberations.

Senator LEAHY. Thank you. So we were misled by that testimony last week.

Let us say an American soldier is captured by a foreign government, and they accuse him, say, of spying. They obtain evidence against him by preventing him from sleeping for days on end or requiring him to stand or squat for hours or interrogating this American for 18 hours a day. Then they convene a military commission

with judges handpicked by their King or President or Prime Minister, whatever it might be.

Then they exclude the accused from large portions of his trial, introduce a statement from the interrogator that they never gave the accused an opportunity to read, to say whether that was what he said or not, and then permit the death penalty to be imposed on that American soldier by a less than unanimous vote.

Afterwards, you have an appeals panel whose members were, again, handpicked by whoever the head of this foreign country is, and who had also assisted the prosecution—the appeals court had assisted the prosecution in the preparation of the case.

Would you have any objection to that?

Attorney General GONZALES. I would have a lot of objections to that. I do not know if you intend by that characterization to describe the military procedures that the Department of Defense has worked on for many, many months. That certainly would not be accurate.

Senator LEAHY. Well, it is hard to see where the differences are with what has happened in practice. We are saying that in this case the soldier is accused of being a spy, and as you know, international law—in particular, The Hague Convention—provides no protection for spies. But I am glad to hear that you would object if another country tried this.

In 2002, 17 American POWs and their immediate family members brought a claim against the Iraqi Government and Saddam Hussein for the brutal torture and horrendous abuse they suffered while they were detained during the 1991 Gulf War.

Now, after these POWs got a judgment in Federal district court, your administration took legal steps that had the effect of protecting Iraq and Saddam Hussein from liability, denying these Americans any kind of compensation for the torture these Americans received at the hands of the Iraqis.

Why do you oppose and continue to oppose justice for Americans who were tortured under the regime of Saddam Hussein? If he is as bad as everybody says, why do we stop Americans from getting any recompense for the torture he committed?

Attorney General GONZALES. Well, of course, the treatment that was dispensed by the Hussein regime was atrocious. It is for that reason that he is now being tried—

Senator LEAHY. That is not the question.

Attorney General GONZALES.—for that kind of conduct.

Senator LEAHY. Why are we opposing justice for the Americans? Why are we blocking it? Because that was a country that was recognized by us and the U.N.

We sent high-ranking Republicans and others over to meet with Saddam Hussein. We are doing everything possible to help out Iraqis with their claims. Why are we blocking Americans who have a claim because they were tortured?

Attorney General GONZALES. Well, again, Senator, this implicates serious and delicate issues relating to actions of a sovereignty, and the notion—

Senator LEAHY. It is a pretty serious issue that those Americans were tortured.

Attorney General GONZALES. Absolutely, and those involved in that conduct are going to be held accountable and should be held accountable. But allowing people to go into the courts and to sue foreign leaders does implicate some serious issues relating to sovereignty that I think must be considered in making the decision—

Senator LEAHY. We do not stop people from going in and suing Fidel Castro, for example. Why should they not be allowed to do this? You know, the Senate, the Republican-controlled Senate, has twice passed resolutions asking the administration to sit down and work with these people to get a just settlement, and I supported those resolutions. So have you met with these victims and their families?

Attorney General GONZALES. I have not personally met them.

Senator LEAHY. Has anybody met with them from the administration pursuant to the Senate resolutions?

Attorney General GONZALES. I do not know if that is, in fact, the case, but I am happy to check and get back to you, Senator.

Senator LEAHY. At this point they are being blocked by their own Government from seeking it, and I will introduce whatever you want for the record, but the fact of the matter is these Americans were tortured by Iraqis and now they are being blocked by not the Iraqi Government from recovering, but by your administration. It just does not make sense.

Now, in a number of States, when soldiers are killed in the line of duty, the Governors will order the lowering of the American flag, which is a mark of honor to those American soldiers who were killed in the line of duty. Do you think that is appropriate? Do you have any criticism of Governors doing that?

Attorney General GONZALES. I do not.

Senator LEAHY. Do you know of anybody in your administration that does?

Attorney General GONZALES. I do not.

Senator LEAHY. Interesting, because many have. They do not think that this should be done by Governors. In my State, I believe you will find it true that Vermont has lost more than any other State on a per capita basis. And I applaud our Governor, a Republican, for lowering the flags to half-staff when that happens.

Attorney General GONZALES. Senator, I do not know who you are referring to when you say people have criticisms about that.

Senator LEAHY. You have no criticism.

Attorney General GONZALES. Sir, I have no criticism. I think our men and women should be honored for their service.

Senator LEAHY. So do I. So let us ask another question that profoundly affects the lives of many Americans. We have seen a dramatic increase in violent crime in our Nation. The FBI report shows its preliminary statistics on crime for last year show the number of violent crimes is on the rise: murders up almost 5 percent, the largest percentage increase in 15 years; robberies rose by almost the same amount.

Now, we had seen crime come down during the Clinton administration. We passed the Clinton administration's crime bill. We put more cops on the street. And your administration was glad to take credit for that.

In fact, in his 2004 resignation letter to the President, your predecessor, John Ashcroft, boldly declared the objective of securing the safety of Americans from crime and terror has been achieved. "Mission accomplished," some might say. Well, we have seen how often the "Mission accomplished" sign is accurate.

The administration has proposed cutting $2 billion in Federal aid to State and local law enforcement. Do you think that is the right signal to send at a time when crime is going up?

Attorney General GONZALES. Well, of course, you said the right word—"preliminary statistics." We need to understand the reasons for those numbers, and obviously I am concerned that, to the extent that crime is rising—

Senator LEAHY. Well, you have had 6 months to be looking at why crime is rising. These are last year's numbers.

Attorney General GONZALES. I do not think we are in a position yet to definitively say the reasons for the rise in crime.

Senator LEAHY. Well, you are in a position to say whether you agree or not whether the $2 billion cut your administration has made to State and local law enforcement. Do you agree with that?

Attorney General GONZALES. Well, my own sense, Senator, is that you cannot look at just one particular number and determine—

Senator LEAHY. Would you agree with the $2 billion cut? That should be easy enough. Do you agree with that $2 billion cut? This is money going to local and State police to cut down crime, and, of course, they have the preliminary responsibility. Do you agree with that cut?

Attorney General GONZALES. Well, again, I might agree with portions of it, depending on what those funds are being used for. If they are used for programs that are ineffective, that are being duplicated—

Senator LEAHY. Do you disagree with any portion of it?

Attorney General GONZALES. Pardon me, sir?

Senator LEAHY. Do you disagree with any portion of it?

Attorney General GONZALES. Sir, I do not know what the $2 billion covers. I would be happy to have—

Senator LEAHY. Let me give you one area.

Attorney General GONZALES.—additional discussions with you about it.

Senator LEAHY. The Bush administration proposed to zero out the Crime Victims Trust Fund. That would rescind money collected from criminals intended to fund 4,400 direct service programs to 4 million victims of crime annually.

Attorney General GONZALES. We support very much, of course, having moneys available for victims.

Senator LEAHY. Do you agree with zeroing out the Crime Victims Trust Fund? Yes or no.

Attorney General GONZALES. Well, the reason that we support that is because under congressional rules we cannot spend an amount over the cap.

Senator LEAHY. Well, let me ask you this: The House and the Senate have passed bills asking you to abandon your efforts to emptying the Crime Victims Fund. Do you agree with that?

Attorney General GONZALES. I am sorry, Senator? Can you repeat that?

Senator LEAHY. The House and the Senate both passed legislation asking you not to abandon—or not to empty the Crime Victims Fund. Do you agree with that or not?

Attorney General GONZALES. Of course, if it is the will of the House and the Senate, we will abide by that.

Senator LEAHY. Mr. Chairman, my time is up. I will have more questions in the next round.

Chairman SPECTER. Thank you, Senator Leahy.

We will proceed under the early bird rule in the order of arrival, and on the Republican side, the order is Senator Hatch, Senator Cornyn, Senator Grassley, Senator DeWine, Senator Sessions, and Senator Kyl. So we turn now to Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Welcome, General Gonzales.

I want to touch on a few of the issues that you have been asked about already, and let me start with the questions that Senator Leahy had about the treatment of Americans who might be captured on the battlefield in some hypothetical circumstance and whether they should be treated as unlawful combatants as the detainees at Guantanamo, the al Qaeda detainees, are.

America is a signatory to the Geneva Conventions, and our troops wear a uniform. They respond to a chain of command. They obey the laws of war. And because they meet all four of those criteria, they are entitled to be treated as prisoners of war if they are captured on the battlefield, are they not?

Attorney General GONZALES. That is correct, Senator.

The reason that we would object to the kind of treatment described by Senator Leahy is because the United States is a signatory to the Geneva Conventions.

Our soldiers do fight according to the laws of war. As you indicated, they do wear uniforms, they carry arms openly, they fight under a command structure, and they follow the laws of war. And as a result of all of that, they are entitled to the full protections of the Geneva Conventions that are afforded to prisoners of war.

Senator CORNYN. American troops do not divert from these rules. Should there be an exception to that, they are investigated and prosecuted to the fullest extent of the law, are they not?

Attorney General GONZALES. In all the actions for the Department of Defense, of course, one of the considerations is what is going to be the collateral damage, what will be the loss of innocent life. If the belief is that the risks for collateral damage are too high, there are occasions where certain maneuvers are not undertaken because of that very concern.

Unfortunately, war is messy and there are instances when civilian life is lost. When that happens, there is an investigation by the Department of Defense to ensure that everything that should have been done to protect against that loss was, in fact, done.

Senator CORNYN. But what we do in the event there is a criminal act and investigation and prosecution, the enemy that we are confronting in this global war on terror actually targets civilians, does it not?

Attorney General GONZALES. They not only target civilians, they celebrate it. They emphasize that tactic, absolutely. The difference between the United States and our enemy, between the United States and our friends and allies around the world and our enemy, is that there are certain standards that must be met. We are held to account to those standards. Any infraction against those standards is investigated. If people do not meet those standards, they are held accountable.

Senator CORNYN. And I believe we covered this at your confirmation hearing on January 6. It is pretty clear, from at least three Federal court decisions—and the 9/11 Commission made this observation as well, as well as the Schlesinger Commission that independently investigated some of the interrogation and detention policies of the U.S. Government—that Al Qaeda, because it does target civilians, because it does not observe the law of war, because it will engage in whatever heinous or barbaric practice that it deems expedient in order to kill innocent people, Al Qaeda detainees are not entitled to the same privileges accorded to American prisoners of war, because Americans do not operate the same way that Al Qaeda does. Is that not right?

Attorney General GONZALES. We believe that that is true as a matter of law, Senator. The President of the United States made a formal determination that the Geneva Conventions do not apply with respect to our conflict with Al Qaeda, as a general matter, because they are not a state signatory to the Geneva Conventions.

The President made a determination as well in 2002 that the Geneva Convention does apply with respect to our conflict with the Taliban. But because the Taliban is not fighting according to the laws of war—for example, they do not wear a uniform and do not operate under a command structure—the President determined that they also were not entitled to the protections of prisoners of war.

Nonetheless, the President also gave a directive that the military treat those who have been captured humanely, and subject to military necessity and as appropriate, consistent with the Geneva Conventions. That was a directive that the President gave to our soldiers in 2002.

Senator CORNYN. But the reason why that is important, General Gonzales, would you not agree, that beyond just sort of an intellectual exercise or whether we are checking off all the right boxes, is because it is important for us to be able to interrogate the detainees and to obtain actionable intelligence that can, in fact, help us detect, disrupt and deter terrorist attacks? Is that not correct?

Attorney General GONZALES. When you are fighting an enemy like this, where you do not know whether or not someone you are capturing is at a corporal level or a general level because they do not wear uniforms, absolutely, getting information from everyone that is captured is essential.

We do not have the luxury of being able to look at someone and make a determination as an initial matter, well, this person has no information that will help save American lives either in America or on the battlefield.

Getting information about this enemy, this new kind of enemy in this new kind of war, is absolutely essential if we are going to be successful.

Senator CORNYN. Is that one of the reasons that you are concerned that the Congress not overreact to the *Hamdan* decision and perhaps create impediments to our ability to interrogate detainees and obtain actionable intelligence? While we treat them humanely, are you concerned about us erecting unnecessary impediments to our ability to gain that information?

Attorney General GONZALES. We must, of course, treat detainees, enemy combatants, humanely. But we are still in a conflict, and that is the difference between these commissions and, other international commissions that have been established in the past, which many people refer to or cite to as precedent for the kind of procedures that we should use in our conflict with Al Qaeda.

Because we are still at war, it is vitally important that we are able to get information as quickly as possible. And we are concerned that, for example, when someone kicks in a door, they are potentially stumbling onto a crime scene, potentially a war crime violation.

In order to prosecute under the UCMJ, once you suspect that someone has committed a crime, you are obliged to give them those *Miranda* warnings and to provide a lawyer.

Well, once you do all of that, you will not be able to get, perhaps, very important information that is necessary to protect the troops, perhaps necessary to protect Americans here at home.

Senator CORNYN. And as I understood your testimony, that is why you are concerned about perhaps an over- expansive application of Common Article 3, insofar as it would outsource to the European Commission on Human Rights and others whether or not certain conduct constitutes an outrage on personal dignity and other ambiguous terms that might be construed in a way that would jeopardize our own troops.

Attorney General GONZALES. I do not want this to be overstated. If you look at the words of the Common Article 3, it clearly contemplates serious conduct that we would all agree should be prohibited; things like maiming and torture.

The concern that we have is that there are some phrases that have been interpreted by other courts and other treaties in a way that I think could put at risk our soldiers who are simply doing their job and getting information against this new kind of enemy.

And I think when you have conduct that is now criminalized under the War Crimes Act, there has to be absolute certainty about what is or is not permitted. And that is why I think it is important for the Congress to speak clearly about what the limits are with respect to acceptable conduct to meet our obligations under Common Article 3.

Senator CORNYN. On another subject, General Gonzales, in the last minute that I have, let me ask you, in the 106th Congress, a general statute criminalizing general unauthorized leaks of classified information was passed by Congress, but then vetoed by President Clinton.

The 108th Congress asked General Ashcroft, your predecessor, to review the statutory framework and provide us with recommenda-

tions. General Ashcroft determined there was no single comprehensive statute that provided criminal penalties for unauthorized disclosure of classified information, but he said the main problem was the difficulty in identifying leakers.

Would you give us your opinion as to whether it would be helpful to the Department of Justice for us to update and perhaps address this lack of a generalized statute criminalizing the leak of classified information?

Attorney General GONZALES. I will say that we, as a general matter, have great difficulty in our investigations and prosecutions of those who divulge classified information.

Oftentimes, the larger the universe of people who potentially could have access to that information, the more likely it is that we will not be able to mount a successful investigation or certainly a successful prosecution. By their very nature, these are very, very tough cases to make.

Nonetheless, we are at a time of war, and there are some highly classified programs that are being disclosed which are harmful to the national security of this country. And under those circumstances, we have an obligation to do the very best we can to prosecute those who disclose this kind of information.

You asked me if it is helpful. My response is that we are having a very difficult time under the current regime, under our current laws, in making these kinds of cases.

Senator CORNYN. Thank you. My time has expired.

Chairman SPECTER. Thank you, Senator Cornyn.

The Democrats, in order of arrival under the early bird rule, are: Senator Kohl, Senator Kennedy, Senator Feingold, Senator Feinstein and Senator Durbin, and Senator Kohl has agreed to yield to the next round to Senator Kennedy.

Senator KENNEDY. I thank the Senator. Attorney General, have you had an opportunity to review the testimony that was given by the JAGs before the Senate Armed Services Committee recently? It might be worthwhile, if you have an opportunity to review that testimony.

It was enormously constructive and very helpful. It dealt with a lot of complexities, dealt with the history, and I think made some very positive recommendations about how to deal with some of the concerns you have expressed and some of the concerns that have been expressed by the Supreme Court. I do not know whether you have had a chance to review it.

Attorney General GONZALES. Senator, I have reviewed the testimony, and I was able to watch a small portion of it.

Senator KENNEDY. If you have a general response to it, or in particular, maybe you could submit it. I will submit a question on that.

You mentioned Alice Fisher to be nominated to the head of the Criminal Division. As you know, she was reported out of the committee. A number of us did not vote one way or the other, but she has been voted out. She has been out, now, for several months. We are eager, as you are, to get her as the head of the Criminal Division. It is extremely important.

There was the one outstanding issue that was brought up by the Ranking Member, Carl Levin, of the Armed Services Committee,

about communications between an FBI agent and her, talking about torture in Guantanamo.

It is rather explicit on that issue. I have read the e-mail myself. She was asked about it. She did not remember the e-mail at all. No reason to question her good faith. It was the desire of a member of the Senate to inquire of this FBI agent, without a political operative being present, where someone from the IG's office would be perfectly satisfactory.

A very distinguished judge in my part of the country, Judge Wolf, who is a Republican, District Court, I asked him just about these circumstances, whether he thought that this was an unusual process or procedure. He agreed with Senator Levin.

It seems to me we could clear this up. The whole issue of torture, obviously, is enormously important. I think we are entitled to get that kind of information. We are mindful we are getting close to an August period and the process of recess appointments are out there.

But it does seem to me if you would review—that request was made of the Justice Department and rejected, as I understand, by the Justice Department, Senator Levin's request to be able to talk to the FBI agent with a member, any member, of the IG staff present, but not a political operative. If that is your understanding—I do not want to spend much time on it, but I would be glad to—

Attorney General GONZALES. Well, Senator, thank you for raising it. This is very, very important.

We have tried to accommodate Senator Levin's request, and I am happy to have him talk to the agent. If it is someone with the IG—at first, he wanted no one but the agent.

But if that is acceptable and if the questions can be limited to Alice Fisher, I think he—my concern is he wants to use this as an opportunity to get into a lot of other areas. If it is limited to Alice Fisher, we are fine and we have offered this. And so, I hope we can move this forward.

Senator KENNEDY. All right. Well, let us try and review it.

Attorney General GONZALES. Thank you.

Senator KENNEDY. It is Senator Levin's request, but I happen to be interested in the same issue. We would appreciate that very much.

Now, the House of Representatives passed that Voting Rights Act. I would like to know whether your position—the administration's position—is for passing the House-passed bill without amendments.

Attorney General GONZALES. I do not know if I am in a position to state, as the administration, that we are going to support that. I can say we have had some very productive discussions on the bill, and I have every expectation that the bill is going to be reauthorized. And the President is on record, as I am on record, saying we fully support the reauthorization of the Voting Rights Act, Senator.

Senator KENNEDY. We are moving along in a very timely way, and the House has moved along. The Chairman is having a markup tomorrow afternoon, and we want to know where the administration is. I had asked you previously about this issue. As I say, time is of enormous importance. A request has been made to the

Majority Leader to get the time to deal with this in the last few weeks of the Senate session. I am very hopeful that that will be the case. The Chairman has pressed this. The Majority Leader knows it.

It will be enormously important to the success of the legislation if we have the strong support of the administration to support the House-passed legislation. And that is my question, again.

Attorney General GONZALES. Senator, I am not in a position to say formally what our position is. But as you say, it is moving along and it is going to move along.

Senator KENNEDY. Well, can I say, if you cannot say yes, can you tell us at least what the areas are that you want to alter or change in any way?

Attorney General GONZALES. Senator, we want to ensure that the language is sufficient, that it will withstand challenge, because it will, undoubtedly, be challenged.

Senator KENNEDY. Yes.

Attorney General GONZALES. We have every expectation that the Voting Rights Act is going to be reauthorized. We fully support the reauthorization. And I wish I could say more, but I cannot, Senator.

Senator KENNEDY. Well, I appreciate it. The time is moving along, I want to cover some other areas, but this is enormously important.

Attorney General GONZALES. It is important. It is important to me, too.

Senator KENNEDY. And to you, I am sure.

Attorney General GONZALES. Yes, sir.

Senator KENNEDY. We have a situation where not only is it important to get an Act passed, but also then get enforcement of it. This is important, because from 2000 and 2004 elections, the Department did not file a single lawsuit relating to either of those elections on behalf of African-American voters.

The Bush administration Civil Rights Division has litigated only three lawsuits on behalf of African-American voters, two of which were initiated by Attorney General Reno. And just last week, the Department filed a complaint against Euclid, Ohio, the first voting rights lawsuit investigated and filed on behalf of African-Americans.

It is even more astounding when one considers that the Bush administration is in the process of litigating the Department's first-ever case alleging discrimination against white voters.

So this is the record. We need to get a good bill and we need the assurances of the enforcement.

Attorney General GONZALES. Senator, might I just say that the Chairman expressed some concerns in response to a newspaper story about the record of the Civil Rights Division, and we provided to him a discussion about our record in this area, and we will share a copy with you, which I think supports, certainly, my view that the Civil Rights Division is doing a good job in the protection of civil rights.

Senator KENNEDY. Well, I just mentioned that. I am not going to have time to go through the Section 5, where the career attorneys were overruled in the Texas case and also overruled in the Georgia

case, and even your Department did not find any problem with what has been labeled a $20 fee. Some have called it a poll tax. And not surprisingly, it has been struck down again.

Let me, if I could, go quickly to the immigration bill.

Attorney General GONZALES. One thing on VRA. I can say we support the bill passed by the House. I have stated the administration's SOP. So, I can say that.

Senator KENNEDY. Could you repeat it one more time so we all get it?

Attorney General GONZALES. We support the bill passed by the House, as stated in the administration's SOP.

Senator KENNEDY. Stated in the what?

Attorney General GONZALES. In the administration's position on the legislation.

Senator KENNEDY. Well, the problem with the administration's position is that the administration supports the legislative intent. That is what it says, "legislative intent."

And that is what you are saying now: we support the bill and the administration's statement. But your statement is not saying that you support the bill. I do not want to be splitting hairs.

Attorney General GONZALES. I know this is important to you. It is important to me. Let me see if, during the day, we can get additional information to give to you.

Senator KENNEDY. All right. If we could get very strong on it, I would tell you that it would be enormously significant and important.

Just quickly on the immigration. We have had your support for a comprehensive immigration bill. Would you spend maybe 20 seconds in saying that, as compared to enforcement only, please?

Attorney General GONZALES. More importantly, the President believes very strongly in comprehensive immigration reforms. Obviously, border security is very, very important, but I do not think you can have effective border security unless you are also taking into account those that are here in this country illegally.

We need to know who they are, where they are at and why they are here. And so, I think this is a problem that will only get worse over time. We need to deal with it, I think, at once. I think the American people expect the Congress and the President to deal with it at once. We know it is a tough issue, but that is what we are here to do, is try to deal with these tough issues.

Senator KENNEDY. Just finally, on the FISA. They are important questions and we cannot really deal with them in 15 seconds. How do you determine whether an entire program complies with the Fourth Amendment's prohibition of unreasonable search without knowing who the specific individuals to be searched are and under what circumstances? Does the Fourth Amendment not require such?

Attorney General GONZALES. Senator, obviously, that will be something that will have to be worked out in the details of the application that goes to the court, and that will be the challenge for the administration, to present an application where these judges, who, like every other Federal judge in the United States, have taken an oath to preserve, protect and defend the Constitution.

Well, they will have to make a determination based upon that application that the search that will be undertaken is, in fact, reasonable under the Fourth Amendment, which is sort of a balancing test. And I think, in taking into account the purpose of the search, which, of course, is the protection of this country and the national security of our country during a time of war, and when you talk about a program that is limited in time and limited in scope to some degree, we have confidence that the court will find that, in fact, this is a program that is constitutional.

That is one of the reasons why the President was comfortable in making the commitment to the Chairman, that if the legislation passes consistent with what has been outlined to the President, that it will be submitted to the FISA court for review of constitutionality.

Senator KENNEDY. My time is up.

Chairman SPECTER. Thank you, Senator Kennedy.

Senator Kennedy, you raised the issue of the Voting Rights Act. A few moments ago I received a note that the Majority Leader, Senator Frist, and the Democratic Leader, Senator Reid, who want to act on the bill this week, and we are considering taking our bill and putting it on Rule 14.

And I consulted with Senator Leahy, and my preference, concurred with by Senator Leahy, is that we ought to go ahead with our markup tomorrow afternoon and report the bill out by the committee.

The Supreme Court has had a very stringent test on constitutionality in a number of respects, holding some Acts unconstitutional because of our "method of reasoning" and using a principle of proportionate and very tough standards, and I think it would be a better practice to move through the committee.

So let me say to all the Committee members, we will move ahead with our markup tomorrow afternoon to try to get it out so that the Senate can take it up on Thursday, and we can pass it this week in accordance with the schedule which Senator Frist and Senator Reid would like to accomplish.

Next in line is Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Happy to welcome you, General, to the Committee. I know you always enjoy these experiences up in front of the Judiciary Committee.

The House and Senate are poised to pass today or tomorrow the sex offender bill that Senator Biden and I sponsored back in May of 2005, and we expect the President to sign that bill next week, which would be July 27, which happens to be the 25th anniversary of the abduction and murder of 6-year-old Adam Walsh, son of John and Reve Walsh.

As you, Mr. Attorney General, are well aware, sex offenders are a menace to our society, running unchecked through our schools and neighborhoods with little or no communication between the States regarding their whereabouts.

And I would like to know today, will you fully support all aspects of this bill, and will the Department enforce these provisions to the fullest extent possible?

Attorney General GONZALES. Yes, and yes.

Senator HATCH. Good.

One provision in this sex offender bill creates a new office within the Department of Justice called the SMART office, S-M-A-R-T, which is an acronym for Sentencing, Monitoring, Apprehending, Registering and Tracking sex offenders, and, of course, named after the Smart family, whose daughter Elizabeth was abducted and treated so terribly.

The SMART office will have a Presidential appointee and Senate-confirmed director. This new director will likely be appointed during your tenure. Will you make this a priority within your Department?

Attorney General GONZALES. I will make it a priority. It already is a priority, Senator Hatch.

Can I just say a few words about this issue?

Senator HATCH. Sure.

Attorney General GONZALES. Because I want to commend the Congress for this. The threat to our kids through predators and sex offenders is tremendous, and I fear that because of changing technology, like the Internet, the threats are even greater.

This is one area I really encourage the Congress to remain focused on. Because of changing technology, our battle against predators is a tough battle and we need all the tools necessary, and this as something, as a father of two young boys, that I really, really worry about.

Senator HATCH. I appreciate that. It means a lot. In December of 2005, I sponsored another piece of child protection legislation called Protecting Children from Sexual Exploitation Act, S. 2140, which deals specifically with recordkeeping by producers of sexually explicit material. Members on both sides of the aisle, as well as other interested parties, have participated in a spirited and lengthy process of discussion and negotiation.

Now, this bill is an example of the Congress working to give you the tools necessary to do your job, and I think the American people expect the Department to vigorously enforce anti-pornography statutes and, of course, to assist the States in keeping sex offenders away from our children.

I want to assure you and the Department that these laws will be strictly enforced, and that you will use the U.S. Marshal Service to hunt down sexual predators as our bill authorizes.

I missed an awful lot of the early questioning. But I presume that the Department is going to work very closely with us to try and come up with a way of solving the problems raised by the *Hamdan* decision. That cooperation began when we had Steve Bradbury up last week, and of course it will continue.

Attorney General GONZALES. It is something that the Department is spending a great deal of time on, looking at ways that we can work with the Congress to find a way to make military commissions remain a valuable tool for the President of the United States in a time of war.

Senator HATCH. Well, unlike some of the hysterical comments about that particular decision, as though it was a complete slap in the face to the administration, I did not think it was.

There are a number of things the decision said, but basically it said that they expect us to come up with a set of procedures that

will work during this process. They did not necessarily outlaw military commissions.

Attorney General GONZALES. Absolutely. And we have to remember that, until June 29th, everything the President was doing and had authorized was, in fact, lawful. He had a decision from the D.C. Circuit affirming, in fact, that what we were doing was lawful.

These are very, very tough issues. You have to remember, you had six out of eight justices write in that case, for a total of 177 pages of analysis. So to say that this was something that was so obviously wrong, I just disagree.

I think these are tough issues. We dealt with it the best way that we could. We now have additional guidance from the Supreme Court and we look forward to working with the Congress to address this important tool.

Senator HATCH. We appreciate it. I think we need to have a bipartisan effort to come up with the procedures that will allow military commissions to function, and function as they always have since the time of George Washington, right on down to today, the most prominent of which were when Abraham Lincoln was President, and also when, I guess it was, both FDR and Truman were President. I guess I should not just highlight two or three.

But the fact of the matter is, you have had this authority until this *Hamdan* decision, and it did not take away the authority from you. It just said that we have got to come up with a way of doing it so it is more acceptable.

Attorney General GONZALES. The Supreme Court did not say we could not use military commissions, but the court said that if we were going to use procedures that were not uniform with the Uniform Code of Military Justice, that there would have to be practical necessity to do so, or Congress had to give express authority for different kinds of procedures, and that is what we are exploring with the Congress.

Senator HATCH. All I am asking is that the Department work very closely with us, and hopefully we up here can do it in a bipartisan way without all the politics that seem to permeate this body in its current partisan status.

Attorney General GONZALES. I am confident we can work together with Senators on both sides of the aisle, Senator, to get this problem addressed.

Senator HATCH. Well, it is in the best interests of our country and the best interests of our war against terrorism, and I know that you will help us to get this done.

I personally have appreciated the work that your office has done, and those in the White House have done, with Senator Specter and his, I think, terrific effort to try and resolve the warrantless surveillance issues in a way that would require, or at least allow, the FISA court to play a significant role, because current law really, in my opinion, does not cover what was done there.

I think there are all kinds of precedents that the President has inherent powers to do what was done, and we would be criticizing him today if he was not on top of it, doing what he should do.

But I want to compliment you for the efforts that you have made to try and help resolve our problems, in the minds of many Members of the Congress, and I think many members of the administra-

tion, to try and get a system that everybody agrees on, or most everybody agrees on, so that we can keep up this war against terrorism in a way that works.

Attorney General GONZALES. Well, this is a very important program, Senator, as you know. Being a member of the Intelligence Committee, you know about how this program works, the effectiveness of this program. We look forward to continue working with the Congress to try to find a way to make this tool remain available to the President of the United States.

Senator HATCH. One of the things I have appreciated about your tenure and your service, is the way you are a "Cool Hand Luke." You do not lose your temper, you do not get emotional about it. You just steadily plod ahead, trying to make sure that we resolve these problems in the best way we can.

I do not know how we can ask any more of you than that, and the excellent people who are around you who have worked with us through the years, not just with my staff, but with the Committee as a whole. I personally just want to congratulate you for the work you have done as Attorney General. I have a great admiration for you and have a great feeling of friendship and respect. I think you have served well. In spite of all of the massive criticism that seems to hit every Attorney General, no matter which party.

Attorney General GONZALES. That is part of the job, Senator.

Senator HATCH. One thing I am very concerned about, though. I would like to just kind of make it here in open, public forum. That is, I do not think ONDCP is doing the job that it should be doing. I really believe that some there have ignored the virulent problems with meth.

Meth is, in my opinion, one of the most important, virulent, criminal drugs in America today. It does not take much to have a young person, or anybody else, hooked on that drug. It takes maybe just one usage of it for most people. I do not believe it has been emphasized as much as it should over there at ONDCP, and I am pretty upset about it.

Attorney General GONZALES. I have been at several events with Director Walters where we talked about meth, and his focus on meth. Obviously, it is a huge focus for the Department. But perhaps there is information we can give you on what they are doing in the area, and if there is more than can be done, not just with ONDCP, but with the Department of Justice, in this area, I would be very interested in talking to you further about it.

Senator HATCH. Well, I would appreciate getting that information. I would love to know that they are doing a better job than I think they are doing.

Attorney General GONZALES. Yes, sir.

Senator HATCH. Thanks, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Hatch.

Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, when you worked at the White House you advised the President that the Geneva Conventions, including Common Article 3, did not apply to Al Qaeda or the Taliban.

At your confirmation hearing, you said this was "absolutely the right decision," and, of course, the Supreme Court disagreed. At the

time the recommendation was made, Secretary Powell strongly disagreed with your position on Geneva Conventions.

He warned that it would adversely affect our foreign policy, lead to investigations of our troops, undermine international cooperation among law enforcement and intelligence officials, and lead to abuse. At your confirmation hearing, you said finding any Geneva protections applicable to the conflict would "make no sense."

Unfortunately, if we look at Secretary Powell's concerns now, everything he warned about came to pass. Do you still believe that, notwithstanding the Supreme Court's decision, that your judgment at that time, finding Geneva applications not applicable to the conflict made no sense?

Attorney General GONZALES. Of course, the court only said that Common Article 3 of Geneva applies to the conflict with Al Qaeda, not the rest of the Geneva Conventions. Let us be very, very clear about that.

And whether or not I agree with the court's conclusion as to whether or not Common Article 3 should apply with our conflict with Al Qaeda, the court said that it does and, as far as I am concerned, that is the end of the debate and the discussion and we ought to move on and see what we should be doing as a government to ensure that we have the tools necessary to win this war on terror, and also that we have procedures in place to ensure the safety of our men and women fighting on the front lines in this war on terror.

Senator KOHL. You then do agree or do not agree with the Supreme Court's decision?

Attorney General GONZALES. Let me just say again, of course the position of the Department, which I believe was reflected in our briefs, the Supreme Court disagreed with respect to Common Article 3. As I have said before, I look at words of a statute or words in a treaty and I think they should mean what they say. Common Article 3 talks about its application to conflicts not of an international nature.

I question whether or not our conflict with Al Qaeda meets that definition. But again, no matter what I feel about it personally, it is the law, according to the Supreme Court, and we are going to abide by the law and we are going to conform our conduct to ensure that it is consistent with the law. That is the thing that is important. We talk about respect for the rule of law, and that is that you comply with the decisions of our courts.

Senator KOHL. Very good.

Mr. Attorney General, Federal funding for local law enforcement has been dramatically reduced since President Bush took office. Just a few years ago, the C.O.P.S. program received a little more than a billion dollars in the Department of Justice budget.

Earlier this year, the administration requested $100 million for the entire C.O.P.S. program and nothing for the C.O.P.S. hiring program, which has been eliminated by this administration.

The Byrne-Grant program is another law enforcement funding program run by the Department of Justice. Byrne-Grants, as you know, fund State and local drug task forces, crime prevention programs, prosecution initiatives, and many other local law crime con-

trol programs. For the past 2 years, you have proposed wiping out this program.

Perhaps these budget cuts could be justified if violent crime was not a problem any more, but as we know, that could not be further from the truth. How can the administration possibly justify cutting off programs that support local law enforcement in the face of a resurgent crime wave? These were the very programs that successfully reduced crime in the 1990's.

Attorney General GONZALES. Obviously we are very concerned about measures to fight against violent crime. We obviously want to make sure we are doing what we can do to help our State and local partners deal with violent crime. We are operating under tough budget times with a deficit, when we are fighting a war. So, there are priorities that have to be accounted for in making budgeting decisions.

With respect to C.O.P.S. hiring, it is true that we zeroed out funding for that. That was first created in the Clinton administration to achieve a goal of hiring, I think it was like 200 police officers, and that goal has been met.

I do not think it was ever the intention that it would continue ad infinitum, that we would continue to provide money to hire C.O.P.S. on the streets. You have to, Senator, look at other ways in which we are getting moneys to State and local governments.

For example, we now have the Department of Homeland Security. There is a lot of money that is being made available to first responders through grants through the Department of Homeland Security. So when you look to see how much Federal money is now being allocated to a specific city or State, you cannot just look at the dollars coming through the Department of Justice.

I think it is also appropriate to look at the dollars coming through DHS, because there is a lot of money that is being made available to first responders through DHS. No question about it, these budget decisions can be tough.

It obviously requires us to be more efficient, to develop better relationships with State and local governments otherwise. They are important partners, and we need to figure out a way to make sure that they have the resources absolutely necessary in order to work with us in making our community safer.

Senator KOHL. I would just comment that, as you know, the Homeland Security does not fund any C.O.P.S. on the street. The Homeland Security program does not fund any crime prevention program, in specific. They would conclude, from your actions, that you do not believe that the Byrne-Grant program deserves to be promulgated into the future because what you want to do is to eliminate that program.

Attorney General GONZALES. What I can say, when I talked about DHS, there are times when they make money available to go down to first responders that can be used to purchase assets and resources that can be used by law enforcement, not just emergency and EMT, and not just by firemen. So that would be one way where dollars through DHS can be helpful and is, in fact, used by C.O.P.S. on the streets.

I take issue with your characterization. Absolutely not. The fact that we may eliminate a particular program does not indicate a lack of support or commitment to State and locals.

In fact, what it reflects is a decision by the administration that this is a program that either is no longer efficient or effective, or that there is a better way to address the particular problem.

In some cases, quite frankly, Senator, it may be a determination that these are State and local issues that should be, hopefully, dealt with by the State and locals, or that there are other priorities for the Federal Government. We have a responsibility to protect America, to fight on behalf of America. So again, these are very, very tough budgeting decisions.

But I do not want you to come away from this hearing thinking that I am not fully committed to our State and local partners, because nothing could be further from the truth.

Senator KOHL. Thank you.

Trigger locks, Mr. Attorney General. Federal law passed last year with President Bush's signature requires gun manufacturers and dealers to provide child safety locks with all purchased handguns. Each year, children and teenagers are involved in more than 10,000 accidental shootings. As you know, many of these shootings could be prevented.

Many of these deaths and injuries could be prevented by the use of a gun lock. In the face of such facts, as you know, 70 Senators voted to add the child safety lock provision to last year's gun liability bill. Former Attorney General Ashcroft affirmed the administration's support of this trigger lock mandatory sale. But last month, the House added a provision to a CJS appropriations bill that would prohibit your Department from spending any money to enforce this law.

So, I would like some assurance that this administration continues to stand by its previously stated positions in support of the trigger lock requirement, and that you will do everything in your power to see that it moves forward.

Attorney General GONZALES. I am not aware of the House action that you are referring to.

Senator KOHL. Last week, they voted not to appropriate any funds that would allow your Department to spend money to enforce this law.

Attorney General GONZALES. Before commenting on that, I would like to look at that, Senator. I would be happy to get back to you on this issue.

Senator KOHL. Your position remains as it was, that you support the law, support that the law should move forward?

Attorney General GONZALES. Well, again, I certainly support where we were before, but there may be information that perhaps my staff is aware of that I am not aware of, and rather than making a firm commitment on this issue, I really would like to have the opportunity to go back, study it, and give you a response.

Senator KOHL. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator Grassley?

Senator GRASSLEY. General Gonzales, as you know, many times when we have these oversight hearings, whether it is you or other members of the Cabinet, I take advantage of it to talk about oversight issues, because I do not think Congress does enough oversight.

I raise these questions for two reasons. One, because I think Congress ought to do more oversight, and I want to encourage my colleagues to do that. Second, the extent to which we do not get the proper cooperation from the executive branch, I want you to know about it so that we can get that cooperation and make the checks and balance system of government so Congress can do its constitutional job of oversight.

So I have got three issues I am going to bring up with you. In regard to the first one, I want to remind you that, in answer to Senator Kennedy's question, this is something for you to keep in mind as I am going through my background for a couple of questions I am going to ask you.

You just agreed to provide a line FBI agent for Senator Levin if the Department of Justice IG staff is present. So as I am going through my first point, make sure that you understand that you just made that commitment to Senator Kennedy.

By the way, I am leading up to two questions that I am going to ask for a yes or no answer, then a third one where I would like a written response from you by the end of the week.

In recent months, the Department of Health and Human Services has worked hand-in-glove with the Department of Justice to obstruct the Finance Committee's investigation of the antibiotic called Ketek.

In a letter to the Finance Committee, Assistant Secretary Vince Ventimiglia stated that HHS consulted with the Justice Department regarding the executive branch's assertion of confidentiality.

The Assistant Secretary broadly referred to "longstanding policy" and "governing principles" as a basis for denying access to documents and employees. Because I know that these claims are not correct, I asked the Congressional Research Service—and I am not going to go through what they said, but I am going to refer to what they said in this document—to look into these so-called policies and governing principles.

As I anticipated, CRS told me that there is "no legal basis" for these executive assertions of confidentiality. What HHS and Justice are doing, I think, flies in the face of numerous historical precedents and legal rulings.

In fact, the CRS memo identifies case after case where Congressional committees have legitimately obtained access to information about ongoing investigations, including prosecutorial documents, and conducting interviews with law enforcement officials, including line FBI agents and Assistant U.S. Attorneys.

It seems to me that the Justice Department, in consultation with the Department of Health and Human Services, is part of a concerted effort to obstruct legitimate Congressional oversight into the government misconduct.

Now, I do not accuse you of that concerted effort because that would be at a higher level, maybe, than you. But what is bothering me, is a fundamental disregard for constitutional mandates, long-

established historical precedents, and bedrock legal rulings. Frankly, these are obstructive policies and principles.

So then, answer yes or no. Is it not true that Congressional committees and their staff members have, in the past, had access to deliberative prosecutorial documents at the Department of Justice?

Attorney General GONZALES. Do you mean during an ongoing investigation at the Department? If that is your question, I do not know the answer to that. As a general matter, I would see the natural problems that would arise if that were to occur, because if you are talking about an ongoing investigation at the Department and you subject yourself to in any way influencing that investigation, I think that puts a Member of Congress in serious jeopardy of being accused of somehow guiding, affecting, or steering an investigation at the Department.

I think, for that reason, Senator, we would typically urge strongly, let us do our job and complete our investigation, and then we enter into a normal course of dialog to try to reach an accommodation to share information with the Congress. Or maybe I have misunderstood your question.

Senator GRASSLEY. No. As I get to a written answer, you can include that in your answer if you really do not know, now.

Attorney General GONZALES. All right.

Senator GRASSLEY. But then this next one, in light of what I said that you said to Senator Kennedy, is it not true that Congressional committees and their staff members have, in the past, had access to line attorneys, line FBI agents, Assistant U.S. Attorneys and investigators in the performance of its oversight responsibilities? An obvious "yes" in regard to what you just promised Senator Kennedy.

Attorney General GONZALES. I believe that the answer has to be yes, but I think those instances have been rare, and depending on the circumstances.

Senator GRASSLEY. Well, I have had access to them.

So when I want to investigate something on Ketek that is killing people, a death in my own State from the use of it, and I want to talk to the people that are investigating it, they get advice from your Department that they do not have to let us do it. So, I want a review of that.

So here is what I would like to have your written response on by the end of the week. I understand that this would be, expect for executive privilege or national security.

I want the legal justification, not policies or principles, for denying access to deliberative, prosecutorial documents and for obstructing interviews with line agents in the performance of oversight responsibilities to examine allegations of government misconduct.

Attorney General GONZALES. And this is in the course of an ongoing investigation at the Department, or just generally, sir?

Senator GRASSLEY. Well, this would be within the Department of Health and Human Services, but based on your advice.

Attorney General GONZALES. Now, let me go on. The Department of Office of Professional Responsibility recently found that there was a reasonable basis to believe that the FBI retaliated against

its highest-ranking Arab-American agency for raising concerns about being frozen out of counterterrorism assignments after 9/11.

After the agent, Bassam Youssef, expressed his concern to Director Mueller, the FBI halted its plan to transfer him to the FBI's primary counterterrorism section. While I am glad that the OPR of the Department of Justice has recommended that Youssef's transfer be implemented as it should have been 4 years ago, I am concerned that the person—or maybe persons—responsible for halting his transfer will not be held accountable.

As I understand the Department's whistle-blower regulations, OPR's finding will be reviewed by another office, but there will not necessarily be any further investigation to determine who is responsible for retaliation.

How will retaliation against whistle-blowers like this ever stop if DOJ's internal process does not identify who is responsible and discipline them? So would you determine for me who ordered his transfer be halted, and why?

Also, would you commit to reviewing the Department's regulations to make sure that there is a process for identifying and punishing those who retaliate against whistle-blowers?

Attorney General GONZALES. I will do that. Senator, let me just say, of course, this is a matter that is in litigation. I am firmly committed, and I believe that the Director is firmly committed, to ensure that there is not retaliation against whistle-blowers.

I know the Director issued such a directive when he first came on board. He issued another directive in 2004 about this issue. But let me look into it and see what I can find out, and provide it to you.

Senator GRASSLEY. Yes.

I am going to quickly go through my next question without reading it in detail. You recently had a settlement with Boeing. That settlement was for $615 million. Now, that sounds like a lot of money and a big victory for you, and the government generally, against somebody who did things wrong, a major company that did something wrong.

But what I cannot find out from your Department, do not get an answer on, is whether or not some of that is tax deductible. The law is very clear, that you can have a penalty that spells out that it is not tax deductible, because if this is tax deductible, it is not a $615 million settlement, it is a settlement probably 35 percent less than the $615 million.

The law is clear that you can settle that way. You need to know that lawyers sitting across the table from you know what the law is. It is just ludicrous that I cannot get an answer from your Department that they never took that into consideration.

Attorney General GONZALES. That is our policy. Our policy is, with respect to entering into settlements, that they are tax-neutral. We do not take into consideration the tax consequences of settlements. That has been our longstanding policy and our agreement with the IRS.

What we do, is after such a settlement, we provide relevant facts and information to the IRS so they can make a calculation as to what the tax consequences are of the settlement.

Oftentimes, these are very, very complicated settlements, as you know. We can rarely get agreement on a lot of issues, except perhaps sometimes the amount. So to also expect that we also get agreement as to the tax consequences, Senator, that is just not something that we do as a matter of routine or policy.

Senator GRASSLEY. Well, the law allows you to do it, and you ought to be doing it and save the taxpayers 35 percent of that settlement, so a settlement is a settlement.

Chairman SPECTER. Thank you, Senator Grassley.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Attorney General Gonzales, I would like to followup on a letter that I sent you yesterday about the *Hamdan* decision and the NSA wire tapping program. The last time you testified before this Committee you told us that the program expires approximately every 45 days, and that the President has to, himself, reauthorize it.

When is the program next due to be reviewed?

Attorney General GONZALES. I do not know the exact date, Senator.

Senator FEINGOLD. Does your staff know?

Attorney General GONZALES. They would not know.

Senator FEINGOLD. Well, if there is some way we could get that information, because I want to ask you how this process is working.

Will you or anyone else at the Justice Department participate in the review?

Attorney General GONZALES. Yes.

Senator FEINGOLD. Last week, Acting Assistant Attorney General Bradbury argued that the *Hamdan* decision had no effect on the Justice Department's legal justification for the NSA program, and he pointed to a letter on this topic that the Department of Justice sent to Senator Schumer.

Since then, a group of 14 distinguished law professors sent a letter to Congress, stating that *Hamdan* "significantly weakens the administration's legal footing." At least two commentators who had previously defended the legality of the program have indicated that *Hamdan* makes it very difficult now to argue that the program is legal.

So my question is this: do you agree with Mr. Bradbury's conclusion that the *Hamdan* decision does not change the Department's view of whether the NSA program is legal?

Attorney General GONZALES. We continue to believe that the NSA program is legal. We continue to believe that the authorization to use military force is still a basis for that conclusion and that, of course, the President does have the inherent authority, under the Constitution, to engage in electronic surveillance of the enemy during a time of war without a warrant.

I do not know how much time you want to spend talking about this.

Senator FEINGOLD. Well, let me pursue those two arguments.

Attorney General GONZALES. All right.

Senator FEINGOLD. Because I think, in both cases, the *Hamdan* decision seriously weakens what were already weak arguments. First, on the AUMF, you have the decision in Hamdi saying that the AUMF authorized holding individuals detained on the battle-

field, because that would be a fundamental incident of war. Let me just finish, then you can answer.

But then the *Hamdan* court said that the AUMF did not authorize military force, that lacked basic procedural safeguards and fairness.

So you can give your answer, but one thing I want you to address is, do you really believe that the tapping of the phones of Americans is more of a fundamental incident of war than trying detainees in military commissions?

Attorney General GONZALES. It is tapping the phones of the enemy, not Americans.

Senator FEINGOLD. In some cases, it is Americans.

Attorney General GONZALES. Who may be talking to Al Qaeda. I think the American people expect us to try to understand why.

Senator FEINGOLD. But do you really think that that is more an incident of war than the matter that the Supreme Court clearly identified as something that is not justified by the authorization of military force?

Attorney General GONZALES. I think these are good questions, Senator. I think that the importance of *Hamdi,* is that the Supreme Court said that the authorization to use military force authorizes the President to take those actions that are fundamental and incidental in waging war.

They then determined that detention of an enemy combatant is fundamental and incident to waging war, even though the Congress never used those words in the authorization to use military force. So we have got that decision that informs us as to what the authorization to use military commissions means.

You also now have the *Hamdan* decision, and the court there said that the military commission procedures—I presume, because they never got into this analysis, which is one of several aspects of the opinion that I am still trying to understand.

The court never got into an analysis as to whether or not the military commission procedures are a fundamental incident to waging war. Obviously, the court, I presume, concluded that it is not.

I believe that electronic surveillance of the enemy during a time of war is much closer to the day-to-day military campaign operational control of a commander in chief than the procedures for a military commission of someone who has already been captured. So I still believe that, while the arguments are clearly more muddled—

Senator FEINGOLD. I hear your argument. But let us cut to what you really think is the case here in terms of the Supreme Court. Do you really believe that the majority of this Supreme Court would rule that your saying is correct with regard to the authorization of military commissions? Do you really believe that a majority of this court would say that it is authorized by the AUMF?

Attorney General GONZALES. I continue to believe that a majority of this court would find that the electronic surveillance of the enemy during a time of war is fundamentally incident to waging war.

Senator FEINGOLD. That is not what I asked. I asked if you believe that this court, who just made this decision, would rule that

under the authorization of military force for Afghanistan, that in fact that is permitted under that statute.

Attorney General GONZALES. I stand by the arguments of the Department.

Senator FEINGOLD. I assure you, I have rarely been as sure as I am of this fact, that this court would not rule that way.

With regard to the inherent authority argument, that argument was made and rejected in *Hamdi*. Both Justice Stevens and Justice Kennedy made it clear that, when Congress has passed a law, the President must follow it, even when, in the absence of the law, he might otherwise have had the inherent power to do what he wants to do. That is essentially Youngstown, which you and I have talked about before.

I really find it amazing that the Attorney General of the United States could argue that this is not the case. The stubbornness of this administration in refusing to recognize its own mistakes and to take action to correct them, really surprises me.

We have a clear-cut Supreme Court decision rejecting this unprecedented theory of executive power in which the legal justification for the NSA program is based. The AUMF argument, as I have already indicated, is very weak, but I think that the Article 2 argument has been rejected as well. So, feel free to respond.

Attorney General GONZALES. Well, there is a lot to respond to there, Senator. I disagree with respect to the court rejection of our constitutional arguments. I think the court went to lengths to explain what they were doing was trying to decide this issue on a statutory basis and not on a constitutional basis, albeit, I think the court might have been clearer in its reasoning.

I can understand why some may believe that, as you have indicated. But we continue to believe that the President has the inherent authority to engage in electronic surveillance.

And it still remains true today, Senator, that of all the courts to consider this issue directly, including, most recently, the FISA Court of Review, that all the courts have held that the President of the United States does have inherent authority to engage in electronic surveillance for foreign intelligence purposes, and these decisions were during peace time. I think the arguments will be even stronger during a time of war.

Senator FEINGOLD. But did the court not say, just putting it simply, in *Hamdan*, that the President has to obey the statutes we write? Did the court say that?

Attorney General GONZALES. I think what the court said was, if the President of the United States wants to use military commissions, that unless he could justify it with practical necessity—

Senator FEINGOLD. Mr. Attorney General, I am not asking that. I am asking you whether the President has to obey the statutes we write. Yes or no? Did the court say that the President has to obey the statutes we write?

Attorney General GONZALES. I would not take the *Hamdan* decision as that clear a directive, quite frankly, Senator. I think what the court said, is if the President of the United States want to use military commissions, they have got to use procedures that are consistent with the UC&J and consistent with Common Article 3.

Senator FEINGOLD. I cannot believe you cannot straightforwardly answer the question.

Chairman SPECTER. Let him finish his answer, Senator Feingold.

Senator FEINGOLD. Well, it is the same answer. I asked a different question, Mr. Chairman, which is whether the court said that the President has to obey the statutes we write. That is what Justice Kennedy said.

Attorney General GONZALES. Of course, we have an obligation to enforce the laws passed by the Congress. But the President also takes an oath, Senator, to preserve, protect, and defend the Constitution. If, in fact, there are constitutional rights given to the President of the United States, he has an obligation to enforce those rights.

Senator FEINGOLD. Has the Justice Department issued any new legal guidance to anyone in the executive branch regarding any aspect of the treatment of detainees since *Hamdan* was issued?

Attorney General GONZALES. Of course. Privately and publicly, we have said that the court now says that Common Article 3 applies to our conflict with Al Qaeda, and that our conduct should conform with that standard, whatever it may mean.

One of the things I want to urge this Congress to do is to provide clarity and definition to what those standards are, because those violations of Common Article 3 now constitute a war crime, a felony, for people on the front lines, and they need to understand what the rules are.

Senator FEINGOLD. Has any specific Department or agency requested this advice?

Attorney General GONZALES. I am not aware of any specific requests, Senator. I think that, again, we have been very public, both here in the Committee and elsewhere, in expressing our views about how we interpret the decision by the Supreme Court in *Hamdan*.

Senator FEINGOLD. Mr. Attorney General, I have been briefed on the NSA program as a member of the Intelligence Committee. I am prohibited from sharing what I know with the other members of the Judiciary Committee, so I sent you a letter last month, asking you and the Director of National Intelligence to brief the Judiciary Committee on the NSA program.

The Judiciary Committee is considering a variety of legislative proposals relating to the program, and I firmly believe that the Committee cannot do its job without access to contemporaneous legal justifications for the program and a candid exchange with administration officials about the basis for bypassing FISA.

The Judiciary Committee, I would agree, does not need to know all the operational details, but it does need some basic factual understanding, at a minimum. Will you commit to me today that you will provide this information to the Committee before the August recess?

Attorney General GONZALES. I cannot commit to you, sir, that we will do it. We will, of course, continue to provide as much information as we can for the Committee to do its work. You have received full information in the Intelligence Committee. I cannot commit to your request.

Senator FEINGOLD. Well, it is generally helpful, when legislating, to know the factual basis for the legislation before drafting it. So, this is terribly important.

Attorney General GONZALES. We, of course, have provided our contemporaneous legal justification for the program. That has been on the table since early January of this year. We will continue to work with the Committee as best we can, as well as the Intelligence Committee, to provide information that they need to engage in their oversight responsibilities.

Senator FEINGOLD. Well, would you commit to provide us—when I say "contemporaneous," I mean at the time that the NSA program was established. That is what I am talking about, not the white paper. Would you commit to provide us with that?

Attorney General GONZALES. I have said to the Committee before, Senator, that our analysis has not remained static. It has evolved over time. But with respect to what the program currently looks like today, we have provided our legal analysis. That has been made available to the Committee.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feingold.

Senator DeWine?

Senator DEWINE. Attorney General, good to be with you. Thanks for coming.

I would like to discuss once again with you the backlog of FISA applications. Over the last few years, I have asked about this repeatedly. I have asked you, I have asked the Director of the FBI. I am really going to keep asking about it, because we need to understand why there is a backlog and exactly what we can do to solve the problem.

FISA is one of the most important tools we have to fight terrorism, and we need to make the FISA process as efficient, as rapid, and as effective as we possibly can. So, I am going to keep talking about it until, frankly, we get it fixed.

When I asked Director Mueller about FISA at a Judiciary Committee hearing in 2004, he said, "We still have some concerns and we are addressing it with the Department of Justice, but there is still frustration out there in the field in certain areas where, because we have had to prioritize, we cannot get to certain requests for FISA as fast as perhaps we might have had in the past."

Now, I discussed this topic with you also in February when you testified in front of the Judiciary Committee, and you also were concerned about it. You said, Mr. Attorney General, "It still takes too long, in my judgment, to get FISAs approved. FISA applications are often an inch thick, and it require a sign-off by analysts out at NSA, lawyers at NSA, lawyers of the Department, and, finally, me. Then it has to get approved by the FISA court."

Now, Mr. Attorney General, when Director Mueller testified in May, I asked him what we could do to fix the problem. In summary, what he told me was that we needed more attorneys working on the application process, reduced application paperwork, and an expedited process.

After Director Mueller testified in May, my staff contacted your staff to find out how we could followup to explore the suggestions that Director Mueller made. My staff was told, basically, that these

problems will be addressed when Kenneth Wainstein takes over as Assistant Attorney for National Security.

You, yourself, testified to that effect back in February. After Mr. Wainstein's confirmation hearing in the Intelligence Committee on May 16, I asked a series of specific questions to him regarding the backlog problem and some of the possible solutions suggested by Director Mueller. His answer, basically, was that he would examine the issue once he was confirmed.

Now, of course, we know, unfortunately, that Assistant Attorney General Wainstein has not yet been confirmed. It is unclear exactly when we will vote on his nomination. However, this problem, I think, is, frankly, just too urgent to wait for that.

My staff has recently discussed the backlog problem with an FBI special agent, and we have confirmed, unfortunately, that the same problems still exist today. So, I get to my question: what exactly are you, Mr. Attorney General, doing today to resolve this problem?

Attorney General GONZALES. Well, that is a good question, Senator. You are right, it is a very important issue. I think we have made progress in addressing the issue in terms of, shortly after 9/11 we detailed additional lawyers to OPR to help with the FISA process. We established an FBI–OPR task force to look at additional ways that we could streamline the process.

We do think it is going to make a difference to get Ken on board, because I have instructed him that this is something that has to be fixed. But, quite frankly, without changes in the law in terms of what is required under FISA, I am not sure that this can be solved, unless you are really just talking about throwing additional resources, additional manpower at the problem. There are clear requirements under FISA.

Senator DEWINE. You say, unless we are talking about putting additional resource?

Attorney General GONZALES. Exactly.

Senator DEWINE. All right. It seems to me, Mr. Attorney General, we have a problem. Everyone agrees we have a problem. Nobody wants to talk about it, publicly, very much. When I prod you or prod the head of the FBI, you all will admit there is a problem. Everyone wants to sort of down-play it.

You will admit it. You will say there is a problem. But when I talk to people in the field, they tell me there is a big problem. There is a big problem, when I talk to people behind the scenes.

So there is either a resource problem or there is a law problem, or there is both. It seems to me that if there is a law problem, the administration has an obligation to come forward and say there is a law problem, and then we look at that, and we can either fix that, or maybe we cannot fix it. Maybe that is something that, for many reasons, we cannot muster the votes to change that, and maybe we should not change it; I do not know.

But if it is a resource problem, what is more important than processing FISA cases? What in the world is more important than processing FISA cases, and how much money could it cost to get more lawyers? I keep getting the same answer. Let us go spend the money, Mr. Attorney General. Come forward and tell us what you need. You are not telling us what you need.

Attorney General GONZALES. I do not know who you are talking to out in the field. You may be talking to an agent, for example, who is not working on terrorism cases.

Senator DEWINE. No, Mr. Attorney General. I am talking to some people pretty close to it, and I am talking to a lot of them. I quoted you as saying that there is a problem. I quoted the head of the FBI as saying there is a problem. No one is saying there is not a problem. So there is a problem. Would you not grant me there is a problem?

Attorney General GONZALES. Of course there is a problem.

Senator DEWINE. All right. There is a problem. You just got through saying, short of throwing resources at it. My question to you is, why do we not throw resources at it and fix it?

Attorney General GONZALES. We have thrown resources at it, Senator. What I hear you saying is perhaps we should think about throwing additional resources at it. Certainly that would be helpful, and that is certainly something we ought to be looking at. But there also needs to be changes in the law, quite frankly.

Senator DEWINE. I have got to move on. But will you come forward with those specific recommendations?

Attorney General GONZALES. Yes, sir.

Senator DEWINE. That was a yes?

Attorney General GONZALES. Yes, sir.

Senator DEWINE. All right.

Let me turn to gas prices. Everyone is concerned about gas prices. As Chairman of the Antitrust Subcommittee, I have worked for years to address this concern. We have held oversight hearings on oil mergers, we have requested investigations of fuel price spikes by the enforcement agencies.

I sponsored the NOPEC bill with Senator Kohl. We put it into a new bill with Chairman Specter. That bill makes it clear that the Justice Department can, in fact, prosecute the OPEC oil cartel for its illegal price fixing of oil prices. We have passed that bill once in the Senate.

I have also co-sponsored legislation with Chairman Specter to prohibit oil companies from manipulating supply. I have sponsored legislation with Senator Kohl, and of course there have been a number of other legislative efforts by many other members of the Senate.

One thing is clear, however. We need to make sure that oil companies are obeying the laws as they exist today, and playing by the rules in the marketplace.

Recently, Senator Kohl and I asked the Justice Department to work with the Federal Trade Commission to make sure that oil companies are not gouging consumers or engaging in any other illegal or anti-competitive conduct. We recently received confirmation, Mr. Attorney General, from your Department that you are, in fact, working together with the FTC to examine the market.

Can you tell us more specifically what you are doing to address this extremely important issue and help give consumers in Ohio, and across this country, some relief from these very high oil prices?

Attorney General GONZALES. We are obviously aware of the high oil prices, Senator. First of all, the FTC did do an evaluation and

examination of the market to look at the conduct of the oil companies.

I have met with the FTC Chairman and States' Attorneys General to talk about these issues to see what they can be doing, what they are doing to see whether or not we have the appropriate mechanism or framework in place to be sharing information that would allow us to move forward with respect to prosecutions. That dialog continues today.

There are, quite frankly, though, limits on what we can do in terms of Federal prosecutions. There is no Federal law against price gouging, unless you are talking about collusion, fraud, market allocation, or bid rigging. There are limits to what we can do at the Federal level in terms of prosecuting these kinds of cases.

I know there has been some discussion that perhaps we ought to have a Federal law against price gouging. I would urge caution as we head down that road. If you put a cap on what can be charged in a distressed area—

Senator DEWINE. My time is almost up, and I have one more question. I assume that you will, though, continue to pursue this special inquiry that you referenced in your letter to me dated July 3, and you are going to continue to do that?

Attorney General GONZALES. Yes, sir.

Senator DEWINE. Last question. Mr. Attorney General, on May 2nd of this year, Director Mueller testified in front of the Judiciary Committee. On May 9, I submitted a number of written followup questions to the Director on a range of important topics.

Specifically, I asked questions regarding the FBI's computer system, its allocation of resources to fight crime, the backlog in name checks being done by the FBI, and efforts to increase the facilities available to FBI agents so they can safely examine classified material in criminal intelligence cases.

It has been about two and a half months, and I have not received the answers to any of these questions. Now, I am told that the FBI has drafted responses and sent the over to the Justice Department last week for approval.

Now, I am not sure why it takes the FBI over two months to just draft responses to questions such as these, but I certainly hope, Mr. Attorney General, that the Justice Department can find a way to get these answers to me quickly now that the FBI has finally come up with a draft response. Can I expect this response fairly soon?

Attorney General GONZALES. We will do our best. Yes, sir.

Senator DEWINE. I thank you, and I thank the Chairman.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Durbin?

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Attorney General, thank you for being with us. Mr. Attorney General, Arthur Schlesinger, Jr. is a Pulitzer Prize-winning historian. He was recently quoted in New Yorker magazine, commenting on this administration's legal defense of torture. This is what Mr. Schlesinger said: "No position taken has done more damage to the American reputation in the world, ever."

You were there at the moment of creation, when this administration's torture policy was being debated shortly after 9/11. You rec-

ommended to the President that the Geneva Conventions should not apply to the war on terrorism. In a January, 2002 memo to the President, you concluded: "The war on terrorism renders obsolete the Geneva Conventions."

This was clearly not a unanimous view within the administration. Secretary of State Colin Powell objected to your recommendation. With decades of military experience informing his judgment, he argued that we could comply with Geneva Conventions and fight the war on terrorism.

He wrote a memo to you pointing out that the Geneva Conventions do not limit the ability to hold and question a detainee. In his memo, Secretary Powell concluded that setting aside the Geneva Conventions will "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops."

Secretary Powell said, "It will undermine public support among critical allies, making military cooperation more difficult to sustain."

Mr. Attorney General, as you look back on what has transpired over the last 4 years, from Washington, D.C. to Guantanamo, to Abu Ghraib and the damage that this decision to abandon the Geneva Conventions has done to the country's image, was Secretary of State Colin Powell not right?

Attorney General GONZALES. Senator, you began by talking about a defense of torture. We do not, and will not, defend torture. Our policy, our legal obligations, are that the United States does not engage in torture. So, I will not defend our policies that promote torture, because no such policies exist.

The Supreme Court of the United States has not held that the full protections of Geneva apply to our conflict with Al Qaeda. What the Supreme Court held, was that Common Article 3, which requires basic humane treatment to detainees, apply to our conflict with Al Qaeda.

As you will remember, in February of 2002, the President issued a directive to our military that, even though Geneva does not apply to our conflict with Al Qaeda, they would nonetheless be treated humanely, and as appropriate and subject to military necessity, consistent with the Geneva Conventions.

Senator DURBIN. Mr. Attorney General, it is clear from the *Hamdan* decision that they did not agree with your conclusion that the Geneva Conventions were obsolete. I have been struggling with this, because last week I went to Guantanamo and I met with the leading interrogator. This gentleman, who works for the Defense Intelligence Agency, has been engaged in questioning prisoners for 30 years.

I asked him point-blank, if I were to tell you tomorrow that you had to follow the Geneva Conventions in the way you are interrogating prisoners at Guantanamo, what would change here? He said, "Nothing." What about the Uniform Code of Military Justice? He said, "we follow it." What about the McCain torture amendment? He said, "we follow it."

I have been struggling, Mr. Attorney General, to try to understand your statement, the statement of Mr. Bradbury, and some of the supportive questioning from Republican Senators here. Why,

then, do you not acknowledge the obvious, that the Geneva Conventions that we have followed for more than half a century do apply?

I can only come up with two rationales for why you still cling to the hair-splitting on the Geneva Conventions. One, generated by your own memo, a memo that was disclosed by Newsweek magazine, a memo related to the War Crimes Act.

In that memo, you wrote, one key advantage of declaring that Taliban and Al Qaeda fighters did not have Geneva Convention protection is that it "substantially reduces the threat of domestic criminal prosecution under the War Crimes Act."

Is that what this is about, reserving the possibility that the Geneva Conventions do not apply as a protection for those members of the administration who argued otherwise four or 5 years ago?

Attorney General GONZALES. Of course not, Senator. What this is about, is looking at the words of the statute and to see whether or not, by its words—which is, of course, what the Senate looked at when it ratified the treaty—are the words that we look at with respect to how the treaties are implemented as a domestic matter.

And based on the words of the statute and the conduct of Al Qaeda and the Taliban, a determination was made that the full protection of the Geneva Conventions would not apply. That is what that is about. Now, if you are talking about—

Senator DURBIN. But if you do not deny this memo, the memo you sent to the President, which says, as long as you hold to the position that the Geneva Conventions do not apply to Al Qaeda and the Taliban, then we do not have to worry about prosecution under the War Crimes Act.

Attorney General GONZALES. Well, I think it is certainly important for the President to understand all the ramifications of the decision that he is going to make.

I might add, I think that the memo that you are referring to that has been disclosed or discussed in other publications relate to a draft memo, not the memo that actually went to the President of the United States.

Senator DURBIN. May I see the final memo? Will you send that to us?

Attorney General GONZALES. That is something you will have to raise with the White House, Senator.

Senator DURBIN. I think the answer is, no, you will not send us the memo.

Attorney General GONZALES. Well, the memo was written while I was at the White House. That is a decision to be raised with the White House.

Senator DURBIN. May I ask you, the second part that is interesting, is I am trying to figure out the rationale for the hair-splitting on the Geneva Conventions here, because the people on the ground at Guantanamo and others tell us they live by it, they can live with it, and they think it is a valid starting point in terms of basic human rights. The difficulty seems to be within the administration.

I am wondering this. Was there a signal sent our way by Vice President Cheney when the McCain torture amendment passed 90

to 9, when he said, "We want to exempt intelligence personnel from the coverage of this amendment?" Is that what this is about?

Attorney General GONZALES. I do not know what the Vice President may have said or what signal he may have been sending, Senator.

Senator DURBIN. Well, then let me ask you point-blank. When it comes to intelligence agents of the American government who are working in the field of intelligence, are they bound by the McCain torture amendment?

Attorney General GONZALES. Absolutely.

Senator DURBIN. They are?

Attorney General GONZALES. Yes.

Senator DURBIN. All U.S. personnel, including intelligence personnel, are now required, do you believe, to abide by Common Article 3 in the treatment of detainees?

Attorney General GONZALES. I read the opinion, it says it applies to our conflict with Al Qaeda.

Senator DURBIN. All U.S. personnel.

Attorney General GONZALES. That is what it says, without qualification.

Senator DURBIN. So we have sent a directive, not only to the military, but also to intelligence personnel, that they are to apply the Geneva Conventions?

Attorney General GONZALES. Well, I do not know about a directive. Again, DoD sent a directive, I presume, because they felt that it was appropriate to do so. I do not know what the agency has done, or other departments and agencies have done, with respect to a directive. We stand available to provide guidance, if asked by agencies and departments, in terms of what our legal obligations are.

Senator DURBIN. Despite questions raised by Vice President Cheney, you are saying to us, clearly, the Geneva Conventions apply to intelligence personnel, as well as military personnel?

Attorney General GONZALES. I think the logical conclusion or result of that—I mean, the court says, we believe, in *Hamdan*, that in our conflict with Al Qaeda, Common Article 3 applies.

Senator DURBIN. And one of the other questions I raised at Guantanamo related to a memo which we heard about earlier from an FBI agent who made a statement in e-mail, which was FOIAed, relative to the treatment of a prisoner at Guantanamo.

The statement has become very controversial; it has been raised on the Senate floor, it has been raised in this Committee. I wrote to the Department of Justice and FBI and asked them if they would authenticate the e-mail, and they authenticated it.

When I asked about this particular experience that was related in this e-mail, I was told it was under investigation by the Inspector General, Mr. Fine. Can you tell us, when that investigation is complete, that his findings will be made public?

Attorney General GONZALES. I will certainly see what we can do to make the information from that investigation public, his conclusions. But that is a discussion that I will have with the Inspector General.

Senator DURBIN. I hope they will be made public.

There was a time, many years ago, when you were notified that detainees being held at Guantanamo may have had no connection whatsoever to the war on terrorism and should be released.

It goes back to a period in the summer of 2002, when an analyst was sent to Guantanamo and came back and reported, through a classified report, which reached General John Gordon. It was then sent to the White House, to you, and Mr. Addington, that potentially innocent people were being held in Guantanamo. Do you recall this?

Attorney General GONZALES. I do not. I guess the important word is "potentially." I mean, one of the things that we do is we make evaluations, both before people come to Guantanamo and after they come to Guantanamo.

Senator DURBIN. But Article 5 determinations were not being made as to these people.

Attorney General GONZALES. I think we did far more than Section 5 determinations. There were assessments made on the ground, and before people were sent to Guantanamo of a person's particular status. So I think we went well beyond Section 5 determinations.

Again, once people arrived in Guantanamo, there was an assessment made. We now have Combatant Status Review tribunals where an assessment is made, and we have annual review boards which, annually review a person's status and make a determination as to whether or not they should remain in Guantanamo.

We give far and away much more process than is required under the Geneva Conventions for prisoners of war, and that has been true for many years.

Senator DURBIN. Thank you.

Chairman SPECTER. Thank you, Senator Durbin. Attorney General Gonzales, would you care for a short break?

Attorney General GONZALES. Thank you, Mr. Chairman.

Chairman SPECTER. You are welcome.

Attorney General GONZALES. Actually, I am fine, if Senator Feinstein is ready to go.

Chairman SPECTER. All right.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good morning. I understand that you were already asked a question about Secretary Englund's memorandum to DoD to conform with *Hamdan*, and I believe the question you were asked was, would you send out a similar letter? I think, as was reported to me, the response was, well, it is up to the Department to inquire. Is that a correct assessment?

Attorney General GONZALES. Well, Defense made a determination that they wanted to send out this guidance. As I understand it, the Department was consulted about what the guidance should say. But this was not a decision by the Department to send out the guidance, this was a decision by the Department of Defense.

Senator FEINSTEIN. I understand that. Let me put this question to you: will you be sending a letter, let us say, to the CIA, pointing out the same constraints?

Attorney General GONZALES. I am not aware of any plans to send out a similar letter, Senator.

Senator FEINSTEIN. Why would that be?

Attorney General GONZALES. Well, again, the Department of Defense made a decision that they needed to send out this guidance; perhaps the CIA believes it does not need to send out similar guidance.

Senator FEINSTEIN. Yes.

Attorney General GONZALES. We have been very public about what we think this decision means, and I do not think anyone can misunderstand, even at the agency, what the requirements are. And believe me, if there is anyone that is concerned about complying with the rule of law, it would be the folks down at the CIA.

Senator FEINSTEIN. It would just seem to me that everybody should be on the same page. The decision made no exception for anybody. I, for one, very much appreciated what the Secretary of Defense did, with Secretary Englund did.

Attorney General GONZALES. Again, without confirming anything that the CIA may be doing, of course, if you look at just the raw numbers of individuals within DoD who are involved, day-to-day, with members of Al Qaeda, certainly, apparently the Department of Defense believed it was appropriate, if not necessary, to simply remind everyone about this decision.

Senator FEINSTEIN. All right. I got the message.

The message is, you do not feel it is appropriate to remind everybody about the decision.

Attorney General GONZALES. No, ma'am. I did not say that. What I am saying, is I am not aware that the CIA believes that such guidance is necessary. There may be a number of reasons why they believe it may not be necessary.

And, quite frankly, Senator, they may have sent out guidance that I am not aware of. It is possible that they have sent out guidance and I simply am not aware of it.

Senator FEINSTEIN. All right. Thank you.

In his testimony before this Committee last week on *Hamdan*, Acting Assistant Attorney General in charge of the DOJ's Office of Legal Counsel, Mr. Bradbury, stated, "The court did not address the President's constitutional authority and did not reach any constitutional question." He then repeated the same sworn testimony the next day in a hearing before the House Armed Services Committee.

Is it really the position of the Department of Justice that *Hamdan* did not issue a constitutional ruling on the Separation of Powers Doctrine?

Attorney General GONZALES. You know, Senator, that is a very good question. It is one that I have been wrestling with. I think the bottom line for me is, it did not. In fact, I think there is a statement, even by Justice Stevens, where he says we do not have to reach that constitutional question. But oddly enough—I believe I recall, and I may be wrong—he says Congress has already said something in this area.

I have a hard time following the analysis. I think at the end of the day, my ultimate conclusion is that the court decided this on fairly narrow grounds, on statutory grounds, and did not take a position on the constitutional authority of the President here, and the Congress, vis-a-vis military commissions. So, that is my view.

Senator FEINSTEIN. All right.

I know that Senator Schumer sent you a letter and received a response from Will Maciella, asking you to explain why the reasoning in *Hamdan* does not also apply to the NSA domestic surveillance program.

In the letter to Senator Schumer, Mr. Maciella stated that DOJ's initial impression is that the court's opinion does not affect our analysis of the terrorist surveillance program because, in part, Congress "left open the question of what rules should apply to electronic surveillance during war time."

Now, Congress did not leave the question open. FISA explicitly says that warrantless surveillance can continue for only 15 days after a declaration of war. Now that you have had an opportunity to examine *Hamdan*, is it still DOJ's opinion that it does not affect the legality of the TSP?

Attorney General GONZALES. Of course, there has been no declaration of war here, so we cannot take advantage of that particular provision. Our judgment is, it does not affect the legality of the TSP program. But let me explain why.

Senator FEINSTEIN. Oh. But if I might just interrupt you. Then you are saying, clearly, that the AUMF does not carry the full constitutional weight of a declaration of war.

Attorney General GONZALES. Yes, that is correct. When you declare war, that affects diplomatic relations.

Senator FEINSTEIN. I understand that.

Attorney General GONZALES. That maybe nullifies treaties. So there is a reason why Congress has not declared war in 60 years, but they have authorized the use of force several times. Clearly, there is a difference, yes.

Senator FEINSTEIN. But you are creating a caveat now and saying that the 15 days does not extend to the AUMF.

Attorney General GONZALES. No. What I said was, we cannot take advantage of that provision under FISA because there has been no declaration of war. Maybe I misunderstood your question. I am sorry, Senator.

Senator FEINSTEIN. Well, see, I think Congress did prepare for that eventuality by providing the 15 days. You are saying, well, it really does not apply. In essence, you are restricting the AUMF, which I think should be restricted. So you are, in essence, agreeing with my point.

Attorney General GONZALES. Well, I agree with your point that the authorization to use military force is not a declaration of war. That is certainly true.

Senator FEINSTEIN. All right. So the President's plenary powers are somewhat restricted then, anyway.

Senator Specter's new FISA bill eliminates the 15-day window on surveillance outside of FISA after a declaration of war, leaving unanswered the question of what a President could do in that situation.

In *Hamdan*, the court assumed that the AUMF had triggered the President's war powers. Would this combination, in your opinion, give the President the ability to claim that Senator Specter's bill gives him statutory power to conduct surveillance outside of FISA until the end of the war on terror, unless we repeal the AUMF?

Attorney General GONZALES. Senator, I am sorry. I am not sure that I understand your question. I hesitate to ask you to repeat it. If you do not want to repeat it, I would be happy to try to respond in writing.

Senator FEINSTEIN. Well, Senator Specter's new bill eliminates the 15-day window on surveillance.

Attorney General GONZALES. Yes. It requires us now, at the option of the President, to submit for constitutional analysis to the FISA court whether or not it is constitutional.

Senator FEINSTEIN. So essentially it gives the President the ability, under that bill, the statutory power to conduct surveillance outside of FISA for as long as the war on terror continues.

Attorney General GONZALES. The President has already committed that, if in fact legislation passes in a form that is not otherwise unacceptable to the President, that he is going to submit the program to the court and the court is going to reach a conclusion as to whether or not the program is, in fact, constitutional. So, we will have, at the end of the day, a decision by a court saying what the President is doing is, in fact, constitutional.

Senator FEINSTEIN. All right. Let me continue on. Maybe this is too obtuse.

Attorney General GONZALES. I apologize, Senator.

Senator FEINSTEIN. That is all right.

The President is saying that if there is agreement without amendment to Senator Specter's bill, he, in essence, will sign the bill.

Attorney General GONZALES. I was not present in the meeting with the Chairman and the President, but my understanding is that, of course, if there were amendments made that are acceptable to the President of the United States, that that would not vitiate the agreement.

Senator FEINSTEIN. Well, as I understand it, he will then voluntarily agree to submit the domestic surveillance program to the FISA court if the Congress passes the bill.

Attorney General GONZALES. Yes.

Senator FEINSTEIN. My question is, why does he not submit it now?

Attorney General GONZALES. I am not sure that the FISA court has the authority, quite frankly. I think the FISA court responsibility is to see whether or not an application comports with the statute, the FISA statute. I think that this legislation would be important in clarifying the responsibility and jurisdiction of the court.

Senator FEINSTEIN. Well, we are in open session, but I really do not accept that because of past actions with respect to the FISA court. I will not go into it. He could submit the program to the FISA court. I think we are all prepared to take care of any problems.

When you testified before us once before, you said, well, it is too hard to prepare, it takes too long, we need to move on an emergency basis. All of those are remedial problems.

Attorney General GONZALES. Senator, I beg your pardon. I am going to go back and look at the transcript of your question. I probably will want to modify. I want to make sure that I am being as

accurate as I can about what we are doing, because there may be some things here that may affect my response.

Senator FEINSTEIN. I would appreciate that, because the way I view it, a very conscious effort has been made not to submit, certainly, content collection to the FISA court.

Attorney General GONZALES. Senator, this is something that you and I should have a conversation about.

Senator FEINSTEIN. All right.

Now, several of us here, and especially those of us serving on the Intelligence Committee—

Chairman SPECTER. Senator Feinstein, how much more time do you want?

Senator FEINSTEIN. Is my time up? It is. I will yield.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Senator SCHUMER. Mr. Chairman? Just before you call on Senator Kyl.

Chairman SPECTER. Senator Schumer?

Senator SCHUMER. I am at the back of the line here because I came last, and that is fine. I have a 12:22 appointment on the floor of the Senate to speak on stem cells. That is the only time I get.

I know Senator Sessions still may want to ask questions, at which point I could come back after that. But if we start a second round, would it be all right for me to have my 10 minutes right when I got back at, say, 12:35?

Chairman SPECTER. Well, if we are here at that time. We will arrange to be here then.

Senator SCHUMER. Great. Thank you, Mr. Chairman. I appreciate that.

Chairman SPECTER. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Mr. Attorney General, now you know what the Senate means by promising we will give you a warm welcome when you come up here to Capitol Hill.

It is obviously a time when we can all share our grievances, but I also want to share some kudos. The line prosecutors that represent the Department of Justice, as well as your very capable staff here in Washington, do a great deal of work, especially relative to the war on terror that sometimes goes unnoticed.

I just want to state for the record my appreciation for the work that they do, and especially your acknowledgement that some of the tools that we have helped to provide for the Department of Justice to fight this war against the terrorists have been put to good use, and I appreciate that.

Attorney General GONZALES. Thank you, Senator.

Senator KYL. Mr. Attorney General, I have, I think, five questions. One relates to a question that Senator Leahy asked you.

On this rare occasion Senator Leahy and I appear to be in agreement, therefore, I would ask you to be especially attentive to this point, and that has to do with the Crime Victims Rights Fund.

The intention here was that the money end of that fund be spent for the benefit of victims. There is not nearly enough money to meet all of their needs, yet everything above the cap gets zeroed out and we have to start from scratch the next year. It would be

my hope that the Department of Justice would support removing the cap so that the money that goes into that fund, which I believe is the cap is $650 million.

I believe there is $1.255 billion in the fund, so there would be another $605 million available. I would just ask you to consider supporting a removal of the cap and not zeroing out the money above the cap so that that can be spent for crime victims. Would you be willing to consider that, please?

Attorney General GONZALES. I am obviously willing to consider it. If you remove the cap, I am not sure if it is even possible to spend that much money. Maybe a better approach to consider would be raising the cap. But obviously we want to help victims as much as you do, Senator, and we want to work with you, and we will obviously consider it.

Senator KYL. And I appreciate, there were some recent proposals regarding staff changes, and so on, and you were very attentive to the concerns that I expressed. Just raising the cap would be of tremendous benefit here, if you would consider doing that. I appreciate it.

Something else I would like to compliment your office on, is the work now that has been done recently with respect to Internet gambling, and especially the laws that prohibit sports gambling, the Wire Act. I think, just yesterday, there was another indictment announced relating to a bet on sports.com.

I wrote to you May 18, complimenting the office for an indictment obtained against a William Scott and a Jessica Davis of Solberry Limited and Worldwide Telesports, Inc. for laundering about $250 million worth of Internet gambling wages.

The point here is, we have legislation that has just passed the House of Representatives that would give further enforcement mechanisms to not just the Department of Justice and the States' Attorney General, but also enable the Department of the Treasury to issue regulations to banks with respect to how they honored these gambling debts of the prohibited businesses, thus to help put them out of business.

The Department's statement of position in the House of Representatives was in support of that legislation, although it indicated that there were other changes that you would be willing to discuss with us.

We are hoping to get that legislation up in the Senate. There is not a lot of time. But I appreciate the statement in support of the legislation and would hope that the Department would work with us in trying to get this important Internet gambling legislation passed in this session of Congress.

Attorney General GONZALES. It is very important for us as well, and we look forward to working with you on it, Senator.

Senator KYL. Thank you very much.

Now, a third subject has to do with a complaint that I often hear in my State of Arizona from the county prosecutors. We have 15 counties, and there is a county attorney in every county.

Well, I guarantee you that the four busiest are the counties that border the international border with Mexico, as well as Maricopa County, the seat of government in the State, because much of the prosecution that has heretofore been done by the U.S. Attorneys

has had to be neglected because there are simply too many cases being brought for the court time, the number of attorneys available, the public defenders, the judges. I mean, every aspect of the criminal justice system is stressed.

We have just about doubled the number of Border Patrol agents in the last 6 years, and so the number of apprehensions is going way up. Over 10 percent of the people apprehended are criminals, either wanted or have serious criminal records.

The amount of crime committed by and against illegal immigrants is mushrooming, which makes it very difficult for either the U.S. Attorney's office or the county prosecutors to do their job. They complain that, because of the squeeze on the U.S. Attorney's office, the U.S. Attorney is not able to prosecute drug-related cases, for example, that in the past they have prosecuted.

The common practice, of course, is to have a threshold, a number of ounces, for example, of marijuana or cocaine that represents the threshold that will justify a U.S. Attorney prosecuting the case. That threshold has continued to go up as these cases have mushroomed.

I checked, because of these complaints by the county attorneys, and in 2004, I worked with Attorney General Ashcroft, who obtained an additional 10 spots for the U.S. Attorney's office in the State of Arizona.

But because of budget cuts over the last 3 years, it has now been reduced again by 10 percent and we are now worse off than we were in August of 2004 when I was able to get those additional 10 spots.

What I would ask you to do, is this. Considering the extraordinary pressure as a result of the failure of the Federal Government to be able to adequately enforce our border with Mexico, would you and would the Department of Justice be willing to support, both in next year's budget, but also in a supplementary way, additional funding to add U.S. Attorneys, as well as other necessary components to our Federal criminal justice system, both to meet the Federal needs, as well as relieve some of the burden that has been placed on our State law enforcement officials as a result of this?

Attorney General GONZALES. Senator, of course, the President, in the 2007 budget, has asked for additional resources for U.S. Attorneys' offices, which, quite frankly, we really need to have total funding with respect to U.S. Attorneys.

There was additional moneys available in the supplemental, which we very much appreciate. But the truth of the matter is, we have had some issues because we have not had our request for U.S. Attorney funding honored in the past, and we hope that that is corrected.

There is no question about it, that I fear that the demands on the Department, given the focus on apprehension, securing our borders, closing our borders, at the front end, that at the back end, we may have a serious problem, a serious problem for the Department. It is one that we are looking at internally.

I am talking to the White House about this, expressing, "guys, let us pay attention, not to just what happens at the front end, but what happens at the back end." We cannot simply be detaining

someone or arresting them, and if we do not have the resources to prosecute them, we do not have the resources to put them somewhere, what good are we doing?

So it is something that I am worried about, and I know that you are, likewise, concerned about. You are from a border State and you understand the pressures there. So we are looking at it, and obviously we want to work with you to try to find the appropriate solution.

Senator KYL. Well, great. I will take that as an offer to perhaps meet with our appropriation legislators, as well as others, to find a way to get as much funding as possible for the Federal criminal justice system to meet this need.

Attorney General GONZALES. I will just say that of course there are other priorities that have to be met, and other issues we are tackling, like terrorism and things like that, so we just have to find a way to accommodate all of those priorities. It may mean that we have to be simply smarter, more efficient, and more effective. But we are obviously happy to talk with you about the best way we can find to solve this problem.

Senator KYL. Well, somebody has likened this to the pig and the python: it has got to go through the system once. As you point out, you have hired more Border Patrol and they apprehend more people, and a bunch of them are criminals and they have got to be prosecuted.

There is no alternative but to prosecute them. That has to be one of our highest priorities. In our oaths of office and in the establishment of our government, the security of the people is the first responsibility of the Federal Government. That is both from threats without and threats within.

Given the Federal nature of some of these crimes, it seems to me that that is a top priority. I would certainly hope that you would work with us to increase the funding on that.

Let me just close. I would like to ask you to just submit for the record for me a brief statement of your position with respect to limiting the kind of habeas rights that American citizens have to detainees in places like Guantanamo Bay, if you could just give us a short statement on your views with respect to that and the legislation that Congress passed.

Then, finally, I would just ask if you are supportive of legislation that I hope we are about to get through the Senate dealing with child crime and some ways of fighting that, including an establishment of a national registry of the people who have been found as abusers throughout the various States as a means of helping to protect children when the abuser moves from State to State. If you are familiar with that, could you express an opinion on that, please?

Attorney General GONZALES. Well, we support it. It is a serious issue. We ought to be doing, I think, more to protect our kids. We support this effort. I would be happy to submit, for the record, my views on habeas challenges for aliens held at Guantanamo.

Senator KYL. I thank you very much, Mr. Attorney General.

Chairman SPECTER. Thank you, Senator Kyl.

Mr. Attorney General, I have been advised by your staff, through my staff, that you would prefer to finish before the luncheon break, and we will try to accommodate that.

Attorney General GONZALES. If it meets with your schedule, Mr. Chairman.

Chairman SPECTER. Well, we are going to try to accommodate that. It is not possible to say how many Senators will appear. It looks as if we are about to finish, and then more Senators exercise their right to come back when their time is close.

Senator Leahy and I each have a second round, and it may well be that there will be no other second rounds. Senator Schumer, as you know, will be returning here shortly after 12:30 to have his round. So, I think there is a realistic expectation that we could finish before 1, that is, subject to other Senators not coming in to request a second round.

Mr. Attorney General, coming back to the point of departure from my first round, you said it was a last resort to have a contempt citation and a jailing of New York Times reporter Judith Miller for 85 days. I questioned that in the context of the issues which were before the grand jury at the time she was held in contempt and incarcerated.

You have a question as to whether there ought to be a privilege, generally. But if the Congress comes to the conclusion on the Lugar bill to establish a Reporter's Shield, we may well make an exception for serious national security cases. I am not sure, but if there is to be an exception, it is my judgment that that would be the only one.

Now, if you start off with the grand jury investigation on the issue of the outing of an undercover CIA agent, Valerie Plame, and when that issue is no longer in the grand jury investigation, as it was not, then it seems to me that it is an entirely different situation when you are looking at perjury and obstruction of justice, not to say that those are not serious offenses, but they do not rise to the level of a serious national security issue.

Now, if the Congress comes to the conclusion that the only exception to the Reporter's Shield would be a serious national security question, would you think it appropriate to proceed with a contempt citation and incarceration of a reporter in the context that the charge is perjury and obstruction of justice?

Attorney General GONZALES. You mean, following the passage of legislation that would provide that sort of immunity to a reporter?

Chairman SPECTER. A shield, yes.

Attorney General GONZALES. It seems to me, at that point the courts would have to look at that. What the courts decided was that there was not otherwise a shield and that, therefore, she had to come forward with that information.

But if the Congress says there should be such a shield, limited only for national security reasons, it seems to me that that would be something the court would have to consider, and would consider.

Chairman SPECTER. Let me move, now, to signing statements, Mr. Attorney General. There are a couple of more subjects I want to take up with you.

The Constitution, as we all know, provides that when the President disagrees with legislation sent by Congress, he vetoes it. What

is the legal authority for the President to decide which provisions he will enforce and which provisions he will not enforce, to cherry-pick on legislation?

Attorney General GONZALES. Sir, his authority is the oath of office that he takes to preserve, protect, and defend the Constitution. With or without a signing statement, all a President can do is to preserve, protect and defend the Constitution.

So if there is a statute that is passed that is subject to different interpretations, he has an obligation under his oath of office to interpret that statute and to have that statute enforced in a way that he believes is constitutional. That is his duty under his oath of office.

Signing statements have been around since Thomas Jefferson. There is nothing unusual or unique about signing statements. It is a way for the Executive to communicate to the Congress, to communicate to the executive branch, and to communicate to the public about his views about legislation.

Chairman SPECTER. If the President finds portions of the legislation unconstitutional, would it not be preferable, in his oath to uphold the Constitution, that he follows the constitutional provision to veto the bill, and say to the Congress, send me a constitutional bill?

Attorney General GONZALES. That is certainly an option for the President of the United States.

Chairman SPECTER. How many options does he have?

Attorney General GONZALES. Well, sir, I think what he wants to do, as much as he can, is respect the will of the Congress. To veto the bill means everything about the legislative will is gone.

But there may be a particular provision in a massive piece of legislation that may be subject to a different interpretation, and I think it would be more disrespectful to the Congress to simply veto that legislation, to veto all of that work, when, in fact, we can maintain the will of the Congress subject to the President upholding his constitutional authority.

Chairman SPECTER. I think you are wrong on your evaluation of what the Congress would conclude represented respect for the Congress. I think the Congress would prefer a veto and battling it out within the constitutional confines of a veto, as opposed to a cherry-picker.

Let me move on to the issue—

Attorney General GONZALES. Can I make one final point, Mr. Chairman?

Chairman SPECTER. Sure.

Attorney General GONZALES. With or without a signing statement, I do not think would alter this President's actions. With or without the signing statement, subsequent to the signing of the legislation, he is going to interpret the legislation in a way that he believes is consistent with his oath of office, and I believe every President would do that.

Chairman SPECTER. Well, that comes back to the idea that, if he thinks a bill is unconstitutional, to veto it, unless Congress sends him a constitutional bill.

Let me move back to the electronic surveillance program and the issues as to how we are going to get it submitted for judicial review.

Does the provision in the Foreign Intelligence Surveillance Act, that it is the exclusive procedure for authorizing wire tapping, have any impact at all on the President's Article 2 constitutional authority?

Attorney General GONZALES. Well, I think it would be one factor. In applying the Youngstown analysis, you would see what Congress has said in a particular area, what is Congress's constitutional authority in a particular area, and what is the President's constitutional authority in a particular area.

We believe, though, the statute contemplates Congress otherwise giving approval for the President engaging in electronic surveillance, and our position has always been that the AUMF constitutes such approval.

Chairman SPECTER. Well, if you reject that, as almost everyone else has, is it not your base contention that the three Federal appellate positions—the Supreme Court has reserved on the question. You are nodding yes.

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. As to whether the President has inherent authority to conduct warrantless wire taps. Three Federal appellate courts have said that the President does, providing he meets the balancing test.

So if a President meets the balancing test, which is the test of Article 2 power, at least according to three Federal appellate courts, then the provision of the Foreign Intelligence Surveillance Act on exclusive procedure is superseded by inherent authority, is it not?

Attorney General GONZALES. That is correct, sir. I think that was the finding of Judge Silberman in *In re: Sealed Case*, which says, assuming the President has this constitutional authority, based upon these other decisions by Circuit Courts, FISA cannot encroach upon that constitutional authority.

Chairman SPECTER. Similarly, when there is language in a statute which says nothing in this statute shall encroach upon the President's Article 2 inherent power, that provision, similarly, is meaningless, is it not, because the President has whatever constitutional authority the Constitution says.

Attorney General GONZALES. It does not change the status quo.

Chairman SPECTER. It cannot change the status quo. But we have a lot of arguments. The President's negotiations insisted on putting in a provision, that "nothing in this statute shall affect the President's inherent constitutional authority," where nothing can, just like those who want to modify the FISA Act, want to put in, FISA has exclusive authority, which does not affect whatever the constitutional power of the President is.

May the record show that the witness is nodding in the affirmative. Now, you were nodding in the affirmative?

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. All right.

When Senator Feinstein asked you, why does the President not submit the program to the FISA court, you accurately answered, I

think, that the court does not have jurisdiction, but there would be a grant of jurisdiction by the bill.

Now, the question that I come to, Mr. Attorney General, is how to have the rule of law govern, and how to have a core review of the constitutionality of the program, while maintaining its secrecy. The FISA court has an unblemished record for not leaking, and it has expertise.

We had a series of hearings—four to be exact—and at one of them, four former judges of the Foreign Intelligence Surveillance Court looked at the proposed legislation, made improvements in it, and said that the FISA court would be well qualified and well suited to make a determination on constitutionality.

Now, for us to pass a statute conferring jurisdiction on the FISA court, we are going to have to have the concurrence of the President, unless we can override a veto, which is a total impossibility, given the complexion of the House and Senate.

The President is getting something from the statute in terms of increased flexibility, 7 days instead of three; you can delegate the authority; if a call both originates and ends overseas, it could be construed as being subject to FISA if a terminal is in the United States. We clarify that point.

There may be revisions, as you have noted, if they are acceptable to the President. I think Senator Feinstein makes a good point, retain the 15 days. There can be improvements, subject to agreement by the President.

So in the search for a way to get the President to make the commitment to give the FISA court jurisdiction, it has been necessary to accommodate compromises, necessarily.

But the bill does not expand on the President's constitutional authority because the statute cannot do that. It does give the President greater flexibility. And understandably, he did not want a legislative mandate, which the statute initially included that he had to submit it.

He understandably said, no, that would encroach upon the institutional powers of the President and could bind a future President, although, again, it is doubtful if any statute can bind any President, because of whatever Article 2 power he has, or she has.

I do believe that a significant precedent would be created if we worked this out and the President fulfills a commitment to refer to FISA, conditioned on the statute being possed as negotiated.

The future President would look back and note what President Bush did, and he would not be bound by what President Bush did, but it would be a very solid precedent, which would weigh in public opinion as a political issue, do you not think?

Attorney General GONZALES. Mr. Chairman, this is a very significant effort. I appreciate and applaud your efforts in this respect, because it is an important program.

We need to find a way to continue the program, but do it in a way where everyone is comfortable regarding the legalities. This is an opportunity to present it to Federal judges and let them tell us whether or not, in fact, we are meeting our obligations under the Constitution.

Chairman SPECTER. Well, in the final negotiating session, Mr. Attorney General, we missed you. It was worth attending.

Attorney General GONZALES. I got a report on it, sir.

Chairman SPECTER. Even if you had a non-speaking role, it was worth attending.

In light of only Senator Leahy being present, I have exceeded the red light, as a rarity.

Senator SESSIONS. I do not count, Mr. Chairman? I heard I was a member of the Committee.

Senator LEAHY. You do in my mind, Senator Sessions.

Chairman SPECTER. I would not have exceeded the red light. If it is all right with you, Senator Sessions, I will yield to Senator Leahy, then to you.

Senator SESSIONS. Thank you.

Senator LEAHY. Attorney General Gonzales, there is nothing stopping the President of the United States from submitting that program today, just voluntarily, to FISA, is there? You have talked about the enormous authority you feel he has. There is nothing to stop him. If he wanted to do that, there is nothing to stop him from doing that today, is there?

Attorney General GONZALES. Obviously, as a physical matter, no. The President could submit an application, even knowing that the court may not have any jurisdiction or authority to rule on the application.

Senator LEAHY. But you do not know whether they do or not. There is nothing to stop the President. If legislation was passed exactly the way he wants it written, which gives him a whole lot of other benefits, he has agreed to submit it to the court. There is nothing to stop him from submitting it to the court today, is there?

Attorney General GONZALES. Sir, if the President of the United States wanted to do that. But I think the approach that the Chairman has outlined is a correct approach.

Senator LEAHY. I understand that, because the President gets so much on the other side. But there is nothing to stop him from doing it today, if he wanted to.

Attorney General GONZALES. Well, again, the test would be different. Under the current statute, the court would—

Senator LEAHY. A minute ago, you said there was nothing to stop him.

Chairman SPECTER. Let him finish.

Senator LEAHY. Yes, I know.

Chairman SPECTER. He is saying things favorable to my bill. Let him finish.

Senator LEAHY. I know. But he is saying two different things here.

Attorney General GONZALES. Sir, of course, if the President wanted to submit an application, he could.

Senator LEAHY. Thank you.

Attorney General GONZALES. It would be, perhaps, an effort in futility, in that he would submit an application—

Senator LEAHY. But you do not know that.

Attorney General GONZALES. [Continuing]. And seek an opinion from the court.

Senator LEAHY. But you do not know that. Attorney General Gonzales. Well, if the court, clearly, does not have jurisdiction, that would be one reason why you would not submit.

Senator LEAHY. Mr. Attorney General, on to another matter. I will look at what I think are two different answers on that, and I will pick the one I like, you pick the one you like.

I was in Vermont on July 15th, and I was reading a Washington Post front-page story online that talked about a series of bribery and smuggling cases and increased corruption among Federal officers along our southern border. Last year in Texas, 10 Federal officers were charged with taking bribes from drug dealers and human smugglers. It was reported that 17 others were arrested for similar offenses in Arizona.

Now, the part that troubles me the most. Most of our border agents are totally honest, dedicated, hard-working men and women. But here is what I heard: the president of the National Border Patrol Council says that agents that were trying to help stem the corruption, those agents are trying to turn in the bad apples in the barrel, were told to shut up and not make waves.

What are you doing to protect whistle-blowers who report such unlawful conduct?

Attorney General GONZALES. These are Border Patrol agents, sir?

Senator LEAHY. Yes.

Attorney General GONZALES. Well, of course, they work for DHS.

Senator LEAHY. Yes. But you end up bringing prosecutions. The Justice Department brings prosecutions. If somebody comes to you with a charge, do you work to protect that whistle-blower?

Attorney General GONZALES. Of course.

Senator LEAHY. So you do not agree with whatever Federal agents that were telling these people to shut up and not make waves?

Attorney General GONZALES. Sir, I do not believe it is appropriate to retaliate against whistle-blowers. I mean, we want people to come forward. If they have information about wrongdoing, I would like to know about it.

Senator LEAHY. Are you actively investigating such corruption?

Attorney General GONZALES. Sir, I am not aware of the specific case you are referring to. We can get back to you and let you know.

Senator LEAHY. There were 17 in Arizona, 10 in Texas. Has the Department of Justice been actively investigating?

Attorney General GONZALES. Sir, I do not know, but we can find out and get back to you.

Senator LEAHY. All right.

Now, a study by the Southern Poverty Law Center has drawn attention recently to the infiltration of skinheads and white supremacists into our military.

A Defense Department investigator was quoted recently as saying that they know that recruiters are allowing these white supremacists to join the Armed Forces, but the pressure is on them to get recruits. Due to the unpopularity of the war in Iraq, they are lowering, and lowering, and lowering the standards.

What is most alarming, is this same Defense Department investigator said that when he provided evidence of the presence of extremists, 320 in the past year from one investigator, commanders will not remove them. I worry about this, because we saw what happened.

We always worry about terrorists outside of our country, but we look at Timothy McVeigh, one of the worst terrorist attacks here. He was an American, served in our military.

If Department of Defense is not going to remove these extremists, and we have seen what has happened when they have gotten out of hand, attacking, raping, killing Iraqis, at least as the charges have now been brought in Federal court.

Are you involved at all in trying to stop these kinds of people from getting into the military, or investigating them if they are not removed?

Attorney General GONZALES. Sir, first of all, I do not know about the story that you may be referring to or allegations that the military is lowering its standards. I would find that very hard to believe.

Senator LEAHY. Well, if they had 320 incidences of this found by one investigator in 1 year—

Attorney General GONZALES. Well, sir, it is a big military. Again, I do not know whether or not those facts are even true. But to the extent that someone has engaged in criminal conduct and we are asked to participate, we do so.

But as a general matter, if you are talking about someone who is in the military who engages in that kind of criminal conduct, it is something that is investigated by DoD and prosecuted by DoD, and not by the Department of Justice.

Senator LEAHY. Going back to what you were saying about the President introducing legislation, Senator Feinstein and Representative Harman were briefed on the President's program for warrantless wire taps of Americans. After the briefing, they said the FISA statute, as currently written, could accommodate everything NSA is doing.

Are they wrong? You know what the law is. You know what FISA can do, and you know what is happening. Are they wrong when they say that FISA, as currently written, could accommodate everything NSA is doing?

Attorney General GONZALES. I have doubts about it.

Senator LEAHY. You think they are wrong? Do you think Senator Feinstein and Representative Harman are wrong?

Attorney General GONZALES. I think there is a serious question as to whether or not FISA could accommodate what it is that the President has authorized, quite frankly, Senator.

Senator LEAHY. Will you be coming back in to talk to us about changes in FISA?

Attorney General GONZALES. Sir, we are always happy to talk about changes in the tools that we utilize to fight the war on terror.

Senator LEAHY. I know. But I love it, when we have a hearing up here, where we actually get it answered that way.

Attorney General GONZALES. I would be happy to come by and speak with you directly, one-on-one, Senator.

Senator LEAHY. I think you ought to speak to the Committee about this. If we are going to make changes, I would expect I would certainly be reluctant to support any changes in the FISA statute, unless I have heard clear evidence from you and others of why it

is needed, because I do find what Senator Feinstein and Congresswoman Harman stated to be compelling.

Incidentally, there are press reports now that say that the FBI has tracked the telephone calls of journalists, of wire tapping journalists. The Christian Science Monitor recently reported that the FBI may be using national security letters to access the phone records of reporters at ABC News, New York Times, the Washington Post.

Are you doing that? Are you monitoring the phone calls of journalists?

Attorney General GONZALES. Well, I presume that it is conceivable that somewhere in America there is someone who happens to be a journalist that we believe has committed a crime where there may be some kind of wire tap. But as far as I know, and I do not believe it to be true that there is some kind of program to engage in surveillance—

Senator LEAHY. The Christian Science Monitor speaks of reporters at ABC News, the New York Times, and the Washington Post.

Attorney General GONZALES. I do not believe the story is true.

Senator LEAHY. All right. And you would know if it was happening?

Attorney General GONZALES. I would hope so.

Senator LEAHY. I would hope so. You are the Attorney General.

Attorney General GONZALES. That is why I said I would hope so.

Senator LEAHY. All right.

You talked about bill signing statements that have been discussed here. When the President signed the PATRIOT Act Reauthorization bill, the second part of the PATRIOT Act, he said in his signing statements that he did not feel obligated to obey requirements in the bill to inform Congress about how, and how often, the FBI was using expanded police powers.

I was one of those that fought very hard for the oversight provisions to make sure that the FBI did not abuse the special terrorism-related powers to search homes and to seize papers that were given under the PATRIOT Act II.

Now, our laws specifically required oversight reporting to the Congress. The President said in his signing statement that he does not have to follow that. Is that the case? Or will the Bush-Cheney administration fully comply with the reporting and oversight provisions of the reauthorized USA PATRIOT Act?

Attorney General GONZALES. Senator, we are going to work with the Congress to make sure that you have the information that you need.

Senator LEAHY. I wanted the specific reporting and oversight provisions in the reauthorized PATRIOT Act. Will the Bush-Cheney administration follow what is written in there with those specific requirements?

Attorney General GONZALES. Sir, we are going to follow our legal obligations. As you know, with respect to sensitive classified information, Senator, sometimes there are disagreements about whether or not you satisfy your reporting obligations if you simply give the information to the Chair and Ranking Member.

Senator LEAHY. No, no. That is not my point, Mr. Attorney General. That is not my point, and you know that is not my point. The

point is, it was written out very specifically in the Act, after months of negotiation, including negotiation with the administration, to get a bill that the President would sign.

He signed it with great fanfare, said this would protect us, and we are going to follow this law. But he then said he is not going to follow all the reporting and oversight provisions, which are very, very, very specific.

My question is very simple: taking those very specific provisions, will the Bush-Cheney administration follow the law or will they follow the signing statement?

Attorney General GONZALES. Sir, he will follow his oath of office. That is all I can respond. We understand how important it is to provide information to the Congress about what we are doing. It has always been the case, however, that the President of the United States has to make decisions with respect to access to certain classified information. We are going to do the best we can to work with the Congress.

Senator LEAHY. Mr. Attorney General, there has always been a provision, from the beginning of this country, that the President is supposed to follow the law, and the President is not above the law.

Attorney General GONZALES. That is certainly true.

Senator LEAHY. Basically what the President is saying on a lot of these signing statements, is I am not going to follow the law. You and I have a strong disagreement on that, but the fact is, he signed 700 of these, more than all other Presidents put together. He is not following the law.

Attorney General GONZALES. That is not true. That number by The Boston Globe is wrong.

Senator LEAHY. What is the number?

Attorney General GONZALES. The Boston Globe retracted that number.

Senator LEAHY. What is the number then?

Attorney General GONZALES. I think the number is closer to 125 to 110. President Clinton signed 382 signing statements in his 8 years of office.

Senator LEAHY. President Clinton's signing statements were usually oratory things, like press releases saying, is this not great, we signed this bill. They did not say, we are not going to follow the law.

Attorney General GONZALES. This administration will follow the law, Senator.

Senator LEAHY. At some point, this administration has to reach a point to stop trying to blame everything on the Clinton administration and to start taking responsibility for your own mistakes.

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Sessions?

Senator SESSIONS. Thank you, Attorney General Gonzales. As I have the numbers, this was not 700. The Boston Globe did retract those numbers. President Bush's signing statements, when they deal with actual constitutional issues on which the President has suggested that there may be a constitutional limit to how far the language of the bill should be interpreted, his numbers are less than what President Clinton did. Is that your understanding?

President Bush had even more. Ronald Reagan had quite a number.

This is not an unusual thing for a President to explain, as the chief law officer, how he will enforce problematic, constitutionally dubious, or gray area statutes. Is that right?

Attorney General GONZALES. I believe that the actions of this President are quite consistent with his predecessors. And again, he has an obligation, whether or not he issues a signing statement, to preserve, protect and defend the Constitution.

Senator SESSIONS. I agree. I just think this is much ado about little or nothing. First, let me congratulate your predecessor, Attorney General Ashcroft, the President of the United States, and you as his chief counsel, his personal White House counsel, for helping us go almost, what, 5 years now without another attack since 9/11. Everybody was concerned about more attacks coming any moment, from any number of sources.

There still remain concerns that there might be sleeper cells operating in this country this very date. I do not see how anybody could deny that, do you? Is that not a possibility, some that you may have inkling of and some that you may have no inkling of?

Attorney General GONZALES. We clearly are safer today, Senator, but we are not yet safe. I see it every morning in the intelligence briefings. We have a very dedicated, very dangerous, very smart enemy, a very patient enemy. Obviously, we are fortunate to not have had an attack in 5 years.

Congress deserves credit for that, giving us tools like the PATRIOT Act, giving us additional tools. Obviously, a lot of the credit goes to our fine men and women in uniform, fighting overseas. So, we have much to be thankful for. But make no mistake about it: we have a very dangerous enemy.

Senator SESSIONS. I could not agree more. The President told us early on that he intended to use all the powers, the legal authority he had, the legal powers he had, to protect the American people. I think the American people appreciate that. We do not want him to go beyond his powers, but we expect him to use what powers he does have to protect the people of this country.

Attorney General GONZALES. That has been his directive. His standard is that we do everything that we can do legally to protect this country. Obviously, some of these issues are tough. They present tough legal questions. In some cases, the courts have said we have drawn the lines in the wrong place. That is fine; that is what courts exist for.

But we make these decisions in good faith, based upon our interpretation of precedent. When the Supreme Court says otherwise, we conform our conduct because we are a country of the rule of law.

Senator SESSIONS. Let us take the *Hamdan* case. You authorized, or the President did, and the Department of Defense also authorized, military commissions. Those military commissions have been used since the founding of the Republic.

This Supreme Court, by a 5 to 3 ruling—really 5 to 4, since Chief Justice Roberts had ruled the other way in the lower court and had to recuse himself—concluded that military commissions are legitimate to try the kind of people that were being discussed as to be

tried, but they suggested some additional enhancements to provide a certain number of additional protections. Is that basically the summation of where we were in that case?

Attorney General GONZALES. Well, there was no question in this decision about the ability to have military commissions. What the court said was, in essence, if you are going to have military commissions, however, they need to be uniform with the Uniform Code of Military Justice, unless there is a practical necessity for the difference.

The court rejected the President's determination that there was a practical necessity in this particular case, but invited the Congress and the President, if this was a tool that we continued to believe was a necessary tool in fighting the war on terror; to pursue legislation that would codify the procedures that we would want to use.

Senator SESSIONS. The point is, the commissions, only by a 5 to 4 opinion, really were asked to be enhanced a bit and provide some additional protections. I am just saying this to the American people who are listening to some of the rhetoric we have had here. They have suggested that the Supreme Court of the United States completely rejected the administration's position on military commissions. That is not a fair statement, is it?

Attorney General GONZALES. That is not a fair statement. Even with respect to specific procedures, there were some concerns raised by four of the Justices about some of the Department of Defense procedures for military commissions.

But there were not five votes indicating a concern or expressing disapproval for any of the procedures that have been promulgated by the Department of Defense. Nonetheless, I am not sure how productive it is to reargue the case.

I think what we are all focused on, as I am sure you are, Senator, is what to do, moving forward, to make sure that military commissions remain available tools to the commander in chief in a way that allows us to protect America and bring terrorists to justice.

Senator SESSIONS. I would just mention also, Mr. Chairman, we approved the National Security Division in the Department of Justice, Mr. Wainstein. We have funded it and we still have not confirmed him. We have Ms. Fisher in the Criminal Division, and Steve Bradbury, a nominee for legal counsel. All of those are critical positions in the Department of Justice. Do you not need those people on quickly, Mr. Gonzales?

Attorney General GONZALES. Everybody wants to have their own team. If you do not have a full complement of your team, I do not think you can be quite as effective. So I think these people do deserve to be confirmed, and I appreciate the work of the Committee in getting Ken Wainstein and Alice Fisher out. We need to now get them confirmed.

Obviously, I would respectfully ask that we get Steve Bradbury out of this Committee. This is all very important because they all play very critical roles, not just in the war on terrorism, but other big issues that we have to deal with at the Department of Justice.

Senator SESSIONS. Mr. Attorney General, we continue to have this problem with local law enforcement and the funding through

Byrne-Grant and C.O.P.S.. I think those joint task forces—I used to lead one to prosecute drugs locally, and the OCEDF program, the local ones and the others. I think we are going to have to get, next year in your budget, straight about how we are going to fund the local law enforcement.

The C.O.P.S. program really should have already been completed several years ago, as you noted. But that does not mean that there might not be other, more effective ways to help local law enforcement be more effective. So, just briefly, will you talk with us about that and help us reach a happy conclusion to this so we can make sure we are not ending funding for local law enforcement? Sometimes Congress has overruled the President.

Attorney General GONZALES. I am not sure how, in the time remaining, I can help us reach a happy conclusion on this particular issue, which is a tough issue, there is no question about it. But I would be happy to engage in a dialog with you long term, Senator, about how we meet the priorities of the Department.

Obviously, the President is concerned about a deficit. Obviously there are other big priorities as well. At the same time, we understand that we are asking more and more of our State and local partners. They have limited resources as well, so we need to figure out a way to make all this work.

Senator SESSIONS. Mr. Attorney General, I am concerned that in your written remarks there were no references to enforcing immigration law. You have got to know that those of us who talk to our constituents on a regular basis understand that the American people are just aghast that we blithely go about our business without enforcing the laws. And some of the comments you made to Senator Kyl were a bit concerning to me.

So I guess my question to you is, are you committed to working creatively and imaginatively to utilize resources that you have, to ask for more resources if necessary, to make sure that we have workplace enforcement, border enforcement, that the organized groups that bring in people illegally, the Coyotes and the document fraud people are brought to justice?

Frankly, as you know—I will not go through the list—we have had an actual decline in prosecution in so many key areas when it comes to work site enforcement, and even border enforcement over the last number of years.

So let me just ask you, will you commit to us that you will give the leadership and directive to make sure that we make this system a lawful system instead of an unlawful system?

Attorney General GONZALES. Absolutely, Senator. We already are doing that. The fact that it was not mentioned was an oversight, quite frankly. It is something that I am concerned about.

Obviously, we know that there may be limits on the amount of resources available, and therefore we have already directed the DAG to look to see what else we ought to be doing, what can we do, to ensure that we are enforcing our immigration laws. You are absolutely right; it sends the wrong signal when we have laws on the books that are not being enforced. That is not the way that it should be, so we have an obligation to try to find ways to do a better job here.

Senator SESSIONS. I think Senator Kyl is correct. We are going to need some additional resources in some areas, and in some areas it simply has got to come from the top that these are priorities.

Some of the cases, by their very nature, are going to be misdemeanors or felonies with small penalties. Some Assistant U.S. Attorneys think that is beneath their dignity. But if you do not prosecute those cases, then you send a signal that you basically, de facto, wiped out the statute. So we have got to get better enforcement there.

One more thing about the reporter's privilege and that concept. What we are dealing with is a circumstances in which a reporter receives information from a person who violated the law, violated the security standards of the United States. They have given information to a reporter and that reporter then publishes it to the whole world, including our enemies.

Now, it is my understanding, under aiding and abetting, the statute is: aid, abet, counsel, or procure the commission of a crime, or conspiracy. Either one of those could very well make a reporter subject to prosecution.

Second, of course, and primarily, as you noted, the person we should be focusing on is a government official who broke their oath and actually set forth a chain of events that could lead to publishing this information and giving it to someone who is not authorized to receive it.

So I do not think you should dismiss the possibility that reporters, simply, in top-secret matters involving the national security of this country, they have to be subject to prosecution if they violate the law.

Attorney General GONZALES. I did not mean to dismiss it. If that was the message I conveyed, I apologize.

Senator SESSIONS. Well, it was not very strong.

Attorney General GONZALES. But again, Senator, as you indicated, the focus has to be, as it traditionally has been, on those in government. In many cases, they sign non-disclosure agreements, so they breach these agreements when they disclose this information. We hope to continue to work with the press to persuade them not to publish.

Senator SESSIONS. Let me just follow that. The problem is that it provides a perfect wall and a protection for the leaker if the reporter is never required to testify and to reveal who gave it.

Chairman SPECTER. Senator Sessions, how much more time would you like?

Senator SESSIONS. Mr. Chairman, I did go over, but I missed, by 1 minute, my second round. So I guess I will just finish up with one further comment.

That is, if you are unwilling to challenge that reporter, you may never be able to identify the person who may have released information that led to the death or failure of the foreign policy of the United States of America.

Attorney General GONZALES. I think that in certain cases, that may be the last stop for the prosecution. If we cannot get this information from the reporter, we cannot go forward with a criminal investigation. I cannot imagine that the American people would support that.

Senator SESSIONS. The Department of Justice manual puts high standards on it. You do not do it lightly.

Attorney General GONZALES. Absolutely.

Senator SESSIONS. You do it very, very few times. But every now and then, it may be necessary and I hope you will not dismiss it.

Chairman SPECTER. Thank you, Senator Sessions.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman.

Thank you, General Gonzales.

I would like to continue in the subject of leaks and damage to national security. Since September 11, there have been a series of leaks of sensitive classified information reported in the media.

Sometimes the administration condemns those leaks; sometimes, however, the administration is completely silent. Sometime the administration alleges that great harm was done to national security; sometimes the administration says nothing. Sometimes the administration publicly announces an investigation into a leak; sometimes, however, the administration appears to sweep it under the rug.

Now, I worry, frankly, that you and others in the administration have engaged in a pattern of selective outrage, and I worry that you and others in the administration speak out of both sides of your mouth on the subject of leaks and their harm to our National security.

When it serves your purpose, you condemn leaks; when it does not serve your purpose, you do not. In fact, it is reported over and over again that White House officials engage in leaks, and that is part of Washington. But what is good for the goose is good for the gander.

So with those concerns in mind, let me ask you a series of questions. First, during your last appearance before the Committee, Senator Biden asked you about what harm had been caused by public disclosure of the NSA's warrantless surveillance program.

This was your response: "You would assume that the enemy is presuming we are engaged in some kind of surveillance, but if they are not reminded about it all the time in the newspapers and in stories, they sometimes forget."

That statement was astounding to me. It is like saying banks should not advertise because it reminds bank robbers where the money is.

Now, 6 months have passed. Do you have a more concrete answer on how the disclosure that wire tapping is going on harmed national security?

Attorney General GONZALES. Let me just say, Senator, my comment that "the more we talk about what we are doing to get information about the enemy, the more we inform the enemy about what we do" should not be viewed as astounding.

This is something that the intelligence experts tell me is, in fact, the case. It seems to make sense to me. Obviously they know that we are engaged in surveillance. But if we talk more and more about what we do and how we are doing it, we are just going to help the enemy.

Senator SCHUMER. Well, how we are doing it is one issue. Talking about it, which is what this article did, as I understand it, sim-

ply said it was going on, and it had been sort of known that it was going on before.

Sometimes I think the administration's high dudgeon, if you will, is aimed at where the source, where the leak, appeared. If it is the New York Times, it is terrible. If it is the Washington Times, it seems to be all right.

So just be a little more concrete with me. How did that NSA article, now 6 months later, hurt our National security? As I recall, the article avoided specifics, avoided who, where, what or when. It did not talk about the details, just revealed that it was happening, something that had been known repeatedly.

Attorney General GONZALES. Well, sir, certainly since then there have been 7 months of discussion about this program. Your question, quite frankly, is one that can be better addressed by the intelligence experts in terms of how it has been damaged.

All I can say is, in testimony before the Intelligence Committee, both General Hayden and Director Mueller have indicated that this is a very important program. It has helped us identify terrorist plots. By talking about this program, we have made it more difficult to gather intelligence about our enemy.

And for the record, sir, let me just say, whether or not I say anything publicly here on out, I condemn all leaks. So, just for the record.

Senator SCHUMER. I know. But it is a lot different when you, and the President, and the Vice President on that last one, on banking, on following the money, the administration had bragged about that previously. But all of a sudden it becomes an issue. Many of us doubt the motivation here.

I want to ask you about specific leak investigations. There appears to be little rhyme or reason to the administration's approach. It is not one area or one type, again. It seems, to the casual observer, that it is where the leak appeared: a friendly newspaper is all right, a non-friendly, not all right.

Now, a review of the record leaves the impression the administration is unconcerned about leaks of classified information to certain media sources, and when the revelation may have provided certain political advantage to the administration.

So I have sent this letter to you with Congressman Delahunt, who I have worked with on this, to you and to John Negroponte, asking you to explain the classification and declassification process and to correct any misimpression that you are only selectively investigating leaks, that when it is a leak you investigate all of them.

I will wait for written answers to the detailed questions in that letter; I just hope it will not be many months.

But here is what I want to know now. How many leak investigations are going on in the Justice Department right now?

Attorney General GONZALES. I do not know the answer to that. Typically, Senator, as you know, we do not confirm or deny the existence of a leak. There is a process that we go through before making a decision to initiate a leak investigation.

In some cases, there may be what appears to be a leak in the paper of a classified program, and we go through that process. It may take a period of time before we are ultimately in a position

to make a decision that, yes, we should go forward with an investigation.

Senator SCHUMER. Can you give me a ballpark figure? Are there 100? Are there 5?

Attorney General GONZALES. Sir, I do not know. I really cannot give you that.

Senator SCHUMER. Is every leak investigated?

Attorney General GONZALES. Not every leak is investigated. Obviously the most egregious leaks are investigated.

Senator SCHUMER. Let me ask you this. How do we determine which are the most egregious?

Attorney General GONZALES. Well, oftentimes, in most cases it begins with a referral from the offended agency, in most cases from the FBI and from the NSA or the CIA.

Senator SCHUMER. So do you make the decision?

Attorney General GONZALES. No.

Senator SCHUMER. Has the White House ever asked you to investigate a leak?

Attorney General GONZALES. No. This is a decision made by career folks down in the Criminal Division. Once we get a referral, we normally submit an 11-question questionnaire to the agency, have them answer the questions, and the answers often dictate whether or not we move forward with an investigation. That is a decision made by the career folks in the Criminal Division.

Senator SCHUMER. So Dick Cheney, Karl Rove, or John Negroponte has never called you up and said, please investigate this leak?

Attorney General GONZALES. No.

Senator SCHUMER. It all comes from the bottom up?

Attorney General GONZALES. Yes.

Senator SCHUMER. What happened with the banking one where the President and Dick Cheney publicly asked for an investigation 2 days or 3 days after it was published?

Attorney General GONZALES. Well, listen. The fact that they have asked for an investigation, this is something they say publicly. But we have a process that we use internally. We will initiate an investigation when we believe the circumstances, based upon the recommendations of the career folks, are warranted.

Senator SCHUMER. Let me ask you about some specific ones. Here is an article from the Washington Times, which regularly reports high sources. This one seems to me to have the kind of detail that does compromise security, far more than the articles that the White House has gone in high dudgeon about.

This one was from February 24, 2004, "U.S. Search for Bin Laden Intensifies." "The Pentagon is moving elements of a super-secret commando unit from Iraq to the Afghanistan theater to step up the hunt for Bin Laden." It gives the name of the task force.

It says, for instance, "The Washington Times is withholding some person's name because of the secret nature of the operation." A lot of details here. Do you know if this one was ever investigated?

Attorney General GONZALES. I know that that is a very troubling story. I cannot tell you there has been a final decision as to whether or not a formal investigation should commence.

Senator SCHUMER. Wait a second. Sir, it occurs—

Chairman SPECTER. Let him finish his answer.

Senator SCHUMER. All right. I just wanted to—

Chairman SPECTER. He was right in the middle of his answer. Go ahead.

Attorney General GONZALES. Well, let me just say, Senator, you may have a very serious story like that, and then once we begin looking at it, we may determine that there are a million people that have access to that kind of information.

That would tell us whether or not, all right, does it make sense to initiate an investigation when there are a million interviews that we have to do. So, there are factors that we have to weigh in deciding whether or not to initiate an investigation, no matter how egregious it may look.

Senator SCHUMER. This one occurred. You said we have to determine it. This one occurred two and a half years ago.

Attorney General GONZALES. And there may have already been a decision on that, Senator. I just do not know, quite frankly.

Senator SCHUMER. Can you get back to us and let us know?

Attorney General GONZALES. If I can share that information, I will try to do so.

Senator SCHUMER. Well, if you do, I would be happy to do it in a top-secret setting, if you cannot share it publicly.

But here is what I want to know. Is there a standard? Is there a pattern to any observer that this one does far more damage than a general article in the New York Times saying that we trace money in banks?

Attorney General GONZALES. It depends on the disclosure.

Senator SCHUMER. I did not hear the President talk—

Chairman SPECTER. Let him finish his answer, Senator.

Senator SCHUMER. No, no. I did not finish mine. I did not hear the President talk about it. I did not hear the Vice President talk about it. I never heard anybody get up on their high horse about it. So the question I have is, what is the standard? Is there a set standard? Does every referral get investigated?

Attorney General GONZALES. No.

Senator SCHUMER. How is it determined if you get a higher one? That is what I would like to know. Do you know the standard that determines whether a leak is investigated or not?

Attorney General GONZALES. Again, Senator, we have this process that we follow in virtually every case, and the decisions are made by the career prosecutors in the Criminal Division as to whether or not an investigation should be initiated. A number of factors are weighed in deciding whether or not an investigation should go forward.

One, I have already talked about, the number of people that have access, the damage to the national security of our country. So there are a number of factors that are weighed. Ultimately, the decisions are made down at the Criminal Division as to whether or not to move forward with an investigation.

Senator SCHUMER. Right. How about this one? Congressman Hoekstra. He is an ally of the President. He is a defender of the President's efforts on the war on terror. He wrote a letter concerning another government program that the President has kept secret from Congress. He reportedly got that secret information

from—and these are his words—"government tipsters." Is an investigation going on about those government tipsters?

Attorney General GONZALES. I do not know.

Senator SCHUMER. Would you get me an answer to that?

Attorney General GONZALES. I will see what I can provide to you, sir.

Senator SCHUMER. All right.

Mr. Chairman, I think I would make a suggestion, with all due respect. We could use a hearing here on leak investigations, how they are conducted, how they are started, et cetera.

There are too many people—myself included—who think that this is used as a tool to bludgeon certain papers in certain instances, but it is not a uniform process that you see proceeding apace in the government.

Now, maybe it is and maybe we just hear about certain ones or others, but I think it certainly merits an investigation. So I will send you a letter asking that maybe we have a hearing on this particular issue.

Chairman SPECTER. Senator Schumer, it is an important subject and we would be glad to consider where we go from here.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. Senator Leahy has one more question.

Senator LEAHY. Mr. Attorney General, I do not want people to think we disagree all the time. We have a number of areas we do agree, and I think this is one we probably agree on.

In August of 2000, President Clinton adopted Executive Order 13166. That order improves access to Federal programs and activities where people are limited in their English proficiency. I have written the President about this, and I recently asked the Commerce Secretary about this issue, when he was before us. So I ask you, will the Bush-Cheney administration continue to adhere—they presently are, but will they continue—to the Clinton Executive Order 13166?

Attorney General GONZALES. I have no reason to believe that we will not, sir.

Senator LEAHY. Thank you. We have discussed this before. My wife was born of immigrant parents and English became her second language. My mother was born of immigrant parents, with English as her second language. Fortunately, they learned it as young people. But sometimes older people coming here could be helped greatly with this. I appreciate that. I thought you were sympathetic.

Attorney General GONZALES. Yes, sir.

Senator LEAHY. I know Secretary Gutierrez was. I appreciate that.

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. Thank you very much, Mr. Attorney General. You have been good, sitting through almost four hours. You are to be commended for your stamina and your good cheer in handling a lot of questions which have been direct and difficult.

Attorney General GONZALES. Yes, sir.

Chairman SPECTER. I noted that National Public Radio had a program on yesterday morning about your appearing here today, and about the relationship between the Judiciary Committee and

the Department of Justice, and perhaps more pointedly, the relationship between the Attorney General and the Chairman.

I do hope that NPR will replay the 4-hour hearing, because I think it shows that while there is a certain tension, which is entirely appropriate may the record show that the Attorney General is nodding yes—when you have the administration, Article 2, and the Congress, Article 1. I know the administration would like to renumber the Constitution. Maybe the administration already has.

Attorney General GONZALES. We have a great Constitution, Mr. Chairman.

Chairman SPECTER. We have had a lot of questions for you, but I think it is a fair assessment that it has been a very civil proceeding. There are times, because of limitations, where we do want to move on, and perhaps interrupt a little more than we should, or perhaps not. You are in a position to speak up and to defend yourself, and you are an experienced lawyer. You are an experienced counselor. You are an experienced judge.

You have responded to the questions, and we have tried to frame them in a way which tries to get at positions, facts, and understanding what it is the President wants to accomplish, what it is the Department of Justice wants to accomplish, and to give you our concerns and our views, which naturally do differ from time to time, and especially in an era where there have been as many difficult issues as we have had in President Bush's tenure, really, since 9/11.

There are just a tremendous number of issues. There are differing views. The separation of powers has never been more sorely tested than it has been recently. It has been tested sorely over the years on other occasions, but this ranks among the real tests of separation of powers and our respective responsibilities.

So we thank you, and we renew our request that NPR play our session in its entirety.

That concludes our hearing.

[Whereupon, at 1:14 p.m. the hearing was concluded.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

January 18, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on July 18, 2006. The hearing concerned Department of Justice Oversight.

Several of the questions relate to the Terrorist Surveillance Program described by the President. Please consider each answer to those questions to be supplemented by the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record for Attorney General Alberto Gonzales Senate Judiciary Committee DOJ Oversight Hearing on July 18, 2006

Senator Specter

Rep. Jefferson FBI Raid

1. **On May 27, 2006, The Washington Post reported that you, Deputy Attorney General Paul McNulty, and FBI Director Robert Mueller all threatened to resign if the President compelled you to return the documents collected from Rep. Jefferson's offices. Is this report accurate and what was your motivation for considering such a drastic step? If Chief Judge Hogan's July 10th decision had ordered the documents found in the raid to remain sealed and be returned to Rep. Jefferson's office, would you have accepted that decision?**

ANSWER: Respectfully, it would not be appropriate to comment on internal deliberations within the Justice Department regarding steps that might have been considered or taken with respect to the seized records. It is accurate to say that it is the Department's view that the search and seizure of Congressman Jefferson's records were conducted pursuant to a lawful search warrant approved by a federal judge, and that procedures were proposed by the Department and approved by the court. The Department will, of course, abide by the final decision of the courts in this case.

It is important to note that Judge Hogan's July 10, 2006 ruling carefully considered the governing law in light of the facts of this case and fully upheld the Department's actions. If, however, Chief Judge Hogan's July 10 decision had ordered the records found in the search sealed and returned to Rep. Jefferson's office, the Department would have carefully evaluated Chief Judge Hogan's decision and reasoning in light of the governing law, and then considered a range of possible responses including an application for reconsideration as well as an appeal to the DC Circuit Court of Appeals.

2. **Despite Judge Hogan's ruling on July 10, 2006 that the FBI's search of Rep. Jefferson's office did not violate the Constitution's Speech and Debate Clause, I still question why the FBI failed to take certain actions leading up to and during the execution of the search warrant. Arguably, tensions could have been eased between Congress and the Executive had the FBI taken any of the following actions:**
    i. **Sealing the office in question by utilizing Capitol Police or other law enforcement authorities;**

ii. Pursuing Rep. Jefferson's cooperation through the Clerk of the House;

iii. Allowing Rep. Jefferson's attorney to be present during the search.

In such a high profile case, do you think any of these actions would have alleviated the tension that the raid has caused?

ANSWER: As a matter of comity, and out of an abundance of caution, the Justice Department proposed, and a federal judge approved, special procedures designed to accommodate the Speech or Debate Clause privilege and the legitimate needs of a coordinate branch of Government. These procedures included the following precautionary measures:

- The search was conducted by agents and certified forensic examiners from the FBI who have no role in the investigation, and who are prohibited from revealing any non-responsive or politically sensitive information that they may have come across inadvertently during the search, and are required to attest in writing to their compliance with this procedure.

- Under the procedures proposed by the Government and adopted by the court, the responsive documents would have been transferred from the non-case agents to a "Filter Team" consisting of federal prosecutors and an FBI agent with no role in the investigation. The Filter Team would have reviewed each document seized to ensure that it was responsive and, if so, ensured that no document falling within the purview of the Speech or Debate Clause was transferred to the Prosecution Team.

- Under those procedures, any potentially privileged materials would have been logged, copies would have been provided to Rep. Jefferson's counsel, and the Filter Team would have asked the Court to review the records for a final determination about privilege.

It is clear that no authority required that Rep. Jefferson's office be sealed by the Capitol Police, that the Department first pursue Rep. Jefferson's cooperation through the Clerk of the House, or that Rep. Jefferson's counsel be permitted to be present during the search. Nevertheless, the Department did attempt to use other means to obtain the documents before seeking the court's approval of a search warrant. We cannot describe those other means because the information concerns matters that are under seal.

We can assure you that the Department has been and continues to be sensitive to what you describe as the "high-profile" nature of this case. Investigations such as this one are always "high profile," but their prominence only underscores the importance of conducting them in a fair and impartial manner. Deviations from the normal procedures followed in the execution of a search warrant in an investigation of a Member of Congress might tend to suggest that Members of Congress are above the law and could expose the Department to charges that it is giving special treatment to Members of

Congress for political reasons, thereby undermining confidence in the integrity of criminal prosecutions.

3. The fact that the FBI used a "filter-team" to execute the search warrant as a means to shield the information found in Jefferson's office from the Special Agents assigned to the investigation suggests that the Department of Justice was concerned about violating the Speech and Debate Clause or, perhaps, some other aspect of the separation of powers of the two branches. How did the use of FBI employees not associated with the investigation resolve this concern with respect to the Speech and Debate Clause?

ANSWER: The use of a Filter Team and other special procedures were proposed by the Department and approved by the Chief Judge as a matter of comity and out of an abundance of caution. The search warrant properly addressed issues relating to the Speech or Debate Clause or other applicable privileges (such as attorney-client communications), as well as politically sensitive materials. The Department understood that execution of the search warrant would involve the incidental and cursory review by the seizing agents and Filter Team of materials that might be potentially covered by the Speech or Debate Clause, subject to other potential privileges or politically sensitive. As a result, the Filter Team and other special procedures were included in the search warrant as a reasonable method to control the process by which the seizing agents and Filter Team would perform an incidental and cursory review of potentially privileged or politically sensitive materials in order to extract the non-privileged evidence specifically sought by the search warrant.

Moreover, as Chief Judge Hogan held in his July 10, 2006 decision, "the incidental and cursory review of documents covered by the legislative privilege, in order to extract non-privileged evidence, does not constitute an intrusion on legitimate legislative activity."

Americans with Disabilities Act

4. What is the status of the proposed changes to the ADA Accessibility Guidelines? When does the DOJ plan to issue its proposed rules that will lower the wheelchair scoping for stadiums and all public assembly facilities?

ANSWER: The proposal to reduce wheelchair scoping in assembly facilities is contained in the revised Americans with Disabilities Act guidelines published by the U.S. Architectural and Transportation Barriers Compliance Board (also known as the Access Board) in July 2004. The revised ADA Guidelines are the result of a multi-year effort by the Access Board to revise and amend its accessibility guidelines. The overriding goal of the project was to promote consistency among the many federal and state accessibility

requirements. To become enforceable, the guidelines must be adopted by the Department of Justice as the revised ADA Standards for Accessible Design.

The Department has initiated the process of revising its regulations implementing Titles II (public entities) and III (public accommodations and commercial facilities) of the ADA to amend the ADA Standards for Accessible Design (28 CFR part 36, appendix A) to ensure that the requirements applicable to new construction and alterations under title II are consistent with those applicable under title III, to review and update the regulations to reflect the current state of law, and to ensure the Department's compliance with section 610 of the Small Business Regulatory Enforcement Fairness Act (SBREFA).

The Department initiated the rule-making process required to make this provision enforceable by publishing an Advance Notice of Proposed Rulemaking in September 2004. We received over 900 comments on that ANPRM, which are facilitating our process of drafting a Notice of Proposed Rulemaking and developing the required regulatory impact assessments. We expect that we will publish a Notice of Proposed Rulemaking in 2007. We will, of course, take public comments and hold hearings on the proposal before completing the final regulatory assessment and publishing a final rule thereafter.

Inherent Authority

5. **On May 21, 2006, you told George Stephanopoulos of ABC News that the Department was investigating the possibility of prosecuting The New York Times under the Espionage Act of 1917 for its stories publishing details of classified programs. What authority, other than Justice White's dissenting opinion in *The Pentagon Papers* case, are you citing as giving the Administration authority to pursue this course of action? Has the Department reached any conclusions regarding the feasibility of prosecuting journalists? Does the Administration support Congress's efforts to provide journalists with statutory protections through the reporters' shield legislation or the Free Flow of Information Act?**

ANSWER: Section 793 of title 18 of the U.S. Code prohibits, among other things, gathering and transmitting defense information; section 798 prohibits "knowingly and willfully communicat[ing] . . . or *publish[ing]*" classified information concerning the "communication intelligence activities of the United States." (emphasis added). Those provisions, on their face, do not provide an exemption for any particular profession or class of persons, including journalists. Many commentators and jurists (including Justices of the Supreme Court of the United States) have examined these statutes and reached the same conclusion. As you note, one such jurist was Justice White, who in his concurring opinion in the "Pentagon Papers" case wrote, "from the face of [the statute] and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793(e) if they communicate or withhold the materials covered by that

section." *New York Times v. United States*, 403 U.S. 713, 739 n.9 (1971) (White, J., concurring); *see also id.* at 730 (Stewart, J., concurring) (noting that "[u]ndoubtedly Congress has the power to enact specific and appropriate criminal laws to . . . preserve government secrets" and "several [such laws] are of very colorable relevance to the apparent circumstances of these cases"). As Justice White noted, the legislative history of these provisions indicates that "members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed." *Id.* at 734 (White, J., concurring). As you stated during a May 2, 2006, hearing, "the White-Stewart opinions" from the Pentagon Papers case "are pretty flat out that there is authority under those statutes to prosecute a newspaper, [and] inferentially [to] prosecute reporters."

The Fourth Circuit's opinion in *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908 (1988), also supports the conclusion that members of the press can be prosecuted for disclosing classified defense information. Morison was a military intelligence employee who had also been performing certain off-duty work for a London periodical. The court explicitly rejected a defendant's assertion that the First Amendment barred his prosecution under section 793 for unauthorized disclosures of classified information to a publisher. The Fourth Circuit did so over the objections of numerous news organizations that had filed amicus briefs in the case to press the First Amendment defense against prosecution.

The Justice Department's focus in leak cases has been and will continue to be investigating and prosecuting those who leak, not members of the press. The Department strongly believes that the best approach is to work cooperatively with journalists to persuade them not to publish classified information that can damage national security.

As for the proposed Free Flow of Information Act, the Department's views on that legislation were set forth in a letter from Assistant Attorney General William Moschella to you dated June 20, 2006. As that letter makes clear, "[t]he Department opposes this legislation because it would subordinate the constitutional and law enforcement responsibilities of the Executive branch—as well as the constitutional rights of criminal defendants—to a privilege favoring selected segments of the media that is not constitutionally required." The Department's opposition to this legislation was further stated and explained in the testimony of Deputy Attorney General Paul J. McNulty, dated September 20, 2006, at the Senate Judiciary Committee Hearing on Reporters' Privilege Legislation: Preserving Effective Law Enforcement. As the Deputy Attorney General stated: "The bill would significantly weaken the Department of Justice's ability to obtain information of critical importance to protecting our nation's security, inject the federal judiciary to an extraordinary degree into affairs reserved by the Constitution for decision within the Executive Branch, and, at bottom, encourage the leaking of classified information."

***Hamdan* decision**

6. What does *Hamdan* mean for the President's other claims of inherent executive power, such as activities of the National Security Agency that have recently come to light?

ANSWER: For purposes of these questions for the record, we assume that the Terrorist Surveillance Program involves "electronic surveillance" as that term is defined in FISA.

The Terrorist Surveillance Program described by the President in December 2005 ("Terrorist Surveillance Program" or "Program") does not rest simply on "claims of inherent executive power," as your question suggests. To be sure, Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief, *see* U.S. Const. art. II, § 2, and to conduct the Nation's foreign affairs. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). The Supreme Court has long recognized that the Constitution grants the President inherent power to protect the Nation from foreign attack. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). Accordingly, *every* court of appeals to reach the question has held that the President has inherent constitutional authority to conduct electronic surveillance for foreign intelligence purposes without first obtaining a court order, even during peacetime. *See, e.g.*, *In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) (noting that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information," and, assuming that is so, "FISA [cannot] encroach on the President's power."); *United States v. Truong Dinh Hung,* 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko,* 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown,* 484 F.2d 418, 425-27 (5th Cir. 1973); *see also Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 30-34 (Jan. 19, 2006) ("*Legal Authorities*").

Congress confirmed and supplemented this constitutional authority of the President in the armed conflict against al Qaeda in the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"). Congress both expressly acknowledged that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," Force Resolution pmbl., and authorized the President to "use all necessary and appropriate force" against those responsible for the September 11th attacks. A majority of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that, with these words, Congress authorized the President to undertake all the "fundamental and accepted [ ] incidents to war." *Id.* at 518 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Intercepting the international communications of the Nation's declared enemies has been a fundamental incident of warfare since well before the Founding. *See Legal Authorities* at 15-17. During the Revolutionary War, George Washington directed his agents surreptitiously to open British mail to monitor enemy planning. Presidents Wilson and Franklin Roosevelt, relying on the President's constitutional powers and general congressional authorizations for use of force,

authorized the interception of *all* telephone, telegraph, and cable communications into and out of the United States during the two World Wars. Under *Hamdi*, this clear historical tradition strongly supports the President's authority to undertake the Terrorist Surveillance Program under the Force Resolution and the Constitution; indeed, the Program is much narrower than the interceptions authorized by either President Wilson or President Roosevelt.

The Department of Justice continues to consider the effect of all legal developments, including the Court's *Hamdan* decision, on its legal analysis of the Terrorist Surveillance Program. Based on its review, the Department of Justice has concluded that *Hamdan* does not undermine the legal analysis regarding the Program set forth in the *Legal Authorities* paper.

The Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), did not address the President's inherent authority to establish military commissions; it explicitly stated that it "need not address" whether Chief Justice Chase was correct in suggesting that "the President may constitutionally convene military commissions 'without the sanction of Congress' in cases of 'controlling necessity.'" *Id.* at 2774 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (Chase, C.J., concurring in judgment)). Rather, the Court concluded that the Force Resolution did not "expand or alter" existing authorizations for military commissions set forth in the Uniform Code of Military Justice ("UCMJ"). 126 S. Ct. at 2775. But the primary point of analysis in our *Legal Authorities* paper is *not* that the Force Resolution somehow altered, amended, or repealed the Foreign Intelligence Surveillance Act of 1978. Instead, we explained that section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities* at 20-23 (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside FISA and Title III. Otherwise, use of pen registers and video surveillance in ordinary law enforcement investigations would have been unlawful, a result the drafters of FISA clearly did not intend. *See id.* at 22-23 & n.8 (explaining this point with respect to pen registers). And, as noted above, there is a long tradition of interpreting force resolutions to supplement the President's constitutional authority in the particular context of electronic surveillance of international communications.

Thus, the Force Resolution is best understood as an additional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. For these reasons, the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004), which held that the Force Resolution satisfies a materially identical prohibition on the detention of American citizens "except pursuant to an Act of Congress," is more relevant than the *Hamdan* decision for purposes of analyzing the Terrorist Surveillance Program. In *Hamdi*, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," even of U.S. citizens who fight for the enemy, as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides

that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Section 109 of FISA and section 4001(a) of title 18 operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

We believe that there are two other reasons why *Hamdan* is consistent with the Department's analysis of the Terrorist Surveillance Program in *Legal Authorities*. First, in contrast to FISA, the UCMJ is a statute that expressly regulates the Armed Forces, even during wartime. By contrast, under FISA, Congress left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch worked out rules applicable to the war). Accordingly, FISA was and is generally directed at foreign intelligence surveillance occurring outside the extraordinary circumstances of an armed conflict. It is therefore more natural to read the Force Resolution to supply the additional electronic surveillance authority contemplated by sections 109 and 111 of FISA specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which, as noted, is intended to continue to apply during periods of armed conflict.

Second, in contrast to Congress's regulation of national security surveillance, *Hamdan* concerns an area over which Congress has express constitutional authority, namely the authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I., § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Because of these explicit textual grants, Congress's authority in these areas rests on clear and solid constitutional foundations. But there is no similarly clear expression in the Constitution of congressional power to regulate the President's authority to collect foreign intelligence necessary to protect the Nation. Indeed, in *Hamdan*, the Court expressly recognized the President's *exclusive* authority to direct military campaigns and that each power vested in the President "'includes all authorities essential to its due exercise.'" *See* 126 S. Ct. at 2773 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns.").

7. The Supreme Court found in *Hamdan* that the government failed to demonstrate that there were circumstances that made courts-martial rules impracticable for use in these military commissions. Could you give us some examples, generally speaking, of what might be acceptable circumstances?

ANSWER: The Supreme Court in *Hamdan* held that the President's Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001), did not explicitly address the impracticability of the

UCMJ, or court-martial rules promulgated thereunder, for use in military commissions. According to the Court, Article 36 of the UCMJ, 10 U.S.C. § 836, required a specific finding that court-martial procedures are impracticable before commissions could be used, and the Court faulted the Military Order for the absence of such findings. *See* 126 S. Ct. at 2791-92. The Court did not hold that such a finding would be insupportable—only that the *specific* findings the Court considered necessary were not in the record. *Id.* at 2792-93. The President's order *had* been based on a review of court-martial procedures and a determination that many specific rules that had been designed primarily for the trial of our own troops charged with criminal offenses were not practicable for the trial of hardened terrorists, captured on the battlefields thousands of miles from the United States, but the Court did not consider those findings sufficiently specific to support use of military commissions.

Congress recognized in enacting the Military Commissions Act of 2006 ("MCA") that many court-martial rules would be impracticable for military commissions. For example, because many terrorists were captured on the battlefield, application of hearsay rules that would require foreign nationals and United States military personnel to appear personally at military commissions would present unwarranted obstacles to the trial of such enemy combatants. Therefore, the MCA recognizes that the limitations on hearsay for courts-martial shall not apply to military commissions. *See* 10 U.S.C. § 949a(b)(2)(E). The MCA also specifically provides that several other provisions of the UCMJ shall be inapplicable, *see id.* § 948b(d), and that the rules issued by the Secretary of Defense shall track those of courts-martial only insofar as he "considers practicable or consistent with military or intelligence activities," *id.* 949a(a). Thus, while the MCA tracks the UCMJ in many respects, Congress correctly determined that these and other court-martial provisions could not be employed for military commissions.

8. On June 29, 2006, while speaking at a public news conference, President Bush said he planned to work with Congress to "find a way forward" and there were signs of bipartisan interest on Capitol Hill in devising legislation that would authorize revamped commissions intended to withstand judicial scrutiny. Can you provide some examples of how you would like to see legislation "revamp" the current commissions in a manner that would enable them to withstand judicial scrutiny as well as meet administration's goals?

ANSWER: True to President Bush's state intentions, the Administration worked closely with Congress over the past several months in developing a statutory system of military commissions. The MCA reflects the product of those efforts. We are confident that the MCA will provide full and fair trials for unlawful enemy combatants and that the courts will uphold this statutory system of military commissions.

9. How many of the detainees held at Guantanamo and marked for trial by military commission have been charged with conspiracy? Would you

provide us with a complete list of the charges pending against those detainees?

ANSWER: Under the previous military commission system, ten detainees held at Guantanamo were charged with conspiracy for purposes of their trials by military commissions. Three of those detainees were also charged with other offenses. David Matthew Hicks also had been charged with attempted murder by an unprivileged belligerent and aiding the enemy. Omar Ahmed Khadr also had been charged with murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. Abdul Zahir also had been charged with attacking civilians and aiding the enemy. Now that Congress has enacted the MCA, the Department of Defense is reviewing the evidence against those individuals and others detained at Guantanamo Bay and will make new charging decisions based upon the standards and offenses detailed in the new Act.

10. What is your opinion of the viability of conspiracy charges against al Qaeda members given that four Justices in Hamdan found that conspiracy is not a crime under international law or the law of war?

ANSWER: The Constitution grants Congress the constitutional authority to "define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10. Congress used that authority in the MCA to clarify that conspiracy is a substantive offense under the law of war. *See* 10 U.S.C. § 950v(28). Congress made clear that conspiracy is an offense "that has been traditionally triable by military commission." *See id.* § 950p(a). We believe that this determination makes clear that conspiracy constitutes an offense under the law of war and remains properly triable by military commission. As Justice Thomas demonstrated in his opinion in *Hamdan*, that view is supported by historical practice and by authoritative commentators on the law of war. Justice Stevens's determination that conspiracy is not an offense under the law of war did not have the support of a majority of the Justices and thus does not constitute an opinion of the Court.

11. In his testimony before the Senate Armed Services Committee on July 15, 2005, Principal Deputy General Counsel Daniel Dell'Orto stated "after the President authorized the use of military commissions, work began within the DOD to establish, consistent with the President's order, the procedures to be used and the rights to be afforded the accused. This process involved working to achieve certain ends, including: ensuring a full and fair trial for the accused; protecting classified and sensitive information; and protecting the safety of personnel participating in the process, including the accused." In your opinion, can a detainee be afforded a "full and fair trial" if the DOD is depriving him of access to the classified and sensitive information being used as evidence against him? Do you believe it is the province of the

Executive branch to devise these commissions without Congressional action or approval?

ANSWER: The MCA establishes military commission procedures that provide the accused with full and fair trials while protecting classified information from disclosure to the enemy. Under the Act, the accused will have the right to be present for all proceedings and to challenge and examine all the evidence introduced against him. *See* 10 U.S.C. § 949a(b). At the same time, however, the Government is given a robust privilege to ensure that classified sources and methods are not disclosed to the accused. *See id.* § 949d(f)(2)(B). These protections will ensure that every suspected terrorist receives a full and fair trial, consistent with the law of war, while also protecting sensitive information.

As you know, and as Mr. Dell'Orto testified, the President directed the Department of Defense to establish the original commissions by military order. At the time, the Administration made the judgment that no further legislative action was required, because the Supreme Court had held in several cases arising out of World War II that the President, acting as Commander in Chief, had the constitutional authority to establish military commissions for the trial of enemy combatants, and that Congress had endorsed the President's authority in what is now codified as Article 21 of the UCMJ.

The Supreme Court's decision in *Hamdan* similarly recognized the President's authority to establish military commissions, but the Court held, by a closely divided vote, that the military commissions previously established by the President did not comply with certain provisions of the UCMJ. Congress now has enacted the MCA, which satisfies the statutory limitations identified in *Hamdan*.

12. A January 2002 draft memorandum signed by you states that the new paradigm of the war on terror renders obsolete the Geneva Conventions' strict limitations on questioning enemy prisoners and renders quaint some of its provisions. Do you still adhere to that assertion now that the Supreme Court has spoken in *Hamdan*? Would you comment on whether you feel the Court's decision was misguided?

ANSWER: The President determined in February 2002 that members of al Qaeda and the Taliban are not entitled to the protections that the Geneva Convention provides to lawful combatants. He also determined that Common Article 3, which applies to conflicts "not of an international character," would not apply to this conflict, because the war on terror, which involves a transnational terrorist movement with global reach and a proven record of targeting United States citizens and interests in multiple countries, is decidedly a war of an international character. The President's conclusion on that point plainly was reasonable. Indeed, it reflects a fundamental truth about the Geneva Conventions—they simply were not drafted in 1949 in anticipation of fighting a war against international terrorists.

The Supreme Court in *Hamdan* did *not* decide that the Geneva Conventions as a whole apply to our conflict with al Qaeda or that members of al Qaeda are entitled to the privileges of prisoner of war status. The Court did, however, disagree with the President's determination that Common Article 3 would not apply. We believe the MCA provides an appropriate response to *Hamdan*: Congress has clearly defined nine "grave breaches" of Common Article 3, while also buttressing the President's constitutional authority to determine whether other, non-criminal conduct also violates Common Article 3. *See* MCA § 6, Pub. L. No. 109-366, 120 Stat. 2600, 2632. This approach ensures that the United States will remain fully compliant with Common Article 3, while also providing our troops with clear guidance about their obligations under international law.

State Secrets and Renditions

13. The Administration has been criticized by some organizations for its readiness to invoke the State Secrets Privilege in cases such as *Arar v. Ashcroft* and other cases involving the practice of rendition operations. Can you explain the criteria used to determine whether information that might come out in a case poses a threat to national security and thus warrants the invocation of the State Secrets Privilege?

ANSWER: The state secrets privilege is a longstanding method approved by the courts to prevent disclosure in civil litigation of information important to the Nation's security. The government does not lightly assert the state secrets privilege, but because the government's paramount responsibility is to safeguard national security, the privilege is asserted on a case-by-case basis where the responsible agency head determines, after giving personal consideration to the matter, that there is a reasonable danger that disclosure of information at issue could cause harm to the national security. The case law makes clear that the privilege applies to protect against disclosure of sensitive national security information including military secrets, intelligence sources, methods, and capabilities, and information relating to the conduct of foreign affairs.

14. Recently, U.S. District Court Judge Marcia Cooke authorized Jose Padilla, a former enemy combatant, to review classified information, including memoranda and videotapes regarding his status and information obtained during his interrogations, for use in his defense in a separate Miami terrorism case. What prevented the Administration from invoking the State Secrets Privilege in this case?

ANSWER: The Government may not invoke the state secrets privilege in criminal prosecutions. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

15. Was the Department of Justice consulted in the late 1990s when the practice of rendition was first used by the CIA? What sort of legal authority has been cited for this type of operation? Does the Administration have any legal concerns regarding the implication that nations that torture are usually at the receiving end of the rendition flights?

ANSWER: It would not be appropriate in this context to comment on allegations of "rendition" activities by the Central Intelligence Agency. Consistent with the long-standing practice of the Executive Branch, the Administration briefs the Intelligence Committees regarding classified intelligence activities in connection with the war on terror. Any internal legal advice rendered by the Department in connection with any classified intelligence activity would be confidential legal advice, and it would not be appropriate to disclose. Maintaining the confidentiality of that advice is necessary to preserve the deliberative process of decision making within the Executive Branch and attorney-client relationships between the Department and other agencies.

"Rendition," as we understand you to be using the term, is a vital tool in combating international terrorism; the practice brings terrorists to justice, and saves innocent lives. Some accounts of "rendition" in the popular press have erroneously suggested that the activity is unlawful. "Rendition" is an accepted and lawful practice, and for decades the United States and other countries have used it to transport criminal or terrorist suspects from the countries where they are captured to their home countries or to other countries where they can be questioned, held, or brought to justice. Both Ramzi Youssef, the mastermind of the 1993 World Trade Center bombing, and "Carlos the Jackal," one of history's most infamous terrorists, were brought to justice in this way. There are a number of published authorities supporting the legality of this tool. The European Commission on Human Rights specifically rejected Carlos's claim that his "rendition" was unlawful. *See Illich Ramirez Sanchez v. France*, Appl. No. 28780/95, Decision of 24 June 1996, Dec. & Rep. 86, at 11. In addition, the Department of Justice opined that forcible abductions of suspects overseas are lawful if officers act in accordance with authority under United States law and under the President's constitutional authority, even if the arrest departs from international law. *See Authority of the Federal Bureau of Investigation to Override International Law In Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163, 183 (1989); *cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990) (holding that the Fourth Amendment does not apply to searches and seizures involving persons abroad "with no voluntary attachment to the United States," and noting that a contrary rule "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries").

The President repeatedly has made clear that the United States does not condone or encourage the torture of anyone, anywhere in the world. *See, e.g.*, President's Speech on September 6, 2006 ("I want to be absolutely clear with our people and the world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it."); Statement on United Nations International Day in Support of Victims of Torture, Public Papers of the Presidents (July 4, 2005)

("[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law. "). Consistent with U.S. reservations to the Convention Against Torture and the Senate resolution ratifying the Convention, it is the established policy of the United States not to expel, extradite or otherwise effect the involuntary return of any person to a country in which it is more likely than not that the person would be subjected to torture. See 8 U.S.C. § 1231 note (directing appropriate agencies to implement the United States' obligations under the Convention "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the [Convention]"); *see also* U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured'"). Where appropriate, the United States seeks diplomatic assurances from other nations that a person will not be tortured if returned to that country before transferring an individual to the custody of a foreign nation.

Signing Statements

16. For the McCain Amendment or the PATRIOT Act, if the President thinks that the legislation needs a provision added to make the Act constitutional, wouldn't the President be better off if he followed the Constitution, vetoed the Bill, and then asked the Congress to pass it in accordance with what he would accept?

ANSWER: We disagree with the premise that a President does not "follow[] the Constitution" when he makes signing statements construing a bill or expressing his constitutional reservations. As demonstrated by the longstanding practice of Presidents of both parties, the use of presidential signing statements is entirely consistent with the Constitution. A President need not veto an otherwise valid bill simply because of constitutional reservations about some provisions of the bill in some applications. As Assistant Attorney General Dellinger explained during the Clinton Administration, "we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 135 (1993) (*available at* http://www.usdoj.gov/olc/signing.htm); *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds").

The Constitution requires the President to take an oath to "preserve, protect, and defend the Constitution," and directs him to "take care that the Laws be faithfully executed." U.S. Const., art. II, §§ 1, 2. When Congress passes legislation containing provisions that could be construed as contrary to well settled constitutional principles, or

that could be applied in a manner that is unconstitutional, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution. Presidents, like courts, assume that Congress does not intend to legislate unconstitutionally. Using a presidential signing statement to give a potentially problematic provision in a bill a construction that avoids constitutional concerns does not represent an affront to Congress; rather, it gives greater effect to Congress's will than simply vetoing the legislation, or tacitly declining to enforce a provision (as other Presidents have done). As Assistant Attorney General Walter Dellinger explained, the practice of issuing a signing statement to construe a statutory provision to ensure its constitutionality is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." 17 Op. O.L.C. at 133. Thus, "[s]igning statements have *frequently* expressed the President's intention to construe or administer a statute in a particular manner (*often* to save the statute from unconstitutionality)." *Id.* at 132 (emphases added). "[S]igning statements of this kind can be found as early as the Jackson and Tyler administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice." *Id.* at 138.

In addition, the mere fact that a President issues a signing statement about a bill does not mean he considers the measure to be unconstitutional. For example, when the President signed the PATRIOT Act reauthorization bill, he President indicated that the Executive Branch would construe provisions that may involve "furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority . . . to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties." The two sections of the reauthorization bill specifically mentioned in the signing statement involved audits of the use of certain business records and mechanisms for obtaining records. The constitutional reservations the President expressed in his signing statement simply echoed concerns made consistently by prior Presidents in signing statements involving similar provisions. Presidents routinely assume that when Congress passes a bill requiring the production of information, it does so against the backdrop of what President Clinton, in a signing statement, called the "President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999). In a similar context, President Eisenhower wrote:

> I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.

Pub. Papers of Dwight D. Eisenhower 549 (1959).

Where an enrolled bill is constitutional on its face, there is no call for a President to ask Congress to change the bill before he signs it into law. It can be beneficial, however, for the President to use signing statements to remind the Executive Branch, the public, and Congress that information-sharing requirements do not alter the President's constitutional duty to oversee the appropriate disclosure of sensitive information.

17. Can you please explain the process by which signing statements are prepared and drafted in the White House?

ANSWER: The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill. The Department of Justice also reviews legislation to determine its constitutionality, but anyone in the Executive Branch who is participating in the legislative review process may offer comments on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

Attorney-Client Privilege

18. Do you acknowledge that the announcement of an investigation by DOJ against an organization, particularly a public company or private partnership almost always does substantial harm to that company's reputation, stock price, shareholders, customer base, and employee retention? (Note that business in the financial/professional services industry have always failed after such an announcement – witness Drexel Burnham and Andersen.)

ANSWER: The Department does not publicly announce the existence of a criminal investigation. Indeed, the Department generally does not confirm or deny the existence of a criminal investigation. Privately held entities, such as partnerships, usually have no obligation to disclose an ongoing investigation and do not do so. A publicly held corporation may be required to disclose to its shareholders that it is the subject of an investigation or it may restate its earnings, as occurred recently in stock option backdating matters, to ensure that it is complying with its legal obligation to make full disclosure of all material information to its shareholders. Depending on their nature, such disclosures can trigger a negative response in the market. Stock prices may decrease for an extended period upon an announcement of a restatement of earnings or may simply experience a short spike downward and then move upward again. Also depending on the nature of the disclosures, a corporation's customers and employees may choose to

disassociate from the corporation because of concerns about its long-term viability or a desire to avoid associating with criminal conduct. Any adverse consequences to the company do not result from any announcement by the government, but rather from the scope and gravity of the remedial measures (such as adverse earnings restatements in the millions of dollars) or the underlying conduct disclosed by the company.

19. If you were the General Counsel of an organization that had recently been named to be under investigation by the Department of Justice and your stock was tanking, you were losing customers and employees, and the very survival of your company depended on whether you could quickly reach a non-prosecution agreement with DOJ and avoid indictment, wouldn't you advise complete cooperation with DOJ including satisfaction of all of the elements outlined in the Thompson memorandum including waiver of attorney-client privilege?

Follow up: If the answer is that none of the 9 factors are dispositive, which do you view as "optional," and when?

ANSWER: An experienced General Counsel of a corporation would never undertake to enter into an agreement with the Department of Justice if there was no evidence of wrongdoing by the corporation or its employees. There would be no need for such an agreement. On the other hand, a responsible General Counsel, whose company was obligated to publicly disclose corporate misconduct and/or restate earnings because of misconduct, would be focused on investigating the allegations as quickly as possible in order to make an informed decision about their merits and discharging management's obligations to shareholders by disclosing all material facts, correcting any misconduct, rectifying any damage done, and preventing its recurrence. Many of the steps a responsible General Counsel would take, unsurprisingly, will coincide with the factors reflected in the *Thompson* Memorandum, and the subsequent memorandum on the same topic by Deputy Attorney General Paul J. McNulty (*McNulty* Memorandum), since those memoranda are designed, among other things, to provide incentives for responsible corporate management. Most important, the guidance on when to exercise discretion to charge is not triggered unless there is sufficient evidence of criminal wrongdoing by corporate officials that the corporation can be held criminally liable.

Because the factors are guidance, rather than intended to "mandate a particular result," the importance of a factor can vary from case to case. A number of factors must be considered: the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the corporation's history of similar conduct, the corporation's timely and voluntary disclosure of wrongdoing, the existence and adequacy of the corporation's pre-existing compliance program, the corporation's remedial actions, collateral consequences, including disproportionate harm to shareholders, pension holders and employees, the adequacy of prosecuting individuals responsible, and the adequacy of remedies such as civil or regulatory enforcement actions. Some factors may or may not apply in specific cases and in some cases, one factor may override all others,

e.g., the nature and seriousness of the offense. *Thompson* Memorandum IIB; *McNulty* Memorandum IIB. Whether one factor is dispositive is to be determined on a case-by-case basis. Waiver of attorney-client privilege is not one of the listed nine factors; it is a subfactor of the cooperation factor. *Thompson* Memorandum VI; *McNulty* Memorandum VII.

20. You are still a GC: in circumstances that pose such extreme risk, would you be likely or unlikely to offer privilege waiver before it is requested, given its prominence in the Thompson Memo? Under these circumstances, would you consider this to be a "voluntary" waiver?

ANSWER: If the corporation, through its employees, had engaged in criminal activity, such activity must be disclosed to the regulatory authorities, shareholders, and the investing public. Such negative news would likely have a deleterious effect on stock prices, employee morale and business operations. Responsible prosecutors are obligated to investigate this conduct to discharge their duty to investigate and prosecute criminally culpable individuals and entities. In such circumstances, responsible boards of directors, corporate management and corporate counsel would also conduct an internal investigation. Counsel could reasonably conclude that, rather than forcing the government to conduct a protracted grand jury investigation by subpoenaing employees into the grand jury and requesting documents -- a process that could take months or years -- disclosure of an internal investigation may bring the matter to quick resolution. The fact that it is in the corporation's interest to conclude the matter quickly, however, does not mean that a decision to pursue disclosure is not voluntary. Rather, it is a consequence of the company's desire to advance its own interests, including its interest in a prompt resolution, during the government's investigation.

21. If a DOJ prosecutor says to an organization under investigation: "Have you considered waiving your attorney-client privilege?" or "Are you aware of the cooperation factors outlined in the Thompson memorandum?" and the company subsequently provides attorney-client privileged material, is that a voluntary waiver?

ANSWER: Yes. In the first scenario, the government is not making a request but simply asking whether waiver was considered, oftentimes in response to a corporate inquiry about what it can do to facilitate a speedy government inquiry. The second scenario does not mention waiver at all. Thus, if the corporation offers waiver under either of these scenarios, it was not at the request of the government. Finally, the Department notes the use of the term "voluntary waiver" to describe these types of negotiations is fundamentally misleading. "Voluntary" waiver assumes that there could be "involuntary" waiver. The Department has no ability to coerce or compel counsel to waive a valid privilege. Ultimately, counsel freely decides to waive privilege when the corporation decides such action in is its own best interests because it seeks to avoid indictment caused by the criminal activity of its employees.

It should be noted that the *McNulty* Memorandum establishes new process requirements for waiver requests. Prosecutors engaging in preliminary discussions regarding waivers of privilege should make clear that all comments or remarks, like those set forth in the above question, are preliminary and do not create any obligation by the company to provide privileged documents. Under the *McNulty* Memorandum, should the prosecutor request waiver for factual information, that request is subject to review and approval by the United States Attorney or Department component head. If the prosecutor requests waiver for attorney-client communications, that request must be made by the United States Attorney or Department component head, subject to review and approval by the Deputy Attorney General. Even where the company volunteers waiver, a prosecutor must notify the United States Attorney or Assistant Attorney General in the Division where the case originated and a record of the notification must be maintained.

22. How does the Justice Department compile information, if at all, on the behavior of its U.S. Attorneys and other prosecutors regarding privilege waiver? How is the information collected in the field offices and at DOJ main? How long has this information been collected? Do you only collect information when prosecutors self-report that they have made a privilege demand, or do you also collect information about what prosecutors term privilege waiver "requests" or other times when privilege waiver issues are raised? Do you collect information on the circumstances in which waiver is discussed: i.e., at what point is the subject raised (in early conversations or only after fact-finding/investigations are complete); or is it requested only when other avenues to discovering the probative content sought have been exhausted (is it a first or last resort)?

ANSWER: The United States Attorneys' Offices, DOJ components, and the Deputy Attorney General handle privilege waivers and maintain the investigatory files for each case. Pursuant to the *McNulty* Memorandum, prosecutors must obtain written approval from the United States Attorney or Department component head prior to requesting purely factual information that is covered by the privilege (Category I information). The Assistant Attorney General of the Criminal Division must be consulted with prior to the United States Attorney's or component head's decision to grant or deny the request for waiver. A copy of each waiver request and authorization must be maintained in the files of the United States Attorney or component head. Prosecutors must obtain written authorization from the Deputy Attorney General prior to requesting attorney-client communications or non-factual attorney work product (Category II information). A copy of each waiver request for this information must be maintained in the files of the Deputy Attorney General.

Pursuant to the now superseded *McCallum* Memorandum, DOJ prosecutors were required to obtain supervisory approval before requesting a waiver. The information regarding this policy would have been generated after October 2005.

The Executive Office of United States Attorneys also collected sample information on the use of privilege waivers from various offices throughout the country in 2006. The information requested encompassed recent instances when waiver was requested by the government, when waiver was volunteered by defense counsel without a request from the government, whether waiver was obtained at all, and whether waiver had any impact on the investigation and prosecution of individual or corporate targets. The Attorney General's Advisory Committee also reviews corporate charging practices, including waiver, and discusses them in its meetings.

23. Prior to the adoption of the Holder and Thompson memoranda, the Department had no formal policy instructing its prosecutors to demand waiver of the attorney-client privilege as a condition for cooperation credit, and yet the Department appeared to have no trouble securing convictions against organizations that violated the law. In fact, former Attorney General Dick Thornburgh testified in March of this year that he could not remember one case during his tenure at Justice where DOJ asked for or otherwise sought an organization to waive its attorney-client privilege. What is different about the prosecutions in the past few years as compared to previous decades and what significant additional information does waiver provide that cannot be revealed through non-privileged sources such as independent investigations, grand jury testimony, and proffers?

Are there current examples of cases that could not have been brought without privilege waiver? By could not have been brought, I mean in which information could not have been gathered pursuant to government interviews, proffers, and subpoenas, and through gathering non-privileged material from the company?

ANSWER: There is nothing different about the prosecutions from earlier years, except that they may have grown in size and complexity after the corporate scandals. The Department respectfully disagrees with the suggestion that prior to the issuance of the *Thompson* Memorandum in January 2003, waiver was never discussed. Waiver was discussed in the *Thompson* Memorandum's predecessor, the *Holder* Memorandum, issued in 1999. Moreover, those memoranda did nothing more than commit to paper what prosecutors had been doing for decades. Prior to 1999, prosecutors received otherwise privileged materials, *e.g.*, internal investigations and documents prepared by opposing counsel in investigating corporate fraud. The difference between then and now is that there was no formalized guidance provided to prosecutors about how that disclosure should be considered in a comprehensive analysis of whether the corporation should be charged.

In the typical case, waiver of privilege does not provide anything that cannot be obtained through subpoena. In some cases, however, the corporation will choose to provide its internal investigation to avoid protracted grand jury investigation, including numerous employee grand jury appearances and document requests that often last for

months or years. In some cases, waiver may be necessary if the corporation argues reliance on an "advice of counsel" defense or its attorneys are implicated in efforts to conceal the crime after the fact, such as the destruction or concealment of documents, suborning the perjury of witnesses, or other obstructive conduct.

By way of example:

In *United States v. The University of Medicine and Dentistry of New Jersey*, Mag. No. 05-3134 (PS), a criminal complaint was filed on December 29, 2005 against the University of Medicine and Dentistry of New Jersey ("UMDNJ") for heath care fraud in violation of Title 18, United States Code, Section 1347. On that same date, UMDNJ entered a deferred prosecution agreement with the government and agreed to the installation of a federal monitor, among other things. The institution also waived any claims of attorney-client privilege and/or attorney work product doctrine as to (1) factual internal investigations undertaken by the Institution or its counsel relating to the matters under investigation by the U.S. Attorney's Office; and (2) legal advice given contemporaneously with, and related to, such matters. The government agreed to maintain the confidentiality of those documents and promised not to disclose them to a third party unless required to do so by law or unless disclosure was necessary in order for the government to discharge its duties. The first waiver of attorney-client privilege and attorney work product doctrine was requested on September 21, 2005 and was obtained on September 30, 2005. In a letter to the government announcing its waiver, UMDNJ stated that "as a public institution of the state of New Jersey, [it]. . . decided . . . to waive these privileges to make available all of the facts so that a speedy, fair, and just resolution of the criminal investigations . . .[could] be made." Within two months of receiving the initial waiver, the U.S. Attorney's Office received key privileged documents which led to a speedy resolution of the criminal case against the corporate defendant. This clearly was a case in which waiver allowed the Department of Justice to go after wrongdoers in a significantly shorter time-frame than would have been possible had we not been able to seek such waivers. In addition, since the criminal complaint was based on privileged documents, this may very well have been a case in which the only way we could have prosecuted corporate wrongdoers was to obtain a waiver of the privilege. UMDNJ, with an annual budget of $1.6 billion, is the largest public health institution in the nation.

In the Southern District of New York, in *United States v. Martin Armstrong* (HSBC /Republic Securities), waiver enabled the government to freeze $80 million before the defendant could move money. In this massive ponzi scheme, the government received a waiver of work product privilege for forensic accounting analysis tracing the flow of money associated with securities trades. The waiver enabled the government to follow the money quickly enough to freeze $80 million before Armstrong could move it. The case involved a billion dollar ponzi scheme perpetrated by an American investment adviser on a host of major Japanese corporate victims. The investment manager, Martin Armstrong, conspired with officers of Republic New York Securities Corporation ("RNYSC") to hide the fact of massive trading losses from the investor victims and to use money invested by new victims to pay off older victims. Shortly after the government investigation began in August 1999, RNYSC waived its work product privilege and

provided the government with a forensic accounting analysis conducted by its lawyers and retained accountants. This otherwise privileged analysis traced certain cash flows among accounts controlled by Armstrong both to conduct the scheme and to steal from the victims. The waiver enabled the government to follow the money quickly enough to freeze approximately $80 million within two weeks of beginning our investigation. The government was able to secure an arrest warrant for Armstrong (based in part on the privileged work-product information) the following week. Absent this waiver, it would likely have taken at least six weeks to conduct the same analysis. In the interim, Armstrong would have been able to flee and/or transfer abroad the $80 million in cash. Armstrong would likely have done so because he was held in contempt, shortly after his arrest, for secreting another $10 million in gold bullion that was subject to a civil court order requiring Armstrong to relinquish it. Two RNYSC officers subsequently pleaded guilty to participating in the fraud. RNYSC pleaded guilty as well and paid a record $600 million in restitution in 2001.

24. If the Justice Department believes that those under federal investigation should open their files on attorney-client confidences and reveal the details of their legal counseling when the case is important or when the information is otherwise difficult to procure, why is it that you and the President have regularly cited your firm belief that the attorney-client privilege must exist to encourage a free flow of communication and advice of counsel within the Administration? Why has Justice refused to provide a large amount of information under that privilege in very important and high profile cases? Should Congress consider the Administration to be "non-cooperative" because they do not waive their rights to confidential attorney-client counseling? Why is it the privilege enforceable and in the public's interest when asserted by the Administration, but not for others? Isn't this a double standard? Doesn't privilege act to promote the public's interest in encouraging decision-makers to seek legal counsel regardless of whether the client is the President of the United States or an employee of a company?

ANSWER: The Justice Department does not require, or indeed wish to receive, unrestricted access to "files on attorney-client confidences." The government is interested in obtaining facts relevant to whether criminal activity occurred. The Department recognizes the importance of interests served by the privilege, seeks such waivers selectively, and works with counsel to limit the scope to obtain only the information that the Department needs. We respectfully disagree with any comparison between the privilege asserted by corporations that are criminally liable for the actions of their employees and the privilege asserted by the Executive Branch. The assertion of privilege by the Executive Branch, among other things, protects highly-sensitive matters involving national security and the safety of American citizens. Moreover, when asserted in the context of a Congressional inquiry, the privilege also implicates important interests related to inter-branch comity. Thus, a comparison of the two is not valid.

25. Does it bother you that so many of your predecessors, former AG's, Deputy AG's, Solicitor Generals from Republican and Democratic Administrations, the Courts, the Sentencing Commission, lawmakers on both sides of the aisle, and virtually every legal, business, and civil rights organization in the country disagree with current DOJ policies and practices that penalize organizations for preserving their attorney-client privilege? With all of these folks staked out against your policy, who is for it? If the answer is only your department, doesn't that give you pause and cause you to question the propriety and wisdom of your position?

ANSWER: The Justice Department is in a unique position as a governmental entity tasked to enforce our nation's criminal laws. The private bar and corporate counsel play a very different role; that is, they seek to obtain the best result for their corporate client whenever possible. This not only includes vigorously opposing criminal charges, but often includes aggressive litigation in shareholder lawsuits to reduce awards to those shareholders who may have been victimized by criminal activity. While we respect the views of our colleagues, their criticisms likely reflect their roles in the process. Other corporate counsel and former DOJ officials, who have supported this guidance while in public office, have not chosen to join these critics. Moreover, other governmental agencies with enforcement responsibilities, such as the Securities and Exchange Commission, take similar approaches.

The Department supports the guidance set forth in the *McNulty* Memorandum and believes that it reflects a reasoned, time-tested approach to corporate charging decisions.

26. We already know that the privilege does not apply when the lawyer-client relationship is being used to facilitate or promote a fraud (the crime-fraud exception), and we already know that the privilege is rather limited in the scope of what it does protect. Can the Justice Dept articulate more clearly when it is that it believes that the privilege should apply and when it is that clients should not be allowed to invoke it?

ANSWER: There is a crucial distinction between circumstances in which a privilege does not exist and circumstances in which a privilege is waived. In the first instance, a privilege may not ever have existed because the lawyer-client relationship was used to facilitate a fraud (the crime fraud exception). In the second instance, a client may waive a privilege protecting confidential attorney-client communication for the purpose of seeking legal advice. Clients should not be allowed to invoke privilege when the subject communication cannot meet the definition of what is covered as an attorney-client privileged communication, when the privilege is otherwise vitiated because of an established exception under the law, or when the privilege is waived because the communication was disseminated to a third party not covered by the privilege. These issues are typically litigated in filed cases and are not part of the charging analysis covered in the *McNulty* Memorandum.

27. How often do companies who refuse to waive privilege communications still receive complete credit for cooperation? Are you aware of any instances where a company refused to waive its privilege and still received the benefit of bargaining a settlement, was allowed to prove its non-culpability, or was offered a non-prosecution agreement?

ANSWER: The charging analysis is not solely focused on privilege waiver - it is only a subpart of one of the nine factors. The analysis is dependent on all of these factors, only one of which is cooperation. In considering cooperation, the Department can consider the company's willingness to disclose wrongdoing promptly, to identify wrongdoers and to provide access to documents and witnesses, including, if necessary, waiver of attorney-client and work product protections. If an assessment of the factors as a whole weighs against charging the company, the prosecutor will decline prosecution. Decisions to forgo charging are made every day by prosecutors across the country and those decisions are not dependent on whether the company waived a privilege. Moreover, the government must prove a defendant's guilt beyond a reasonable doubt in a criminal case. This is an extremely high standard. It is not up to the corporation to prove its "non-culpability."

28. In October 2005, Acting Deputy Attorney General Robert McCallum sent a memorandum to all U.S. Attorneys and Department Heads (the "McCallum Memorandum") directing them to adopt "a written waiver review process for your district or component." Doesn't this create a worse situation whereby the DOJ is condoning the idea that each field office should be allowed to set its own policies and standards? Doesn't this lead to dozens of different policies around the country? In what way, if any, is this new directive responsive to the concerns of critics who protest the practice of considering privilege waivers as a measure of cooperation? How does the McCallum Memo help add to the certainty of confidentiality of an employee discussing a sensitive matter with a General Counsel?

ANSWER: The *McCallum* Memorandum has been superseded by the more detailed requirements contained in the *McNulty* Memorandum.

The *McNulty* Memorandum promotes consistent and uniform decision-making in each district and across the country and it is responsive to critics who claimed that individual AUSAs had too much autonomy in making waiver requests. It should be noted that to date, no critic has produced empirical evidence substantiating that claim. Pursuant to the *McNulty* Memorandum, only a United States Attorney or Department component head can approve a prosecutor's waiver request for factual information, identified in the *McNulty* Memorandum as "Category I" information. Moreover, a waiver request for Category I information cannot be approved or denied prior to consultation with the Assistant Attorney General. This consultation requirement will promote consistent and uniform decision-making across the Department.

Similarly, with respect to requests for communications between attorneys and their clients, or legal advice or other factual information, known as "Category II" information in the *McNulty* Memorandum, the Deputy Attorney General must approve all waiver requests, ensuring that the policy and standards for requesting waiver of this information are uniform.

With respect to the last question, the *McNulty* Memorandum, as well as the predecessor *McCallum* Memorandum, is an internal process requirement of the Department, and does not impact a rank and file employee's relationship with corporate counsel. Moreover, it is important to note that the scope of corporate counsel's representation is limited to the corporation and its high-level decision-makers. In most instances, corporate counsel does not have a confidential relationship with the rank and file employee.

29. Do you agree with the Supreme Court's logic and insight in Upjohn Co v. United States (449 U.S. 383) that "an uncertain privilege is no privilege at all"? In either event, can you explain the logical relevance between a corporation's VALID assertion of privilege, and the conclusion that the corporation is not being cooperative?

ANSWER: Yes. We agree that a well-defined privilege promotes certainty and stability for those that must rely on the privilege. The *McNulty* Memorandum is consistent with this, as the corporation continues to enjoy an absolute right to assert the privilege when it believes its overall interests are being served by doing so. A corporation may assert a privilege in pre-indictment negotiations and it has a right to take that action, fight the charges, and proceed to trial. Or it may simply proceed without waiving privilege, understanding that such a decision, along with other facts and an analysis of the *McNulty* factors, may impact a prosecutor's charging analysis. That is the corporation's decision to make.

In exercising charging discretion, the prosecutor also has a right to decide that access to privileged information is needed to evaluate the completeness of a corporation's voluntary disclosure and cooperation. After all, the corporation is asking that it not be charged despite the fact that its employees committed criminal acts.

So, for example, where the company urges a speedy decision, it is reasonable to ask for the results of a completed internal investigation. This allows the prosecutor to obtain information without long and cumbersome negotiation of cooperation agreements with each individual-employee witness. It prevents months-long searches through millions of pages of documents when the relevant documents have already been identified by corporate counsel. And as *United States v. Martin Armstrong* illustrates, waiver can prevent further dissipation of assets subject to government forfeiture for the benefit of fraud victims. Finally, in other circumstances, it may be important for the prosecutor to determine what contemporaneous legal advice was given at the time the fraud was occurring. Seeking waiver in these instances is good government practice.

Conversely, if the corporation decides not to waive privilege and that decision plays a part in stalling the investigation or preventing the government from obtaining necessary evidence and assets to compensate victims, the prosecutor has a right to consider that fact in assessing whether the company has fully cooperated. Certainly, a prosecutor may sensibly conclude that a corporation that has waived privilege in these circumstances may be providing greater cooperation than those that do not. But the overall importance of waiver to the *McNulty* Memorandum should not be distorted. It must be emphasized that waiver is only a small part of assessing a corporation's cooperation and it is only sought where necessary. The *McNulty* guidance is much more comprehensive, and waiver is only a subpart of one of the nine factors considered in charging, so it is not dispositive in any given situation.

Immigration Questions

30. On January 9, 2006, you issued two memoranda to U.S. immigration judges and the Board of Immigration appeals for failing to treat aliens who appear before them with respect and for failing to produce quality work. You wrote that you "believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve." You instructed then Acting Deputy Attorney General Paul McNulty and the associate attorney general to conduct a comprehensive review of the immigration court system.

Subsequently, during Deputy Attorney General Paul McNulty's nomination hearing on February 2, 2006, Mr. McNulty stated that he was reviewing the way the immigration courts were operating, the quality of the work that is being done, the efficiency and effectiveness, and "whether or not we have struck the right balance." According to Deputy Attorney General McNulty, that review was to be done quickly.

Then, on April 3, 2006, Deputy Assistant Attorney General Jonathan Cohn testified before this committee that "the review is shortly going to be completed".

- **Has the review been completed?**
- **What were the results of the review?**
- **What efforts have you made to reform the immigration judges and the Board of Immigration Appeals?**

ANSWER: On August 9, 2006, the Department announced the completion of the review together with twenty-two measures that the Attorney General has directed as a result of the review that are designed to improve the performance and quality of work of the immigration courts. That day, Assistant Attorney General Moschella also sent the Committee a letter summarizing the results of the review and attaching a description of

the twenty-two measures. We believe those documents answer these questions and we are pleased to provide a copy of them for inclusion in the record of this hearing.

31. Currently immigration judges and members of the Board of Immigration Appeals are hired subject to an undefined process that is strictly under your purview. However, traditional administrative law judges are subject to an elaborate appointment process including an examination and ranking by the Office of Personnel Management. Shouldn't Board members and immigration judges be subjected to the same independent process for hiring?

ANSWER: The Attorney General also believes the criteria the Department has used in making these appointments are generally sound. At the same time, based on the recently completed review of the immigration courts, the Attorney General directed some enhancements that should further improve our approach to filling these important positions.

Because the INA specifies that immigration judges are to be attorneys, immigration judges and Board Members are appointed pursuant to Schedule A authorization under 5 C.F.R. § 213.3101, the same personnel authority used for appointing lawyers to many other important positions at the Department of Justice and throughout the government. Under this authority, an agency seeking to fill an attorney position specifies, in addition to bar membership, the qualifications most needed for the job and selects accordingly. With respect to immigration judges and members of the Board of Immigration Appeals, the Department has required citizenship and seven years of legal experience. For Board members, it has also required that one year of this experience be at the equivalent of the GS-15 level in the federal service. In addition, in making a selection, the Department generally considers a candidate's education, years of professional legal experience, knowledge of immigration law and procedure, litigation experience, experience handling complex legal issues, judicial temperament, analytical decisionmaking, writing ability, and, when appropriate, ability to conduct administrative hearings and knowledge of judicial practice and procedures. Candidates are required to submit a resume or the equivalent and, after initial selection, to undergo a full field FBI background investigation (BI) unless they have a current and adequate BI. Each appointment is subject to a favorable suitability adjudication is by the Department's Office of Attorney Recruitment and Management and the Executive Office for Immigration Review for employee suitability. Each BI is reviewed by the Security and Emergency Planning Staff of the Department's Justice Management Division for security clearance purposes.

The improvements the Attorney General has directed to this process are as follows. All immigration judges and Board members appointed after December 31, 2006, will be administered a written examination to evaluate their familiarity with key principles of immigration law. In addition, the Attorney General has directed EOIR to employ the two-year trial period of employment generally applicable to newly appointed immigration judges and Board members both to assess whether a new appointee

possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed, while fully respecting the adjudicator's role. These measures will enable the Department to retain the benefits of the current hiring process while also enhancing the professionalism of EOIR's adjudicators.

32. There has been a flood of immigration appeals filed in the Federal Courts causing substantial delays. During a hearing on reducing immigration litigation on April 3, 2006, Assistant Deputy Attorney General Jonathan Cohn testified that one circuit takes over two years to decide the average immigration appeal. One solution to reduce the number of immigration appeals handled by the circuit courts is to consolidate immigration appeals filed in the Federal courts into one U.S. Court of Appeals. During that same hearing Judge Jon Newman suggested a centralization proposal modeled on the FISA or the old Temporary Emergency Court of Appeals in which circuit judges throughout the country are drawn together to staff a U.S. Court of Immigration Appeals.

A. What is your position on consolidating immigration appeals into a centralized court and do you agree with Judge Newman's proposal to draw from circuit judges nationwide in a model similar to the TECA court?

ANSWER: The flood of immigration cases pending in the courts of appeals is a serious matter that cannot and should not be ignored. As explained further in our answer to question 57, the Department believes the most important change Congress could make to assist with this problem is to require an alien to obtain a certificate of reviewability from a federal judge in order to pursue his appeal. If the judge were to deny the certificate of reviewability, the government would not have to file a brief, and the alien could be removed without additional time-consuming and unnecessary proceedings. If the judge were to grant the certificate of reviewability, then the case would proceed to full briefing and consideration by a three-judge panel.

The Administration has not taken a position on centralizing review in a single existing court. We do not, however, support drawing judges from around the country to serve on a temporary basis because we do not believe this would contribute significantly to addressing the flood of litigation. Deciding immigration cases with a rotating group of judges is unlikely to improve the adjudication process, because a rotating group of judges would be less likely to develop increased subject-matter expertise and no set of judges would confront the results of failing to resolve cases promptly.

B. As a related matter, considering the current flood of immigration appeals, what will the additional affect be on the caseload of immigration judges and the Board of Immigration Appeals? Are the additional litigation resources in S.2611 sufficient to address any increase?

ANSWER: With respect to the sufficiency of resources, although the increase in litigation in the Circuit Courts has had a significant impact on the Civil Division's Office of Immigration Litigation, it has had little effect on the Board's and immigration courts' workload, because remands from the Circuit Courts to the Board and the immigration courts continue to make up a very small percentage of the Board's and the immigration courts' cases. What has had a very significant effect, however, are the enhanced immigration enforcement efforts, resources, priorities and strategies of the DHS, which have led to a dramatic growth in immigration court case receipts in recent years. As an example, immigration courts received over 70,000 more new matters in FY 2005, an increase of approximately 30 percent in that year alone. While we applaud DHS's stepped up enforcement, we must note that stepped up enforcement necessarily means that EOIR can expect to receive tens of thousands of additional cases annually. As a consequence, EOIR expects significant increases in BIA appeals as well.

On August 9, 2006, the Attorney General issued certain directives aimed at improving the quality of EOIR adjudications. Among these was a directive to seek funding increases in key areas, taking into account as well the anticipated increases in the immigration courts' and the Board's workload. According to the Department's current projections, the additional resources authorized in S. 2611 are consistent with this directive and sufficient to meet EOIR's anticipated additional personnel needs.

S. 2611 would also increase the size of the Board of Immigration Appeals from 11 to 23 and mandate three-member adjudication of almost all BIA appeals. Based on the review of the immigration courts that the Attorney General directed the Deputy Attorney General and the Associate Attorney General to conduct, the Department concluded that the size of the Board should be increased to 15 and that the Board should also continue to make use of the provisions authorizing the appointment of temporary Board Members as necessary to meet the Board's needs. On December 7, 2006, the Department published an interim rule that would effectuate these changes. Under this approach, the Board would not become so large that it would effectively lose its capacity to deliberate en banc but would still be able to obtain temporary additional help as needed. The Attorney General also directed EOIR to prepare proposed amendments to the streamlining rules that would retain the fundamentals of the current rules but make some adjustments with respect to the cases heard by three-member panels and the cases affirmed without opinion. Therefore the Department does not support the provisions in S. 2611 regarding the size of the Board or the mandatory use of three-member panels, but the Department does believe there is a need for increased resources for additional permanent and temporary Board members and is making the regulatory changes needed to facilitate the devotion of those resources as necessary. We note, moreover, that if S. 2611's mandate regarding the use of three-member panels were adopted, that would greatly reduce the BIA's current rate of adjudication. That in turn would create a substantial backlog at the Board absent significant additional resources beyond those authorized in S. 2611.

33. I have long expressed a concern regarding the Attorney General's authority to overrule conclusions by the immigration judges and the Board of Immigration Appeals. What is the standard the Attorney General uses to determine which cases to intervene in and the standard by which he decides to overrule these cases?

ANSWER: The Immigration and Nationality Act confers upon the Attorney General the power to determine the admissibility and removability of aliens. *See* Immigration and Nationality Act (INA) § 103(g), 8 U.S.C. § 1103(g). Immigration judges exercise that authority in the first instance, *see* INA §§ 101(b)(4), 240(a)(1), 8 U.S.C. §§ 1101(b)(4), 1229(a)(1); 8 C.F.R. § 1003.10, and the Board of Immigration Appeals reviews their decisions, *see* 8 C.F.R. § 1003.1, but they all do so on behalf of and subject to the supervision of the Attorney General, INA §§ 101(b)(4), 103(g), 8 U.S.C. §§ 1101(b)(4), 1103(g); Homeland Security Act of 2002, Pub. L. No. 107-296, § 1101, 116 Stat. 2135, 2273 (codified at 6 U.S.C. § 521 (Supp. II 2002)).

Because the adjudication of immigration cases is ultimately entrusted to my office, it should come as no surprise that cases will be referred for my consideration from time to time. The regulations do not set forth a standard that the Attorney General must use in determining whether to consider a case in every instance. Instead, the regulations merely provide a mechanism for referring cases to me. Cases can be referred in three different ways: (a) the Attorney General can direct the Board to refer the case, (b) the Chairman of the Board or a majority of the Board can refer the case to the Attorney General *sua sponte*, or (c) the Secretary of Homeland Security can refer a case to the Attorney General. *See* 8 C.F.R. § 1003.1(h).

The Attorney General's determination with respect to whether to consider a case directly will rest on a large number of factors, including the costs of a wrong decision in that case, the frequency with which the underlying issue will arise, and the national security and foreign policy implications of a decision. The Attorney General's review is de novo. His decisions, like those of immigration judges and the Board, are based on the governing laws and regulations and the exercise of discretion conferred on him by law and are reviewable in federal courts to the extent provided by the INA.

There is nothing unusual about any of this. Rather, it is standard administrative law practice for Department and agency heads that assign initial decisional authority to hearing officers to retain the authority to review their decisions and for their reviewing authority to be plenary. *See, e.g.*, 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule"). Retaining such authority is particularly important in the field of immigration because immigration decisions are often discretionary and inextricably intertwined with national security and foreign policy. Decisions of this character are of necessity not reviewable in federal court. These considerations make the availability of direct review of such decisions by a member of the Cabinet with relevant expertise particularly necessary and appropriate.

OPR Investigations

34. Mr. H. Marshall Jarrett, the Counsel for the Office of Professional Responsibility, wrote four memoranda in recent months in which he repeatedly requested that he and several attorneys on his staff be granted the necessary clearances to conduct an investigation into the Department of Justice's approval of the Terrorist Surveillance Program. After five months of requests, he was forced to close his investigation because the clearances were never granted. In a letter dated July 17, 2006, Assistant Attorney General Moschella stated that the clearances were not granted because of concerns over leaks. Mr. Jarrett noted in his memo that the Criminal Division, the Civil Division, and the Privacy Oversight Board were promptly granted the necessary clearances for their similar investigations. Did the Department treat reject OPR's request for clearances because OPR has only career appointees?

ANSWER: No. The request of the Office of Professional Responsibility (OPR) for access to classified information about the Terrorist Surveillance Program (TSP) was not treated differently than similar requests for access by other Department components. Nor was OPR's request denied because OPR has only career appointees.

Indeed, the Department of Justice's Office of the Inspector General, which – other than the Inspector General, who was appointed by President Clinton – is made up entirely of career appointees, has been granted access to classified information about TSP. Similarly, many of the Department employees in other components who have been granted access to classified information about TSP are career, not political, employees.

Moreover, as the Attorney General mentioned in his opening statement before the Senate Judiciary Committee's hearing on February 6, 2006, career lawyers at the National Security Agency's Office of General Counsel and Office of the Inspector General have been intimately involved in the oversight of the program.

35. What does it say about this administration's priorities when leaks are quickly investigated and investigations into possible violations of the law are prevented?

ANSWER: We strongly dispute the premise of this question: investigations into possible violations of the law have not been prevented. TSP is overseen by a rigorous oversight regime. Since its inception, TSP has been subject to several rigorous and extensive review processes within the Executive Branch. The internal review process begins with the Office of Inspector General and the Office of General Counsel of the National Security Agency (NSA), which have conducted several reviews of the Program since its inception in 2001. Attorneys from the Department of Justice and the Office of the Counsel to the President also have reviewed the Program multiple times since 2001. Finally, the President, based upon information provided by NSA, the Office of the

Director of National Intelligence, and the Department of Justice, decides approximately every 45 days whether to continue the Program. In addition to that, the Department of Justice's Inspector General recently indicated that he is conducting a review of the Program.

In addition to Executive Branch scrutiny, TSP has been subject to extensive review by Members of Congress. Congressional leaders, including the leaders of the Intelligence Committees, have been given regular, extensive briefings since the Program's early days, and all Members of both Intelligence Committees have access to the operational details of the Program. Numerous Executive Branch officials have testified before several congressional committees about the Program and have answered literally hundreds of questions for the record about the Program.

36. Does the Department of Justice not trust OPR to conduct an impartial and secure investigation?

ANSWER: To the contrary, the Department of Justice trusts OPR to conduct both impartial and secure investigations. OPR was created in 1975 by order of the Attorney General to monitor the integrity of the Department's attorneys and ensure that the highest standards of professional ethics are maintained. Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels.

However, the President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. Every additional security clearance that is granted for TSP increases the risk that national security may be compromised.

New York Times

37. As you undoubtedly know, the House of Representatives recently adopted a resolution that condemned the publication of classified information regarding the Terrorist Finance Tracking Program by newspapers such as the New York Times. That resolution specifically called on the Department of Justice to investigate and prosecute those responsible. Are you confident that at least one federal employee leaked the information to the newspaper?

ANSWER: Respectfully, it would be inappropriate to comment upon whether the Department is now investigating or considering a prosecution in this case. The Department remains committed to identifying, investigating, and, where appropriate, prosecuting unauthorized disclosures of classified information.

38. Do you believe that such a federal employee committed a crime when he or she transmitted classified information without authorization?

ANSWER: The Department cannot comment on whether or not we have a pending investigation into this matter, nor can we comment on whether or not a crime has been committed by a particular person or group of persons.

Without commenting on any pending investigation or prosecution, we can say that the statutes currently in place – specifically 18 U.S.C. §§ 793 and 798 – make it illegal, under certain circumstances, to disclose classified information to one who is not authorized to receive it.

39. Given what you know at this juncture, do you have reason to believe that employees of the newspaper committed a crime?

ANSWER: The Department cannot comment on whether or not we have a pending investigation into this matter, nor can we comment on whether or not a crime has been committed by a particular person or group of persons.

As always, the primary focus of our efforts in this area has been and will continue to be identifying, investigating, and prosecuting those who leak classified information in violation of our criminal laws. As noted above, however, the relevant statutes do not provide an exemption for any particular profession or class of persons, including journalists.

40. Since the House Resolution was adopted three weeks ago, have you heeded the House's recommendation by ordering an investigation into this matter?

ANSWER: Respectfully, it would be inappropriate to comment upon whether the Department is now investigating this matter. Furthermore, to answer the question as posed would be to run the risk of jeopardizing any future investigation or prosecution that may arise from this or any related matter. The Department investigates potential crimes according to the dictates of the law, as well as Department policies and procedures. Decisions regarding the course of each particular investigation – including the decision to prosecute – are made strictly on the merits.

Senator Hatch

QUESTION: On June 25, 2006, the U.S. Department of Justice obtained a court order against the American Bar Association (ABA) for repeatedly violating the terms of that Court's 1996 consent order governing the law school accreditation process. The ABA acknowledged its violations and paid $185,000 in fees and costs incurred in the Department's investigation. The Court's order came one day after the consent decree expired on June 24, 2006.

41. Given that the Antitrust Division found multiple violations of the consent decree, why did the Department not seek to extend the original decree?

ANSWER: In 1995, the United States brought an action against the American Bar Association (ABA) alleging that it had violated the antitrust laws by allowing its law school accreditation process to be misused by law school personnel with a direct economic interest in the outcome of the accreditation review. In 1996, the United States District Court for the District of Columbia entered a judgment prohibiting the ABA from, among other things, fixing faculty salaries and compensation, boycotting state-accredited law schools by restricting the ability of their students and graduates to enroll in ABA-approved schools, and boycotting for-profit law schools.

Subsequent investigation revealed that the ABA was not complying with all provisions of the 1996 judgment, including, for instance, requirements to provide annual briefings to certain employees regarding the judgment and the requirement to obtain written certifications from certain employees regarding compliance with the judgment. Following negotiations, the ABA and the Department of Justice presented to the Court a Proposed Order, which was entered on June 26, 2006. In its Order, the Court found that the ABA had violated provisions of the 1996 judgment and required the ABA to pay $185,000 to the United States in compensation for attorneys' fees and costs related to the investigation of those violations.

Under some circumstances, courts have the discretion to extend the duration of their decrees. For example, courts sometimes extend the duration of a decree when changes in circumstances thwart the basic purpose and intent of the decree. In light of that precedent and in view of the particular circumstances of the matter, the Department determined that it was neither necessary nor appropriate to seek to extend the duration of the 1996 judgment. In particular, the Department found no evidence that the decree violations, though serious, had led to competitive harm related to law school accreditation.

42. What is the Department doing to ensure that the ABA complies with the antitrust laws going forward?

ANSWER: Although the 1996 judgment has expired, the Department is committed to maintaining a marketplace for legal education unencumbered by anticompetitive restraint in the ABA's accreditation process, and we continue to monitor the legal-education market. Individuals who have provided helpful information in the past and who would likely become aware of any conduct of antitrust concern in the future are aware of our continuing interest. If we become aware of evidence that antitrust violations may be recurring in this area, we will investigate.

Senator Grassley

Healthcare Prosecutions

43. We understand that there are certain funds used to support, among others, health care prosecutions. We understand further that there is a funding cap that is inhibiting heath care fraud prosecutions. Would you please describe the impact the funding cap in the HIPAA on DOJ prosecutions and investigations. Specifically, have you seen an erosion of the number of prosecutors or investigators dedicated to health care fraud investigations? If so would you please provide me with specific numbers. Finally, for every dollar spent by DOJ on health care fraud investigations, approximately how much is returned to the federal treasury? Can you please provide those figures for the most recent three years?

ANSWER: The Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 201(b), 110 Stat. 1936, 1993 (codified as amended at 42 U.S.C. § 1398i) (HIPAA) established the Health Care Fraud and Abuse Control Program (HCFAC), which operates under the joint direction of the Attorney General and the Secretary of the Department of Health and Human Services (HHS).[1] The Act annually appropriates monies from the Medicare Trust Fund to an expenditure account, called the HCFAC account, in amounts that the Attorney General and the Secretary of Health and Human Services must jointly certify are distributed and used in a manner consistent with the intent and purposes of HIPAA. These resources are designed to generally supplement the direct appropriations that HHS and DOJ otherwise devote to health care fraud investigation and prosecution. The Act specifies the annual maximum amounts available to HHS and DOJ for their health care fraud enforcement work, and assigns specific authorities to the HHS Office of Inspector General (OIG) and stipulates the range of funding OIG must receive each year. In fiscal year (FY) 1997, HIPAA authorized HHS and DOJ to appropriate from the HCFAC up to $104 million, and allowed the Departments to increase that appropriated amount by up to 15% annually until FY 2003.

Since FY 2003, the maximum available for HHS and the Department of Justice (DOJ) collectively has been fixed at $240.558 million annually. Of this total, the HHS-OIG has received the statutory maximum amount of $160 million annually. The DOJ litigating components and other (non-OIG) HHS components have split the remaining $80.558 million, with DOJ receiving $49.415 million annually from FY 2003 through FY 2006.

Section 303 of the "Tax Relief and Health Care Act of 2006," signed by President Bush on December 20, 2006, provides for annual inflation adjustments to the maximum amounts available from the HCFAC Account and for the Federal Bureau of Investigation starting in Fiscal Year (FY) 2007 for each year through FY 2010. In FY 2010, a fixed funding level or "cap" is reinstated at the 2010 level. With the increasing pressures on

the Department's discretionary funding and the resulting impact on resources for other critical priorities and responsibilities, the annual inflationary adjustments in the Tax Relief and Health Care Act of 2006 will help sustain the Department's current level of criminal and civil health care fraud enforcement activities during the period of 2007-2010. As noted below, however, we anticipate that current levels will be insufficient to address both the anticipated increase in referrals associated with increases in HHS funding and the mounting backlog in cases resulting from prior reductions in DOJ resources and funding.

While the Department welcomes the additional monies that will become available for its health care fraud enforcement efforts beginning in FY 2007, we would like to describe how inflation and other increases in the costs of investigating and prosecuting health care fraud have adversely affected DOJ's health care fraud enforcement efforts since 2003. We also want to note that the Deficit Reduction and Reconciliation Act of 2005, which provided a new stream of anti-health care fraud funding to HHS components -- primarily for combating Medicaid fraud -- but no additional funding to the Department of Justice, is expected to lead to an increasing number of health care fraud referrals from HHS agencies at a time when the Department of Justice has been unsuccessful in its efforts to negotiate an increase in our annual HCFAC allocations from HHS despite the DRA's infusion of new Medicaid anti-fraud resources for HHS agencies.

The Department of Justice's payroll and benefits costs for full-time equivalent (FTE) prosecutors and support staff assigned to health care fraud matters have increased by more than $5 million annually since the HCFAC funding was capped in 2003. In order to retain its dedicated staffing assigned to health care fraud matters, DOJ has drastically reduced its health care fraud litigation support expenditures by a comparable amount. Restricting litigation support expenses, however, has contributed to growing numbers of pending civil and criminal health care fraud matters that are awaiting necessary case-development work due to a lack of adequate resources. The Department's pending civil health care fraud case load has risen from 607 to 778 cases between FY 2003 and FY 2005, while the number of pending civil health care fraud matters rose from 1,277 to 1,334 over the same period.[2] A similar trend has occurred for criminal prosecutions. The number of pending criminal health care fraud cases has increased from 551 to 645 and number of pending criminal matters has risen from 1,574 to 1,689 between fiscal years 2003 and 2005, respectively.

The impact of the HIPAA cap on the FBI's investigative agent and support resources dedicated for health care fraud enforcement has led to erosion in FBI staffing. Under HIPAA, the FBI has received the statutory maximum $114 million annually for health care fraud enforcement since FY 2003. According to the annual HCFAC program reports to Congress, this fixed annual funding level supported 878 FTE positions (507 agents and 371 support staff) in 2003. Due to inflationary and other mandatory cost increases which the FBI could not offset, this fixed funding level supported 806 FTE positions (466 agent and 340 support staff) in 2005.

The Department generally estimates that since the inception of the HCFAC Program in 1997, every dollar spent by the HIPAA-funded law enforcement agencies on health care fraud collectively has produced an average return to the U.S. Government of approximately $4. Cumulatively, since the Program's inception, HIPAA-funded law enforcement efforts against health care fraud have returned nearly $10 billion to the U.S. Government, of which approximately $8.9 billion has been returned to the Medicare Trust Fund, and another $487 million in federal share of Medicaid recoveries. Over the past three years, the average "return on investment" per dollar spent by DOJ and FBI on health care fraud enforcement has been approximately $8. (This figure does not include millions of dollars in state matching share recoveries to the Medicaid program that result from state litigation associated with federally initiated health care fraud cases.) Specific figures for the three most recent fiscal years 2003, 2004 and 2005 are provided in the table below:

HIPAA Funding to the Department of Justice (in Millions):

	FY 2003	FY 2004	FY 2005	Total FYs 2003-2005
FBI Investigation	$ 114.0	$ 114.0	$ 114.0	$ 342.0
DOJ Litigation	$ 49.415	$ 49.415	$ 49.415	$ 148.25
Total DOJ	$ 163.415	$ 163.415	$ 163.415	$ 490.25

HIPAA Transfers and Deposits (in Millions):

	FY 2003	FY 2004	FY 2005	Total FYs 2003-2005
Total	$1,033.5	$1,756.3	$1,708.	$4,498.7
Relators' Payments	$ 269.6	$ 82.9	$ 136.8	$ 489.3
Actual Transfers & Deposits to U.S. Gov't	$ *763.9*	*$1,673.5*	*$1,572.1*	*$4,009.5*

Average "Return on Investment" per HIPAA dollar spent by DOJ on health care fraud enforcement, Fiscal Years 2003-2005 = $8.18.

Document Requests

Jonathan Luna

44. On May 10, 2006, Chairman Specter, Senator Leahy, and I requested copies of the following documents from the FBI related to its internal investigation of misconduct allegations in the investigation of the death of Baltimore Assistant U.S. Attorney Jonathan Luna:

(1) a letter dated April 4,2005, from FBI Agent Emily Vacher to the FBI's Internal Investigations Section (IIS) and Office of Professional Responsibility (OPR);

(2) a letter dated May 3,2005, from FBI Agent Jennifer Smith Love to the FBI Director, Robert Mueller;

(3) a memorandum dated May 10,2005, from FBI Deputy Director John Pistole to the OIG; and

(4) a memorandum dated September 19,2005, from the FBI/OPR to the Office of Inspector General (OIG).

To date, we have not been provided copies of these documents or a commitment to provide them at a later date. A briefing was provided by the FBI/OPR and the head of that office indicated that she had no objection to producing the final report of her office (document #4). Does the Department of Justice have any objection to the production of any of these documents to the Committee? If so please explain the legal basis for your objection. If not, please explain why the documents have not yet been produced to the Committee.

ANSWER: Consistent with longstanding Executive Branch policy, the goal of the Department of Justice in all cases is to satisfy legitimate oversight interests while protecting significant Executive Branch confidentiality interests. As a general matter, the disclosure of Office of Professional Responsibility (OPR) investigative files implicates significant individual privacy interests because these files discuss allegations against individuals under investigation. The Department of Justice has consistently offered to accommodate Congressional requests for information about OPR investigations through briefings, minimizing the intrusion on the privacy of Executive Branch employees.

On June 21, 2006, the FBI responded to the Committee's May 10, 2006, request for information and documents relating to the FBI's investigation of the suspected murder of Assistant United States Attorney Jonathan Luna. In its response, the FBI advised the Committee that documents concerning OPR matters raise serious privacy considerations, particularly when, as in this instance, there is no finding of misconduct. Consistent with the policy articulated above, Candice Will, Assistant Director (AD) of the FBI's OPR, provided a June 30, 2006 staff briefing that included an overview of OPR's investigation and addressed both the issues raised in the Committee's May 10, 2006, letter and all issues raised by the staff. In response to a question from staff concerning the availability of the OPR report, our records reflect that AD Will did not indicate that she had no objection to producing the report, but rather advised that privacy concerns counseled against providing that document to the Committee.

Michael German

45. On February 3, 2006, Chairman Specter, Senator Leahy and I requested copies a number of documents from the Office of Inspector General, regarding the allegations of former FBI agent Michael German. The OIG asked that we seek the following documents directly from the FBI:

(1) copies of all the documents produced in response to the Committee's June 10 and October 28, 2004, requests without redactions of FBI file numbers, so-called "law enforcement privilege" information, "unrelated information," or "personal privacy" information (i.e., deletion codes F, G, H, 0-1, and P-1);

(2) the transcript of the January 23,2002, tape-recorded meeting at issue between members of the foreign and domestic terrorist groups, which German provided to the OIG in February 2003;

(3) any other transcription of that tape-recording referred to above;

(4) a September 6, 2003, email from German to Michael S. Clemens;

(5) a February 8, 2002, electronic communication ("EC") from FBI Tampa division to FBI headquarters, domestic terrorism unit (documenting the January 23,2002, meeting at issue);

(6) any Orlando terrorism undercover operation proposal submitted to the Domestic Terrorism Unit in April 2002 containing information about a confidential informant ("CI") alleging that Subject #I was involved in supporting terrorists inside the United States;

(7) a Tampa Division memo to the file quoting a Tampa ASAC ordering the removal of all terrorism references from the proposal in or around May 2002; and

(8) any FD-302 interview summaries dated in or around October 2002 falsely reporting that the CW did not bring a recorder into the January 23,2002, meeting, or otherwise describing the meeting in a manner inconsistent with the transcript.

While the FBI has agreed in principle to providing copies of the requested documents, they have not yet been produced. Does the Department of Justice have any objection to the production of any of these documents to the Committee? If so please explain the legal basis for your objection. If not, please explain why the documents have not yet been produced to the Committee.

ANSWER: The FBI provided the requested material to the Committee by letters dated April 28, 2006 and July 27, 2006.

Detailee Request

46. On May 9, 2006, I wrote to you to request that Assistant U.S. Attorney James Sheehan be detailed to the United States Senate Committee on Finance. I have yet to receive any response. When should I expect to receive a response to this request?

ANSWER: The Department consulted with your office, via phone and in writing, regarding this detailee request. The Department and your staff came to an agreement to send one DOJ detailee, rather than two as you originally requested. Your office indicated a preference to host a DOJ detailee on the Drug Caucus, rather than on the Senate Finance Committee. Accordingly, the DOJ detailee to the Drug Caucus began his six-month detail on June 1, 2006.

Deliberative Documents and Line Agent Policies

47. I asked you during the hearing to provide by the end of the week a written legal justification -- not policies or principles -- for denying access to deliberative prosecutorial documents and for obstructing interviews with line agents in the performance of my oversight responsibilities to examine allegations of government misconduct. When do you plan to provide a response?

ANSWER: We understand that the Department's letter to you, dated August 2, 2006 addresses this issue. Please let us know if you require additional information.

Credit Card Interchange Fees

48. Just last week, the Senate Judiciary Committee conducted a hearing on the practice of credit card interchange fees. Interchange fees are fees charged to retailers by debit and credit card issuing financial institutions for processing electronic transactions. I've heard many concerns that interchange fees violate the antitrust laws and result in higher prices for merchants and consumers. Has the Justice Department looked into these financial practices, and if so, has the Department identified any antitrust problems?

ANSWER: The Department of Justice has been active in recent years protecting competition in the credit-card market, which is an important area of our economy. For instance, we obtained an injunction prohibiting Visa and Mastercard from barring their

member banks from issuing American Express and Discover cards. *See United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 234 (2d Cir. 2003). At this time, the Department of Justice has no pending litigation regarding interchange fees. As with any allegations of anticompetitive conduct, however, the Department of Justice would take credible evidence of a possible antitrust violation in this area very seriously. The Department continues to monitor industry activities, including private litigation concerning interchange fees and industry conduct concerning interchange fees and related practices involving credit and debit cards.

(Former) Senator DeWine

FBI Staffing Policy

49. I recently received a letter from an FBI agent in Ohio, and he is very concerned about an FBI management policy. Specifically, the policy imposes a 5 year term limit on Supervisory Special Agents in the field, so that they must either be promoted to positions at FBI Headquarters in Washington or to Assistant Special Agent in Charge within 5 years or be demoted, with a salary cut. This has caused a great deal of concern among some agents, and in particular among those who were made Supervisory Special Agents before this policy went into effect - - they now have to consider applying to work in the Washington office or possibly face a pay cut, which also affects their retirement benefits. Of course, many agents have families or other considerations which make that a difficult choice, and there is some concern that these Supervisory Special Agents may retire rather than take the pay cut, which would rob the FBI of a great deal of talent and expertise. Is there any thought to grandfathering these provisions, so that those who became Supervisory Special Agents before the 5 year policy was instituted would not be affected by it?

ANSWER: The Field Office Supervisory Term Limit Policy (FOSTLP) was initially implemented in June 2004 as a way to better position the Bureau for the challenges of the future. As the FBI evolves toward a global, intelligence-driven agency focusing on terrorist organizations, hostile intelligence services, and international criminal enterprises, we must ensure that our front-line leaders develop a broad base of experience as they acquire leadership skills. The FOSTLP will promote a diversification of experiences among the supervisory ranks through a strong emphasis on continued career development.

In developing this policy, consideration was given to allowing those Supervisory Special Agents (SSAs) promoted prior to June 2004 to remain in their positions but, given the current terrorist threat level and the escalating complexities of criminal conspiracies, the FBI could not afford the luxury of waiting five years before realizing the benefits of this policy.

With the understanding that the SSAs affected by this policy are among the FBI's most experienced mid-level managers, however, the program affords a grace period ranging from two to three years (based on tenure) during which these SSAs can exercise the following available options:

- Compete for Assistant Special Agent in Charge (ASAC) positions in the field.
- Compete for Unit Chief and Assistant Section Chief positions at FBIHQ.

- Compete for Term GS-15 Team Leader positions in the Inspection Division.
- Compete for Assistant Legal Attaché or Legal Attaché positions.
- Participate in the Alternate FBIHQ Credit Plan Pilot Project, which allows accelerated opportunities to obtain FBIHQ credit and acquire eligibility to compete for ASAC positions.
- Compete for additional five-year SSA terms in positions designated as "hard to staff."
- Compete for positions in the FBIHQ Term Temporary Duty (TDY) Pilot Program, which allows SSAs to compete for GS-14 and GS-15 SSA positions at FBIHQ and obtain full FBIHQ credit upon completion of an 18-month TDY assignment.

Those SSAs who ultimately decide to remain in the current office of assignment and return to investigative duties will benefit from the FBI's Highest Previous Rate (HPR) policy, pursuant to which GS-14 SSAs returning to investigative duties will be placed in the GS-13 "step" comparable to the GS-14 salary. Only those whose pay conversions exceed a GS-13, Step 10 salary will experience a pay reduction (pay set according to HPR cannot exceed step 10).

While we understand that some SSAs are disappointed in the changes brought about by the FOSTLP and we are aware that some have publicly indicated that they do not intend to seek advancement, this stated intent is contradicted by results obtained through tracking those SSAs affected by the FOSTLP. As of 7/17/06, 93 out of 162 SSAs facing term limits in calendar year (CY) 2006 have already made career decisions, with 88% securing promotions in career-advancing positions. For those SSAs affected by the policy in CY 2007, 102 out of 255 SSAs have already made career decisions, with 82% pursuing career advancement. These career advancements have included the selections of 50 ASACs, 20 Unit Chiefs, 19 Legal Attachés or Assistant Legal Attachés, and 3 Assistant Inspectors. It appears, therefore, that the vast majority of the SSAs affected by this policy are pursuing promotional opportunities.

Byrne/JAG Program

50. Many law enforcement officials, whether in Ohio or elsewhere, have expressed concern about the disappearance of Byrne/JAG program funds. These grant monies have been used for a variety of new and innovative programs such as establishing a Financial Investigations Unit within the Ohio Bureau of Criminal Identification and Investigation, establishing the Franklin County Mental Health Court, conducting studies on Prisoner Re-entry, and providing support to victims, witnesses and jurors statewide.

For FY06, $411M was appropriated for these grant programs, but unfortunately for FY07, the President's budget zeroed it out. Nonetheless, the House has appropriated $635M and the Senate $555M, and most likely the final amount will fall somewhere in between. So Congress continues to believe these are important programs that are worthy of support, and so do I.

At the Judiciary Committee oversight hearing on July 18, 2006, you were asked a question about the lack of support for Byrne/JAG Program and responded that there were more effective ways for state and local law enforcement to obtain funding for their initiatives; you also suggested that DHS had some such funding programs. Obviously any such a funding stream is much more limited in its permissible uses than the Byrne/JAG program. What specific alternatives to Byrne/JAG program were you referring to? Are there any other specific programs or proposals that you believe would be adequate substitutes that would encompass all of the types of programs currently funded through Byrne/JAG?

ANSWER: The decision to eliminate JAG was not made lightly. We recognize the concern this raises among Members of Congress, law enforcement, and other interested parties. For our Fiscal Year 2007 budget request we decided to focus funding on initiatives in key priority areas, where we have the best chance of making a difference.

There are other resources, both within the Department of Justice and in other federal agencies, which can help states and localities combat crime and drug use. The Fiscal Year 2007 President's Budget request provides over $1.2 billion in discretionary grant assistance to State, local and tribal governments, including $44.6 million to fight terrorism; $66.6 million to strengthen communities through programs providing services such as drug treatment; $88.2 million to combat violence, including enhancements to Project Safe Neighborhoods; $409.2 million to assist crime victims; $214.8 million for law enforcement technology, including funding to continue and further develop the Administration's DNA initiative; and $209 million to support drug enforcement, including funding to continue and expand the Southwest Border Drug Prosecution Program.

Another of our key sources of support for law enforcement activities is the Regional Information Sharing Systems (RISS) Program, which improves local law enforcement's ability to target, investigate, and prosecute crime, as well as the ability to share information with member Federal, state, local and tribal law enforcement agencies.

From 2003 through 2005 RISS member agencies' efforts led to over 14,000 arrests, seizure of $124 million in narcotics, and $46 million in seized currency and property. All of the seized funds remain in local jurisdictions. RISS nodes, which are the access points for information, continue to grow and now include 17 High Intensity Drug Trafficking Areas, 18 State agency systems, and 12 federal systems.

Senator Sessions

FY2005 and To Date 2006 NCIC Immigration Violators File entries

51. Immigration violator file entries into the NCIC have crawled along at an incredibly slow rate for the last 4 to 5 years. As of February 3, 2004, only 135,380 Immigration and Customs Enforcement owned immigration violator files had been entered into the NCIC Immigration Violators File (IVF).

Although you don't oversee the Department of Homeland Security Law Enforcement Support Center in Vermont which is responsible for entering these files (and therefore can not tell me whether they have changed their administrative procedures to speed up entries), the Department is responsible for overseeing the NCIC system as a whole.

a) How many files are currently contained in the NCIC Immigration Violators File?
b) How many of those files are in each Immigration Violators sub-files (deported felons; alien absconders; NSEERS violators, and aliens with outstanding ICE criminal warrants)?

ANSWER: As of August 17, 2006, there were 214,119 records in the NCIC Immigration Violators File. Of these, 123,315 were deported felons, 90,804 were alien absconders, and 0 were National Security Entry/Exit Registration System violators. As of August 24, 2006, Immigration and Customs Enforcement had 1,718 records in the National Crime Information Center (NCIC) Wanted Person file.

Basic Immigration Prosecution Statutes

52. a) What are the basic "bread and butter" criminal statutes that DOJ uses to prosecute immigration offenses?

ANSWER: The vast majority of criminal prosecutions for immigration offenses are accomplished using one of the three following statutes:

- Bringing in and harboring certain aliens, 8 U.S.C. § 1324;
- Entry without inspection, 8 U.S.C. § 1325(a);
- Reentry of removed alien, 8 U.S.C. § 1326.

DOJ also uses the following statutes in appropriate circumstances:

- Naturalization fraud, 18 U.S.C. § 1425;
- Forgery or false use of passport, 18 U.S.C. § 1543;
- Misuse of passport, 18 U.S.C. § 1544;

- Fraud and misuse of visas, permits, and other documents, 18 U.S.C. § 1546;
- Alien in possession of a firearm, 18 U.S.C. § 922(g)(5);
- False representation of U.S. citizenship, 18 U.S.C. § 911;
- Fraud in the use of social security card, 42 U.S.C. § 408;
- Marriage fraud to evade immigration laws, 8 U.S.C. § 1325(c).

b) What improvements are needed to make these "bread and butter" statutes more effective?

ANSWER: In our view, the following improvements would significantly assist enforcement efforts. We will also continue to review the issues, and look forward to discussing the below suggestions and additional potential improvements that may be proposed.

Increased penalties. The Department believes that the existing criminal penalties in the United States Code do not adequately address the growing problem posed by alien smuggling and immigration fraud (benefit fraud, visa fraud, and passport fraud). As a result, we believe that the existing penalties for these offenses should be increased, particularly in circumstances where the offenses are committed on a large scale or by organized criminal syndicates.

Uniform Statute of Limitations. The statutes of limitation for immigration offenses within titles 8 and 18 are presently uneven. Some offenses have a five-year limitation, while others have a ten-year limitation. We recommend addressing this inconsistency to provide for a uniform statute of limitation of ten years.

Pre-trial Detention. Many criminal defendants in the federal courts are aliens with few if any ties to the district of prosecution. Thus, they typically pose a serious risk of flight. As a result, the pre-trial detention statute, 18 U.S.C. § 3142, should be amended to specifically address the flight risk posed by alien defendants who (1) are in the United States illegally, (2) are subject to a final order of removal, or (3) have been charged with a serious immigration offense, such as alien smuggling, illegal re-entry, or immigration document fraud.

Intentional Visa Overstays. Under current law, it is a misdemeanor federal offense to enter the country illegally, but it is not an offense to overstay one's visa with the same aim. We would recommend addressing this inconsistency to make it a misdemeanor offense for an alien to overstay his or her visa in order to remain in the country illegally.

Statistics on Immigration Prosecutions

53. When I talk to DHS, they tell me that many of the cases they recommend to DOJ for prosecution are rejected – either because the sentencing penalties are not high enough (misdemeanors) or because the immigration offenses are often too difficult to prove.

However – when I look at the 2003 Sourcebook of Criminal Justice Statistics, it appears that most of the immigration offenders investigated (assumedly by DHS), are eventually charged, convicted, and admitted to Federal prison.

The last year contained in the chart (2000) lists "16,495 cases investigated; 15,613 offenders charged; and 13,151 offenders admitted to federal prison." Those numbers reflect an "immigration case declination rate" as low as 6%.

Can you tell me – for each of the last 10 years (1995 to 2005):

a) How many immigration cases were presented by DHS to U.S. Attorney's Offices for prosecution?

ANSWER: Data from United States Attorneys' Offices (USAOs) is maintained by the Executive Office for United States Attorneys' (EOUSA) case management system. The EOUSA case management system uses program category codes to identify and quantify types of cases. The code for "Immigration Offenses" is composed of violations of the "Immigration and Nationality Act" (INA), which is codified in Title 8 of the U.S. Code. There are, however, multiple offenses in other titles within the U.S. Code which might receive the "Immigration Offenses" program category code including, but not limited to, 18 U.S.C. § 911 (false claim of U.S. citizenship); 18 U.S.C. § 1028 (document fraud); 18 U.S.C. § 1546 (document fraud); and 42 U.S.C. § 408 (Social Security card fraud). Due to agency variations in defining the presentation of cases, there are differences between Department of Homeland Security and Department of Justice case presentation data. Department of Homeland Security agencies and their legacy components presented virtually all of the cases which were coded as immigration offenses. The data below reflects information kept by the Department of Justice and does not differentiate between referring agencies.

The Department of Justice keeps its statistical information by fiscal year (FY). Some cases might be received or opened as "matters" in one fiscal year and then become a "case" in another fiscal year. The term "matters" means investigatory matters referred to a USAO for prosecution. Not all matters ultimately have charging instruments (complaints, informations, or indictments) filed. A "matter" is opened in a USAO when an agency requests a prosecutive opinion, but no commitment is made by a USAO to actually prosecute. A "matter" becomes a "case" upon the filing of a charging instrument. The data below reflects the number of "Immigration Offense" matters received by USAOs.

FY	1995	**7,081**
	1996	**7,045**
	1997	**9,135**
	1998	**13,514**
	1999	**15,459**
	2000	**16,188**
	2001	**15,560**
	2002	**16,366**
	2003	**20,941**
	2004*	**35,661**
	2005*	**35,172**

*The dramatic increase in matters received for FY 2004 and 2005 was caused in large part by the inclusion of immigration misdemeanor cases under 8 U.S.C. 1325(a) entered as "matters received." Cases that do not receive a district court docketing number are not, under the current case management database, entered as "cases" in the system. The offense of improper entry into the United States, a misdemeanor under 1325(a), is often disposed of quickly by plea to a criminal complaint before a United States Magistrate Judge, and does not result in any district court proceedings. Historically, such cases were not entered into the case management system at all. In 2004 and 2005, several Southwest border USAOs began entering these cases into the system as "matters received."

b) How many immigration cases presented by DHS for prosecution were *accepted* for prosecution by DOJ?

ANSWER: The data below reflects the number of "Immigration Offense" cases filed by USAOs during a particular fiscal year. It should be noted that a case might be accepted for prosecution in one fiscal year; however, the charging instrument might be filed in another fiscal year. As noted above, a "matter" becomes a "case" upon the filing of a charging instrument. Thus, the cases filed in a given year are not a complete subset of the matters received in that same year.

FY	1995	**4,042**
	1996	**5,754**
	1997	**6,929**
	1998	**10,080**
	1999	**11,580**
	2000	**13,033**
	2001	**12,537**
	2002	**13,676**
	2003	**16,621**
	2004	**18,164**
	2005	**18,147**

c) Based on the information provided in response to numbers 1 and 2 above, what was the "immigration case declination rate" for each year?

ANSWER: It is important to note that subtracting the "cases filed" in a given fiscal year from the "matters accepted" in that same fiscal year will not produce an accurate number of cases declined. The prosecutive decision to file charges or decline a matter does not always occur in the same fiscal year in which the matter was originally referred to the USAO. Thus, the figures below do not reflect the difference between the data in (a) and (b) above. In addition, as discussed above in the footnote to 53(a), many of the "matters received" for 2004 and 2005 are in fact misdemeanor 1325(a) cases that have resulted in convictions.

Provided below are the "immediate declinations" and "later declinations" for a given year. Immediate declinations are those cases that on their face do not meet prosecution standards in a given district. Given the myriad of ways in which cases can be presented, the data on immediate declinations likely do not capture all such declinations that may occur at the USAOs. Later declinations are those cases that are subject to significant review and consultation at the USAO prior to being declined, and are an accurate representation of such efforts.

Immediate Declination Data

FY	1997	**1,545**
	1998	**661**
	1999	**673**
	2000	**662**
	2001	**714**
	2002	**795**
	2003	**1,195**
	2004	**1,145**
	2005	**2,151**

Later Declination Data

FY	1997	**253**
	1998	**296**
	1999	**374**
	2000	**332**
	2001	**386**
	2002	**419**
	2003	**1,030**
	2004	**504**
	2005	**424**

d) How many immigration convictions were secured by DOJ?

ANSWER: According to EOUSA case management data, the information below reflects the number of "Immigration Offense" convictions.

FY	1995	**3,733**
	1996	**5,522**
	1997	**6,254**
	1998	**8,985**
	1999	**11,206**
	2000	**12,195**
	2001	**12,435**
	2002	**12,580**
	2003	**16,425**
	2004	**15,847**
	2005	**17,757**

e) Under what criminal statutes were the majority of the immigration convictions secured?

ANSWER: The majority of the cases listed under "Immigration Offense" program code involve three statutes: 8 U.S.C. § 1324(a) (Bringing In and Harboring Certain Aliens); 8 U.S.C. § 1325 (Improper Entry by Aliens); and 8 U.S.C. § 1326 (Reentry of Removed Aliens).

FY	§ 1324	§ 1325	§ 1326
1995	**666**	**632**	**2,406**
1996	**1,253**	**607**	**3,448**
1997	**1,310**	**461**	**4,196**
1998	**1,694**	**1,793**	**5,462**
1999	**2,302**	**2,880**	**6,426**
2000	**2,429**	**2,934**	**7,330**
2001	**2,348**	**2,759**	**7,876**
2002	**2,103**	**2,691**	**8,425**
2003	**2,654**	**3,023**	**10,865**
2004	**2,457**	**3,097**	**9,475**
2005	**3,120**	**2,794**	**10,880**

Worksite Enforcement

54. A year ago (June 21, 2005), GAO told us that:

> ***"[various studies] have found that the single most important step that could be taken to reduce unlawful migration is the development of a more effective system for verifying work authorization." ... yet "in the nearly 20 years since passage of IRCA, the employment eligibility verification process and worksite enforcement program have remained largely unchanged."*** [1]
>
> **Despite the GAO report this Administration has not told Congress exactly what they need – in terms of new laws, money, or people – to eliminate the "job magnet" and implement a real worksite verification system. Indeed, in last year's report, GAO found that *"worksite enforcement has been a low priority under both INS and ICE."*** [2]
>
> **It is DHS's responsibility to initiate worksite investigations and present them to DOJ for prosecution, but it is the Department's responsibility to accept as many of those cases as you possibly can and to aggressively prosecute workplace violators – especially employers.**

a) Please tell me:

i) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274A(a)(1) – hiring, or recruiting for a fee, an alien for employment in the United States, knowing the alien is unauthorized.

ANSWER: This data cannot be accurately provided due primarily to the unique problems posed by the codification of the worksite enforcement statute, 8 U.S.C. § 1324a (Unlawful Employment of Aliens), and its similarity to a separate immigration statute, 8 U.S.C. § 1324(a) (Bringing In and Harboring Certain Aliens). The EOUSA case management system does not distinguish the various parentheses in the United States Code. Accordingly, the case management system is not able to readily distinguish between 8 U.S.C. § 1324(a) and 8 U.S.C. § 1324a. The Department of Justice has contracted for a new case management system which is expected to be partially introduced in late 2007 or early 2008.

In addition, several other statutes that are utilized to enforce a wide variety of criminal behavior, (such as the False Statements Act, 18 U.S.C. § 1001; and harboring

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[1] U.S. General Accounting Office, Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts, GAO-05-822T, p.1 (Washington D.C.: June 21, 2005) (emphasis added)

[2] U.S. General Accounting Office, Immigration Enforcement: Preliminary Observations on Employment Verification and Worksite Enforcement Efforts, GAO-05-822T, p.3 (Washington D.C.: June 21, 2005) (emphasis added)

aliens, 8 U.S.C. § 1324(a)(1)(A)(iii) and (iv)) can sometimes be used to punish the employment of illegal aliens. Prosecutors may choose in some cases to charge one of these other statutes rather than 1324a for a variety of evidentiary or other reasons.

Based upon a manual polling of the USAOs, it is clear that 8 U.S.C. § 1324a is not widely utilized, but districts make use of the statute in appropriate circumstances.

Here are three examples of worksite enforcement cases DOJ prosecuted this year under § 1324a and/or § 1324:

- On December 14, 2006, Fenceworks, Inc., d.b.a. Golden State Fence Company, ("Golden State") and two corporate officers pled guilty in federal court in the Southern District of California to charges arising from the hiring of unauthorized alien workers between January 1999 and November 2005. Specifically, Golden State pled guilty to hiring unauthorized alien workers, in violation of Title 8, United States Code, Section 1324a, a misdemeanor. It also agreed to forfeit $4,700,000 as proceeds gained from its unlawful activities under Title 18, United States Code, Section 982(a)(6)(A)(ii)(I). Next, it agreed to implement a compliance program to minimize the possibility of hiring unauthorized alien workers in the future. Melvin Kay, President of Golden State, and Michael McLaughlin, a Vice-President of Golden State, each pled guilty to hiring at least ten individuals with actual knowledge that the individuals were unauthorized alien workers, in violation of Title 8, United States Code, Section 1324(a)(3)(A), a felony. Kay and McLaughlin have also agreed to pay fines of $200,000 and $100,000, respectively. Kay and McLaughlin face a maximum sentence of five years in prison, a $250,000 fine, and three years of supervised release. A sentencing hearing is scheduled for March 28, 2007, at 4:00 p.m.

- On July 20, 2006, Asha Ventures, LLC, successor in interest to Asha Enterprises, Inc., and Narayan, LLC, pleaded guilty in United States District Court in the Eastern District of Kentucky to one count of conspiracy to harbor illegal aliens, one count of conspiracy to launder money and two counts of forfeiture. Asha Ventures, LLC and Narayan, LLC were hiring illegal aliens to work at the Holiday Inn Express, two Days Inn Motels, the Sleep Inn and the Super 8 Motel located in London, Kentucky. The companies were harboring illegal aliens and encouraging the illegal aliens to remain in the United States. The companies were sentenced on October 20, 2006 and ordered to each pay a $75,000 criminal fine for a total of $150,000. Additionally, the companies were ordered to pay $1,500,000 in lieu of the forfeiture of certain assets, and $800 in Special Assessments. The companies paid the 1.5 million dollars in open court, and the judge gave them 12 months probation in which to pay the fine and the special assessments, if unable to pay immediately.

- On December 15, 2006, in the Southern District of Florida, the two leaders of a six-person nationwide employee-leasing conspiracy that exploited hundreds of illegal aliens throughout the United States were sentenced to terms in prison.

Jozef Bronislaw Bogacki, 43, a native of Poland and naturalized U.S. citizen residing in Clearwater, Fla., was sentenced to 57 months in prison. The judge also imposed a money judgment of $950,000 and ordered Bogacki to forfeit six pieces of real property valued at approximately $500,000. Jaroslaw "Jerry" Sawczuk, 38, a Polish and Canadian citizen was sentenced to 51 months in prison and ordered to pay a money judgment of $950,000. A third defendant in the conspiracy, Pavel Preus, 39, a Slovak citizen residing in Pompano Beach, Florida, was sentenced on Sept. 13, 2006 to 37 months in prison and 36 months of supervised release. Bogacki, Sawczuk and Preus had all pleaded guilty to charges of conspiracy to transport, house and otherwise encourage illegal aliens to remain in the United States, and to commit visa, wire, mail and tax fraud, and money laundering.

ANSWER: Please see the answer above to (i).

ii) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274A(f) – engaging in a pattern or practice of hiring an alien knowing they are unauthorized.

ANSWER: See the answer above to (i).

iii) The number of criminal cases accepted for prosecution (in each of the last 10 calendar years) for violations of INA 274(a)(3) – knowingly hiring for employment 10 individuals with actual knowledge that the aliens are unauthorized and have been brought into the United States illegally.

ANSWER: See the answer above to (i).

iv) The number of criminal convictions obtained for each of the above in each of the last 10 years.

ANSWER: Please see the answer above to (i).

b) How can each of these statutes (INA 274A(a)(1); INA 274A(f); and INA 274(a)(3)) be improved for more effective prosecution of employers that hire illegal aliens?

ANSWER: As you know, the Administration has and will continue to work with Congress on various legislative proposals as part of immigration enforcement.

Biometric ID

55. It will be essential that the biometric identification card developed by the Administration to be used in the immigration / visa issuance process be one that is able to identify the card holder as the recipient of the card. The card must also be unable to be duplicated – it must solve the current problems of immigration document fraud.

a) Has DOJ done any work on a biometric ID card?

ANSWER: The Department of Justice has established a program management office (PMO) within the Justice Management Division to address the requirements of HSPD-12. The PMO has performed market analysis and developed plans for providing a biometric ID card for every employee and contractor in the Department's 500+ locations across the U.S. The Department has not specifically worked on the technology needed to prevent immigration document fraud.

b) What are your recommendations for making a biometric ID card fraud proof?

ANSWER: Since nothing is truly "fraud proof" we believe it is most realistic to aim for fraud resistance when designing the identity cards. Technology alone cannot solve this problem; training, physical security, and auditing are necessary to reduce risk. The overall fraud resistance of a card is only as strong as the weakest link in the business process. If you cannot manage insider threats and security gaps then you are bound to have some fraud or abuse.

The U.S. Government must approach this based on risk, as the costs could be prohibitive if the threshold is set too high. Public Key Infrastructure (PKI) can help reduce the risk by adding digital signatures to the card. There are other technical measures that could be employed, but each one involves significant costs and constraints. The Department has not analyzed this complex issue in enough detail to provide specific recommendations to the Judiciary Committee on the implementation of the immigration cards.

Drug smuggling at border / Meth

56. Undoubtedly, the number one drug trafficking concern in the State of Alabama (according to the DAs I talk to) is the Meth traffic now crossing border from Mexico.

What is the Department doing to step up prosecutions in this area?

ANSWER: The Department of Justice recognizes that the importation of methamphetamine from Mexico into the United States is a major concern and has been working very closely with our counterparts in Mexico to address the problem of methamphetamine trafficking. Methamphetamine consumed in the United States originates from two general sources, controlled by two distinct groups. Most of the methamphetamine consumed in the United States is produced by Mexico-based and California-based Mexican traffickers. These drug trafficking organizations control "super labs" (a laboratory capable of producing 10 pounds or more of methamphetamine within a single production cycle), and have distribution networks throughout the United States, as well as access to drug transportation routes to smuggle the methamphetamine from Mexico into the United States. Current drug and lab seizure data suggests that, while approximately 20 percent of the methamphetamine consumed in this country comes from small toxic laboratories, roughly 80 percent of the methamphetamine used in the United States comes from larger laboratories operated by Mexican-based trafficking organizations on both sides of the border. As we have seen a decrease in the number of domestic small toxic labs, we have seen an increase in methamphetamine trafficked into the United States. The Department is addressing the international methamphetamine problem through several avenues.

In May 2006, Attorney General Gonzales, along with the Attorney General of Mexico, announced several joint initiatives to address the meth trafficking problem. For example, DEA is working with Mexican authorities to stand up clandestine lab teams in Mexican "hot spot" locations, to include vetted units to focus on methamphetamine and precursor chemical investigations; DEA is providing training to Mexican officials regarding precursor chemical diversion; DEA is working with CBP, INL and Mexican authorities to establish initiatives at ports to increase scrutiny of containerized cargo; and the Department is assisting the Government of Mexico with a methamphetamine public awareness campaign.

The Administration is also working to attack the diversion and trafficking of meth precursors. The Administration has been working with the United Nations Commission on Narcotics Drugs (CND). At the March 2006 meeting, the U.S. and other countries sponsored a resolution entitled "Strengthening Systems for Control of Precursor Chemicals Used in the Manufacture of Synthetic Drugs." The resolution requests member states to take several important steps that, taken together, plot a useful roadmap to greater operational international cooperation against chemical diversion. It requests governments to: (1) provide annual estimates to the INCB of their legitimate requirements for the critical chemicals used in the manufacture of methamphetamine and synthetic drugs, including drug products containing these chemicals; (2) ensure that imports are commensurate with estimated annual needs; (3) continue to provide to the International Narcotics Control Board (INCB) information on all shipments of the precursors listed above, including, for the first time, drug products containing these chemicals; and (4) permit the INCB to share information on specified consignments with law enforcement and regulatory authorities to prevent or interdict suspect shipments.

While there is much work to be done, overall we have seen cooperation in implementing the new resolution. Many nations have provided annual estimates to the INCB of their legitimate requirements for these chemicals and steps are being taken towards establishing initiatives that will allow for the greater sharing of information regarding suspect shipments of these substances.

DEA, with the support of the Department of State and other U.S. law enforcement agencies, has provided or sponsored training to over 1500 Mexican law enforcement officers and regulatory officials since 2006 in the areas of clandestine laboratories, chemical training, methamphetamine, and related prosecutions.

Between FY 2003 and 2005, OCDETF has experienced a 59% increase in the number of investigations initiated involving methamphetamine. In addition, OCDETF recently allocated 28 new AUSA positions, 16 of which were in districts either on the Southwest Border (SWB) or in districts known to have a significant methamphetamine threat (including the Northern and Middle District of Alabama). This represents a significant commitment of law enforcement and prosecutorial resources to address the methamphetamine problem.

With the significant reduction in the number of domestic small toxic labs, DEA's Clandestine Laboratory Enforcement Teams (CLETs) will expand their efforts beyond dismantling methamphetamine labs to include the targeting of large-scale methamphetamine trafficking organizations. In addition, DEA has redirected the focus of its Mobile Enforcement Teams (METs) to prioritize deployments to assist with methamphetamine investigations. Currently, the teams are assisting state and local agencies by focusing on targeting methamphetamine Priority Target Organizations and clandestine laboratory operators in areas of the United States that have a limited DEA presence. DEA increased the percentage of methamphetamine-related MET deployments from 23 percent in FY 2002 to 74 percent in FY 2006.

In addition, the Department is training U.S. prosecutors and domestic and foreign law enforcement to improve our ability to bring drug traffickers to justice. In July 2006, the Department sponsored training at the National Advocacy Center (NAC) for approximately 80 federal prosecutors that was specifically focused on how to prosecute methamphetamine and precursor chemical cases. Furthermore, we are assisting Mexican authorities as they deploy vetted units along the border, and are engaged in on-going training of law enforcement and regulatory officials overseas in an effort to prevent methamphetamine from reaching our borders.

We believe our efforts have assisted in the advances made in keeping young people away from meth. The most recent Monitoring the Future survey indicates that methamphetamine use by young people is down significantly since 2001 — by more than 40 percent for all young people in the survey combined. By combining proven law enforcement strategies with new partnerships with domestic and foreign law enforcement, we are attempting to make progress against the evolving methamphetamine

threat. And as drug traffickers modify their tactics to evade law enforcement, we will adapt our methods to dismantle their organizations.

Certificate of Reviewability (similar to federal Habeas process)

57. I have stated previously that the reason Immigration Litigation has increased so much is because immigration attorneys know that it delays their clients' removal from the country. As a result there are many frivolous immigration appeals filed in Circuit Court. In testimony before this Committee on April 3, 2006 Deputy Assistant Attorney General John Cohn (Civil Division) urged us to include a requirement that an immigration appeal receive a Certificate of Reviewability before being considered by a Circuit Court Panel.

Do you agree that this would be an important change that would help alleviate the flood of litigation?

ANSWER: Yes. The certificate of reviewability provision is an appropriate and reasonable response to the overwhelming surge of immigration cases that has overwhelmed the federal courts and the Executive Branch. This provision would require an alien to obtain a certificate of reviewability from a federal judge in order to pursue his appeal. If the judge were to deny the certificate of reviewability, the government would not have to file a brief and the alien would be subject to removal without additional time-consuming and unnecessary proceedings. If the judge were to grant the certificate of reviewability, then the case would proceed to full briefing and consideration by a three-judge panel.

It is important to emphasize that this provision would allow every alien to obtain review of his case by a federal judge. The doors to the courthouse are not closed. At the same time, it provides a statutory mechanism for the courts of appeals to resolve weak cases very quickly. The current system, in certain circuit courts, encourages aliens to file appeals from the Board of Immigration Appeals because the appeal could take well over a year to resolve and the alien will likely be able to remain in the United States during that time. As the Supreme Court has recognized, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." INS v. Doherty, 502 U.S. 314, 321-25 (1992).

The certificate of reviewability provision is modeled after a statute applicable to federal collateral proceedings, 28 U.S.C. 2253, which derives in its current form from legislation introduced by Senators Specter and Hatch, S. 623, § 3, 104th Cong., 1st Sess. (1995). Section 2253 requires a party to obtain a certificate from a federal judge before pursuing an appeal in order to control frivolous habeas appeals and to allow courts to focus on cases that have substantial merit. Given that section 2253 applies to United States citizens (as well as aliens), and it applies to criminal cases in which the consequence of an erroneous determination might be life imprisonment or death, there is no compelling reason to avoid a similar requirement in the immigration context.

Ultimately, if adopted, the certificate of reviewability requirement would allow the courts to quickly resolve weak cases (and thus reduce the incentive to appeal such cases) and allow the courts to focus on the more difficult cases.

Judicial Review in Immigration Litigation

58. Deputy AG Cohn also told us that the Department has taken the position the Congress should clarify two other immigration litigation matters: 1) clarify that immigration questions of Administrative discretion are not subject to Judicial Review; and 2) clarify the limits on judicial review in cases involving criminal aliens.

Do you feel these are important fixes to the immigration laws? Are there other fixes that you believe are needed?

ANSWER: Yes, these are important clarifications of the INA, because they will help alleviate the immigration litigation burden, particularly in the Ninth Circuit. That Court has found that there are loopholes in the restrictions on judicial review that Congress enacted in 1996. It is important that we close these loopholes, which simply add to the floodtide of immigration litigation in the federal courts. Specifically, we support modifying section 242(a)(2)(B) of the INA (8 U.S.C. 1252(a)(2)(B)) to make clear that discretionary determinations are not reviewable, and clarifying the scope of section 242(a)(2)(C) of the INA (8 U.S.C 1252(a)(2)(C)), which limits judicial review over factual determinations regarding criminal aliens.

In addition to these fixes, the Department supports other changes that will have the effect of reducing immigration litigation, such as requiring a certificate of reviewability (see the answer to question 57), authorizing the Board of Immigration Appeals to issue removal orders, limiting judicial review over visa revocation decisions, clarifying the Secretary's authority to reinstate removal orders, restricting review of motions to reopen to legal questions, clarifying the alien's burden of proof for withholding of removal, limiting the availability of attorney fee awards in immigration cases, reforming the procedures relating to voluntary departure, and requiring that background checks be performed before immigration benefits may be conferred.

Board of Immigration Appeals Streamlining

59. In his April 3rd testimony Mr. Cohn told us that the streamlining procedures (such as affirmances without written opinions) are not the cause of the increase in immigration litigation and have not resulted in an increase in Circuit Court reversals of administrative decisions.

Do you agree that the streamlining procedures instituted by the Board of Immigration Appeals have been a valuable in combating the increase in immigration cases? Should they be preserved?

ANSWER: So that there is no confusion, Mr. Cohn stated that the increase in cases in the federal courts has been caused by two factors. First, the Department of Homeland Security has stepped up its enforcement efforts, generating a larger pool of aliens who might choose to appeal. Second, the rate at which aliens appeal Board decisions to the courts of appeals has risen – from 6% in fiscal year 2001 to 33% in fiscal year 2006. Either factor standing alone would increase the total number of cases; simultaneous occurrence of both makes the increase even more pronounced.

Some have contended that the streamlining procedures instituted by the Board—particularly the issuance of affirmances without opinion (AWOs)—have resulted in weaker decisions by the Board that in turn are primarily to blame for the increase in the rate at which aliens are appealing to the courts. For a number of reasons, however, the Department is not convinced that that is the case.

First, streamlining applies nationwide, but the appeal rate is far higher in two circuits, the Second and the Ninth, than it is overall. In FY 2006, the appeal rate for the Second and Ninth Circuits was 45% and 43%, respectively; for the Eleventh Circuit it was 10%. This disparity suggests that factors other than streamlining are at work, such as the extent to which an alien can stay his removal by filing a petition for review in different courts.

Second, the Board has actually reduced the number of AWOs since FY 2002, but the rate of appeals to the federal courts has increased over the same time period. In FY 2002, which was after Attorney General Reno authorized the Board to utilize streamlining procedures (including AWOs) in 1999 but before Attorney General Ashcroft expanded the Board's streamlining authority, 31% of all Board decisions were AWOs; in FY 2006, only 15% were AWOs.* Over the same time period, according to the Administrative Office of the U.S. Courts, the rate of appeal nationwide increased from 10% to 33% percent. It is not surprising that the rate of appeal has increased even while the percentage of AWOs has fallen. This is because it is implausible that the primary factor in an alien's decision to appeal would be dissatisfaction with perceived insufficiency of the Board's explanation for its decision, whether that decision takes the form of an AWO or short single-judge opinion. As described below, it is far more likely that the decision to appeal would instead be driven by a desire for a better short-term or long-term outcome, including the calculation that even an unsuccessful appeal may allow the alien to remain in the United States while the appeal is pending.

Finally, what evidence there is does not suggest that aliens' probability of succeeding on appeal before the courts has increased as a result of the streamlining rules. Rather, the rate at which the courts of appeals affirm immigration cases on the merits is

* For the first quarter of FY 2007, that figure fell to under 10%.

high and quite similar to what it was before the 2002 rules. According to the Administrative Office of U.S. Courts, in FY 1999, 89% of immigration cases resolved on the merits in the courts of appeals were affirmed. In FY 2005 that figure was 86%. Affirmance rates are not a perfect proxy for whether an appeal has produced a favorable resolution for the alien or is well-founded, because they do not take into account cases other than those decided on the merits such as stipulated dismissals, but they are a strong indicator.

Meanwhile, what is beyond dispute is that since full implementation of streamlining, the backlog of cases at the Board of Immigration Appeals has been dramatically reduced. According to EOIR's Office of Planning, Analysis and Technology, in September 2002, before streamlining was fully implemented, nearly 30% of the BIA's pending cases had been pending for two or more years, but by September 2006, that figure had dropped to less than 1.5%. Resolving the Board's backlog was of great importance both to hasten the resolution of cases where aliens are being detained during the pendency of removal proceedings and to prevent appeals to the BIA from being used to delay removal for long periods of time in non-meritorious cases.

Much of the increase in the rate of appeal is, therefore, likely due not to changes in the quality of the Board's decisions between FY 1999 and FY 2006 so much as it is to the interest that aliens have in delaying their removal and the increasing necessity of appealing to the courts to secure significant delays. Before streamlining, it often took the Board several years to decide a case, and aliens thus did not need to resort to an appeal to the courts for a reprieve from removal. Now, however, the Board takes only months to decide the average case, so aliens must turn to the federal courts in hopes of any significant reprieve. It is thus unsurprising that the federal courts where a stay is most readily available have also seen the highest appeal rates.

All that said, the Department remains deeply committed to ensuring that immigration adjudications are both fair and efficient. In January 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to conduct a comprehensive review of the Immigration Courts and the Board of Immigration Appeals, including the streamlining rules. Based on that review, in August, the Attorney General directed that twenty-two new measures be implemented to improve immigration adjudication at the Executive Office of Immigration Review. With regard to streamlining in particular, the Attorney General concluded that the fundamentals of streamlining should be retained but that some adjustments should be made through proposed amendments to the current rules. One such proposal will seek to encourage an increase of one-member written opinions to address poor or intemperate immigration decisions that reach the correct result but would benefit from expansion or clarification. Another proposal will provide for the use of three-member written opinions to provide greater legal analysis in a small class of particularly complex cases. Yet another proposal would revise the process for publishing Board decisions as binding precedents. Finally, the Attorney General directed the Deputy Attorney General and the Director of EOIR to monitor the effect of these adjustments and instructed the Deputy Attorney General to

reevaluate the effectiveness of the adjustments after they have been in place for two years.

Chairman Leahy

Hamdan/Military Commissions

60. At the hearing, you indicated that you would have "a lot of objections" to procedures I described, involving a hypothetical American soldier captured by a foreign government. In my example, the solder is accused of being a spy and so not entitled to POW protections under the Geneva Conventions. He is interrogated for 18 hours a day, prevented from sleeping for days on end, and required to stand or squat for hours at a time. A military commission is then convened, with judges handpicked by the foreign government's leader. The accused is excluded from large portions of his trial, and the prosecutors introduce a statement from the interrogators that they never gave the accused an opportunity to read. He is convicted and sentenced to death on less than a unanimous vote. Afterwards, his only appeal is to a panel whose members were, again, handpicked by the foreign leader, and who had assisted the prosecution in the preparation of the case. What specifically would you find objectionable about these procedures?

ANSWER: As stated at the hearing, I believe the hypothetical you pose could raise a number of issues under the Geneva Conventions. By contrast, I believe that the military commissions established under both the President's original order and the MCA would avoid the issues raised by your hypothetical.

A foreign state could not validly avoid its obligations under the Geneva Conventions simply by making the unsupported accusation that an American soldier is a spy. The treatment and interrogation of a uniformed American soldier in the manner that you describe would appear to violate the protections that the Geneva Conventions afford to legitimate prisoners of war. By contrast, the President has found that members of al Qaeda and the Taliban do not qualify as prisoners of war because those forces do not abide by the laws of war and do not meet the definitions established for lawful combatants under the Third Geneva Convention. Nothing in the Supreme Court's decision in *Hamdan* disturbs the correctness of that judgment by the President. The Geneva Conventions also require that lawful enemy combatants be tried in the same courts as the state gives to its own military troops. If the American soldier in your hypothetical were a lawful combatant, then military commissions could not be used unless identical procedures were employed by that state to try its own soldiers.

The trial procedures you describe also raise a number of issues relating to the fairness of the proceeding. A trial before a biased judge obviously is not a fair trial. Of course, it is the regular practice in the United States, as well as in other countries, to allow the Executive Branch to nominate and appoint judicial officers, and so a judge is not necessarily biased simply because he has been chosen by the head of state. Nonetheless, a judge clearly would not be impartial if he were appointed for a particular trial because of his bias or because of his participation in the prosecution of the case.

Neither the military commissions established pursuant to the President's original order (which expressly recognized the accused's right to an impartial and fair proceeding), nor those codified in the MCA, countenance the appointment of biased officials. Under the MCA, the presiding officer must be a certified military judge with the same protections for impartiality that exist under the UCMJ. *See* 10 U.S.C. § 948j. Similarly, the MCA establishes a formal appellate process that parallels the UCMJ, providing an appeal to a military appellate court, followed by an appeal as of right to the Court of Appeals for the D.C. Circuit. *See id.* §§ 950f, 950g.

In your hypothetical, the accused is also sentenced to death on a less than unanimous vote by the finder of fact. I am not aware of any principle of international law requiring unanimity as to the findings of liability or sentence before a military commission. The federal civilian courts do require unanimity as a matter of constitutional law, but in most cases, courts-martial under the UCMJ would not require unanimity. Article 52 of the UCMJ does require a unanimous vote for the imposition of the death penalty, however, and Congress also adopted this approach in the MCA. *See* 10 U.S.C. § 949m.

Finally, although there may be circumstances that would justify the exclusion of the accused under extraordinary circumstances, your hypothetical does not suggest any justification for the individual's exclusion from large portions of the trial. The Administration firmly believes that sharing sensitive intelligence information with terrorist detainees during an ongoing conflict could harm the national security interests of the United States. The previous military commission procedures therefore provided for the exclusion of the accused under limited circumstances and required that the exclusion be limited so as to ensure the fair trial of the accused.

The MCA, as enacted by Congress, ensures that the accused may be present at all proceedings, and he has the ability to challenge all evidence introduced against him. *See* 10 U.S.C. § 949a(b). At the same time, the MCA protects the ability of the Government to withhold the sources and methods used to collect sensitive classified evidence. *See id.* § 949d(f)(2)(B).

These procedures will provide the accused with a full and fair trial, permit the Nation to protect our most important secrets during military commission trials, and avoid the objectionable aspects suggested by your hypothetical.

61. In light of the Supreme Court's decision in *Hamdan*, does the Administration intend to try any of the detainees through courts-martial and if not, why not? Are there specific aspects of the courts-martial proceedings that cannot be used in this context? Given the effectiveness of Article 32 of the UCMJ, why does the Administration need to create an entirely new system to try these detainees?

ANSWER: We believe that courts-martial are inappropriate and impractical to try unlawful enemy combatants in the war on terror. Congress made that same judgment in the MCA, which recognizes that many provisions of the UCMJ would be impracticable if applied to the prosecution of terrorists in the midst of ongoing hostilities. The Administration thus plans to prosecute terrorist detainees before military commissions, in accordance with the MCA.

Your question states that Article 32 of the UCMJ has been effective in the context of courts-martial. Article 32 provides for a pre-charging investigation that is akin to, but considerably more protective than, the civilian grand jury. We believe that such a proceeding would be unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war. The MCA accordingly does not provide for a procedure analogous to an Article 32 investigation, and indeed, the statute expressly provides that Article 32 of the UCMJ shall have no application in the military commission process. *See* 10 U.S.C. § 948b(d)(1)(C).

NSA Wiretapping Program

62. In your testimony regarding the NSA's domestic surveillance programs, you stated that you were in discussions with the Administration about what additional information you could provide to this Committee about any other government surveillance programs that may be operating without a court order or warrant. Have you obtained authorization to disclose this information to the Committee and if not, when do you expect to receive such authorization? Are there any other government surveillance programs or activities that the Administration is carrying out without obtaining a court order or warrant?

ANSWER: As you know, intelligence programs are highly classified and exceptionally sensitive. It would be inappropriate for me to discuss in this setting the existence (or non-existence) of specific intelligence activities, though my inability to respond more fully in this setting should not be taken to suggest that any such activities exist. We would like to reaffirm, however, the Administration's commitment to keeping Congress apprised of intelligence activities. Throughout the war on terror, the Administration has notified Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. Of course, we always take account of developments in the law and consider how best to make maximum use of the authorities now available under FISA.

63. You stated at the hearing, in response to a question I posed, "I think there is a serious question as to whether or not FISA could accommodate what it is that the President has authorized."

(A) Please clarify your response: Can the current FISA statute accommodate the so-called Terrorist Surveillance Program, as Senator Feinstein and others have said, yes or no?

(B) If you believe that FISA as currently written cannot accommodate this program, please identify the specific provision or provisions at issue, and indicate what specific changes would need to be made so that FISA would accommodate this program.

ANSWER: Please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

64. The former presiding judge of the FISA court, Judge Royce Lamberth, said on May 8 that in his view, the so-called Terrorist Surveillance Program would "require some tweaking" to make it comport fully with FISA. Rather than amending FISA to accommodate the program, have you given any thought to "tweaking" the program to comply with the law?

ANSWER: Please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

65. You also testified that the Administration is experiencing a problem with a backlog of FISA applications. What is the extent of the problem, and what additional resources are needed to address it?

ANSWER: The Department of Justice files numerous applications with the Foreign Intelligence Surveillance Court (FISC) every year, and, as a result, numerous requests for FISA authority are pending in the Department at any one time. These requests fall into two categories: (1) requests to initiate collection authority for a target for the first time (referred to as "initiations"); or (2) requests to renew existing collection authority (referred to as "renewals").

The Department strives to prioritize its work on FISA requests in accordance with the needs of the Intelligence Community to review and process promptly requests that the Intelligence Community identifies as having the highest priority. Such prioritization can, and does, change frequently during any given day. The Department regularly responds to Intelligence Community requests to obtain FISA authority on an emergency or expedited basis, which necessarily requires us to reprioritize work and shift resources from one matter to another. The Department, therefore, processes FISA requests that are of a

lower priority – as determined by the Intelligence Community – after it first processes matters that are of a higher priority.

Of course, we adhere to the law at all times. As a result, the Department does not present applications to the FISC until, as FISA requires, the application meets all of the criteria and requirements of the Act. Thus, requests for FISA collection authority that are insufficient when submitted require additional work, and take longer to process, than requests that meet the requirements of FISA when originally submitted.

Thus, lower priority requests and requests that are insufficient when first submitted take longer to process than higher priority requests that are legally sufficient when submitted.

In the past few years, the Department has had tremendous success in reducing: (1) the amount of time it takes to obtain authorization for FISA collection; and (2) the overall number of initiation requests that are pending at the end of a calendar year. The Department has dramatically increased its production and efficiency in processing applications to the FISA Court in recent years. From the end of 2004 to September 2006, for instance, the Department reduced the number of days it takes to process FISA applications by the FBI by approximately 35 percent. In that same time span, the Department reduced the number of FBI FISA applications pending by roughly 65 percent. Thus, the Department has simultaneously improved its output and its efficiency with respect to processing FISA requests. Nevertheless, based on upon information we have received from the Intelligence Community, we expect that the demand for FISA collection authority will continue to increase significantly in the future.

State Secrets Privilege

66. On July 19, 2006, a U.S. District Court judge in California denied the Department's motion to dismiss a lawsuit filed against AT&T involving the NSA's domestic surveillance programs. Noting its constitutional duty to adjudicate the disputes that come before it, the court ruled: "To defer to a blanket assertion of [state] secrecy here would be to abdicate that duty, particularly because the very subject matter of this litigation has been so publicly aired. The compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." The Justice Department has also asserted the state secrets privilege in at least 19 other cases challenging the NSA's domestic surveillance programs. Given the court's ruling in the AT&T case, it appears that the state secrets privilege is being misapplied in these cases.

(A) Will the Department continue to assert the state secrets privilege in cases challenging the NSA's domestic surveillance programs?

ANSWER: The Department will continue to assert the state secrets privilege in cases challenging alleged NSA intelligence activities where it is appropriate to do so -- i.e., where the Director of National Intelligence has determined, after giving personal consideration to the matter, that there is a reasonable danger that disclosure of information at issue in the case could cause harm to the national security.

(B) What is the current status of the lawsuit involving AT&T?

ANSWER: Recognizing that the state secrets issues presented in Hepting represent "controlling questions of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance ultimate termination of the litigation, Judge Walker certified his decision for an immediate interlocutory appeal pursuant to 28 USC § 1292(b). The Department has petitioned the United States Court of Appeals for the Ninth Circuit to accept such an appeal, and the Ninth Circuit has granted that petition. Briefing begins in February 2007.

67. The Justice Department has also used the state secrets privilege to ask the courts to throw out a lawsuit brought by whistleblower Sibel Edmonds, an ex-translator for the FBI who was fired after accusing her coworkers of security breaches. It appears that the Department used the privilege in this case to stop a whistleblower from coming forward and disclosing government misconduct.

(A) What is the Department's policy about asserting the state secrets privilege in whistleblower cases?

ANSWER: In any case, including a whistleblower case, the purpose of asserting the state secrets privilege is to protect against the disclosure of classified or other national security information.

(B) Would you support legislation that would require the court to rule in favor of a whistleblower if his or her case is dismissed because the Government asserts this privilege?

ANSWER: We strongly oppose legislation that would require a court to rule in favor of a whistleblower if his or her case must be dismissed because the litigation cannot go forward without harm to national security. Not only would such legislation fly in the face of well-established principles regarding the assertion of this important privilege, but it could lead to absurd results. For example, assume that classified information, the disclosure of which, by definition, would be harmful to the national interest, revealed that a Department of Homeland Security employee had been assisting terrorists in smuggling weapons of mass destruction into the country. Based upon this information, which cannot be disclosed, the employee is fired. If legislation you describe is enacted into law, the employee could claim that the termination was in reprisal for alleged whistleblowing

and would be entitled to judgment and relief, which could include reinstatement and monetary relief, because the Government could not reveal the reasons for the termination.

It may be regrettable that, at times, litigation cannot go forward because to allow it to do so would harm national security. However, if plaintiffs were entitled to judgment on whistleblower claims whenever the Government successfully asserted the state secrets privilege, it would encourage plaintiffs to raise and focus their claims in the national security context. A rule rewarding plaintiffs for filing claims presenting state secrets concerns -- even frivolous and non-meritorious claims -- cannot be construed as in the national interest. The current state of the law on the assertion of the state secrets privilege adequately balances the interests of litigants and the needs of national security, and should not be disturbed.

OPR Investigation

68. There are still many questions about the shut down of OPR's investigation into the role of your predecessor and other senior Justice Department officials in reviewing the legality of NSA's domestic surveillance programs. You testified at the hearing that the President made the decision to deny OPR attorneys and investigators access to information about this program. However, under 5 U.S.C. § 301; 28 U.S.C. §§ 509-510 and 28 C.F.R. §0.39, OPR derives its authority from the Attorney General, not the President.

(A) Given this, why was the President involved in any aspect of this investigation?

ANSWER: The Terrorist Surveillance Program (TSP) is a highly classified and exceptionally sensitive intelligence-gathering program. Decisions to provide access to classified information about TSP for non-operational purposes are made by the President of the United States.

(B) Did the President override your directive for OPR to investigate this matter by denying these security clearances and effectively shutting down the OPR investigation?

ANSWER: The President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. Every additional security clearance that is granted for TSP increases the risk that national security may be compromised.

(C) Please explain why Criminal and Civil Division Department attorneys have been granted security clearances to review information about the NSA's program in the past, but the OPR attorneys and investigators were denied such clearances in this particular case?

ANSWER: Decisions to provide access to classified information about TSP for non-operational purposes are made by the President of the United States.

(D) Have there been other situations where the President has denied security clearances for Department personnel to access and review (i) the NSA's domestic surveillance programs? (ii) any other classified programs?

ANSWER: We are not aware of any other instances where Department of Justice personnel have been denied access to review TSP. TSP is subject to extensive oversight within the Executive Branch, a regime that includes thorough review of the program by NSA's Inspector General and Office of General Counsel.

In addition, the Department of Justice Inspector General recently announced that he will conduct "a program review that will examine the Department's controls and use of information related to the use of the program and the Department's compliance with legal requirements governing the program."

Acree v. Iraq

69. During our exchange about the American prisoners of war involved in the *Acree v. Iraq* litigation, you stated that, despite several requests that you do so, you have not met with these POWs or their families.

(A) Has any one else within the Department or the Administration met with these brave Americans?

(B) Given the clear evidence that these POWs were tortured by the Hussein regime, what steps has the Department taken to ensure a just resolution of this case?

ANSWER: The plaintiffs in the Acree litigation, Acree v. Iraq, Civil Action No. 02-632 (D.D.C.), brought suit against the Republic of Iraq under a 1996 amendment to the Foreign Sovereign Immunities Act, which allows certain claims against designated state sponsors of terrorism. On July 7, 2003, the United States District Court for the District of Columbia granted a judgment in favor of plaintiffs, awarding them over $900 million in compensatory and punitive damages. Following the entry of judgment, the United States sought to intervene in the matter to advise the District Court of Presidential Directive 2003-03, passed under the authority of the Emergency Wartime Supplement Appropriations Act of 2003, and the United States' substantial foreign policy interests. Thereafter, on appeal, the Court of Appeals for the District of Columbia Circuit issued a decision that vacated plaintiffs' judgment and ordered the suit dismissed. Acree v. Iraq, 370 F.3d 41 (D.C. Cir. 2004). On August 19, 2004, the Court of Appeals denied plaintiffs' petition for en banc rehearing of the case, and on April 25, 2005, the Supreme

Court denied plaintiffs' petition for certiorari. Thereafter, on June 3, 2005, following the Supreme Court's denial of certiorari, plaintiffs filed a motion in the District Court in an effort to re-open their lawsuit. Because the United States is an intervenor in the proceedings, we filed an opposition to this motion on August 2, 2005. The United States' position regarding the viability of plaintiffs' effort to reinstate their lawsuit despite the decision of the Court of Appeals that the suit was to be dismissed is fully explained in our public filing. Plaintiffs' motion remains pending in the District Court.

In February 2005, prior to the filing of the Department's brief in opposition to plaintiffs' petition for certiorari in the Supreme Court, attorneys in the Office of the Solicitor General and the Civil Division met with plaintiffs' counsel to discuss the claims raised by these plaintiffs. Moreover, most recently, in February 2006, the Assistant Attorney General of the Civil Division responded to a letter from plaintiffs' counsel which proposed terms that, if agreed to between plaintiffs and the United States, would have had the effect, in plaintiffs' view, of making it appropriate for the United States to withdraw from its participation in the litigation. The Assistant Attorney General, after extensive consultation with the Departments of State and Defense, concluded that the proposal made by plaintiffs' counsel did not alleviate the United States' concerns which have prompted our participation in this litigation, and did not proffer terms that would warrant the United States' withdrawal from the lawsuit. The Department's position in this litigation was not intended to downplay plaintiffs' suffering or the outrageousness of their captors' conduct. Rather, the United States appeared in the Acree litigation to enforce a Presidential act, issued in furtherance of the United States' foreign policy and national security interests in Iraq, and we support the outcome of that litigation.

Finally, at no time in these proceedings has the United States suggested that Iraq is not responsible for any violation of its international obligations, including under the Geneva Convention, with respect to its treatment of these heroic Americans. To the contrary, to the extent plaintiffs' injuries resulted from violations by Iraq of the Geneva Convention, they were eligible for compensation from the United Nations Compensation Commission ("UNCC"). The UNCC was established by the United Nations Security Council to address the 2.6 million claims from nearly 100 countries seeking approximately $353 billion in damages from Iraq stemming from the first Gulf War. See http://www2.unog.ch/uncc/start.htm.http://www2.unog.ch/uncc/. The compensation fund, derived from the proceeds of Iraqi oil sales, has made awards of roughly $52 billion, of which $20 billion has been paid. Id. State Department records indicate that 15 of the 17 service member plaintiffs in Acree applied for and received some compensation through the UNCC. Moreover, in its Supreme Court brief opposing certiorari, the United States made clear that "[a]fter the Iraqi regime has had time to become firmly established, the President may choose to espouse petitioners' claims through diplomatic means." Throughout this litigation, therefore, the United States has recognized and honored its commitment to ensure that Iraq is not absolved of its international obligations.

Investigation of Journalists

70. Recently, there have been press reports that the Department is stepping up its efforts to prosecute journalists for publishing stories about the Administration's domestic surveillance programs. During the July 18, hearing, you refused to answer questions about whether the Department was actively investigating any journalists for publishing stories about these programs and you stated that the Department's policy is to "pursue the leaker" and to "work with responsible journalists and persuade them not to publish the story."

(A) Without getting into the details of any pending matters, are there currently within the Department of Justice any ongoing investigations or prosecutions of journalists or news organizations for publishing classified information about these programs?

(B) If so, how many ongoing investigations or prosecutions of journalists are currently pending at the Department?

(C) What criteria does the Department use to decide when to open an investigation of a journalist or news organization and what role do you have in making such a decision?

ANSWER: Taking the last sub-part of the question first, the Department of Justice takes seriously any investigative or prosecutorial decision that implicates – directly or indirectly – members of the news media, whether it be the issuance of a subpoena or the filing of an indictment. The seriousness with which the Department approaches these decisions is reflected in the Department's governing policy, 28 C.F.R. § 50.10, which is reiterated in the United States Attorney's Manual. This policy seeks to "balanc[e] the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice."

Specifically, the policy states that "in requesting the Attorney General's authorization for a subpoena to a member of the news media, the following principles will apply":

(1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation;

(2) In civil cases, there should be reasonable grounds, based on nonmedia sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance;

(3) The government should have unsuccessfully attempted to obtain the information from alternative nonmedia sources;

(4) The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information;

(5) Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid claims of harassment;

(6) Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material. They should give reasonable and timely notice of the demand for documents.

As for the role the Attorney General plays in this decision-making process, the Department's policy requires his express authorization for any decision to prosecute a member of the news media for an offense committed during the course of, or arising out of, the news gathering or reporting process. The Attorney General's decisions are guided by the Department's policy of "balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice." 28 C.F.R. § 50.10.

It would, however, be inappropriate to comment upon the existence or non-existence of any investigation or upon whether the Department is now considering the prosecution of journalists for publishing classified information.

71. Earlier this month, I asked you about troubling press reports in *The Christian Science* Monitor and other publications that the FBI is monitoring the phone calls of journalists at *ABC News*, *The New York Times* and *The Washington Post*. During the July 18 hearing, you stated that as far as you knew, you did not believe that the Department has a program to engage in the surveillance of journalists. Because your response did not completely confirm or deny these reports, I ask the following questions.

(A) Is the FBI, or any private telephone company on its behalf, monitoring the telephone calls of journalists, and if so to what extent?

(B) If the FBI is monitoring such calls, what legal authority is the Department relying upon to monitor these calls, and in particular, has the Department used National Security Letters under the PATRIOT Act to access the phone records of any journalists?

(C) Has the Department considered the chilling impact that surveillance has on the press and its ability to inform the public about important

national security matters. If so, how is the Department is addressing the privacy and civil liberties concerns raised by such call monitoring.

ANSWER: As an initial matter, the Department cannot comment on any ongoing investigation, or even whether such an investigation has been initiated. Because we cannot discuss whether or not a particular investigation has been initiated, we also cannot discuss whether any particular investigative steps may or may not have been taken.

As a general matter, however, the Department does not monitor telephone calls or seek records of such calls made by individuals on the basis of their profession. Outside of the Terrorist Surveillance Program, which targets for interception communications where at least one party is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization, and does not target wholly domestic communications or the communications of persons who have no connection to al Qaeda or an affiliated terrorist organization, nonconsensual monitoring is only done with the approval of a court. Any investigative activity involving journalists takes into account Department of Justice policy as set forth at 28 C.F.R. § 50.10. As noted above, this longstanding policy expressly recognizes the sensitive First Amendment concerns implicated when the newsgathering process and the needs of law enforcement intersect.

The Anderson Search

72. Like many Americans, I was troubled by the FBI's request to search the files of deceased journalist Jack Anderson. Under the Department=s official policy with regard to the issuance of subpoenas to members of the news media -- 28 C.F.R. '50.10 -- the Attorney General must approve not only prosecutions of members of the press, but also investigative steps aimed at the press, even in cases where the press is not itself the subject of the investigation. In addition, before a subpoena may be issued to a member of the news media, the government must try to obtain the needed information from non-media sources.

(A) Given this policy, did you expressly authorize the FBI=s attempt to rummage through deceased journalist Jack Anderson=s papers? If not, who did authorize this?

(B) Had the FBI made any attempt to obtain the information sought from alternative non-media sources?

(C) Has the Justice Department made any other attempts to search the files of journalists, either living or deceased?

ANSWER: The FBI attempted to gain consensual access to Mr. Anderson's files pursuant to an investigation in connection with a criminal prosecution currently pending

in the Eastern District of Virginia. We understand that the FBI Special Agents (SAs) in question did not seek access to the files for the purpose of retrieving classified material. Rather, when the SAs were informed that there was classified material in the files, they sought permission to take possession of that material under the general duty of government personnel to safeguard classified material as directed by the President in Executive Order 12958. Whether the information was actually classified and, if so, whether it constitutes evidence of crime is unknown because consent was refused.

With respect to the final part of your question, we are informed that, over the past five years, subpoenas directed to journalists in 65 matters have been approved by the Attorney General and former Attorney General Ashcroft, pursuant to 28 C.F.R. § 50.10. This includes witness subpoenas and subpoenas for documents, film, footage, and other records. In addition, over the past five years, the Department has approved three search warrants for materials related to the news gathering process pursuant to the Privacy Protection Act, 42 U.S.C. 2000aa et seq. It is worth noting, however, that almost all of the subpoenas issued have not sought confidential source information. In addition, a number of the subpoenas approved by the Attorney General have been issued in the context of an agreement between the Department and the media organization in question, whereby the organization agrees in advance to produce the material upon the issuance of a subpoena.

Aid To State and Local Law Enforcement

73. In the FBI's Preliminary Annual Uniform Crime Report for 2005, the Bureau reports that across America violent crime has risen by 2.5% just in the past year. What's more, according to the report, there has been a 4.8% increase in murders and a 4.5% increase in robberies. What trends do you see in these figures and do you expect the final crime statistics for 2006 to be consistent with these figures?

ANSWER: After many years of decreases in the number of violent crimes, the final 2005 data released September 18, 2006, showed an increase. In summary, these data indicate that the rate of violent crime increased by 1.3 percent, but that the rate of property crime decreased by 2.4 percent.

The Uniform Crime Reports (UCR) data for 2005 revealed increases in the number and rate of violent crimes (murder, robbery and, to a lesser extent, aggravated assault). The UCR revealed an annual increase nationally of 1.3 percent in the 2005 violent crime rate. While increases were observed, crime remains at low levels, with 2005 having the second-lowest rate recorded by the UCR in over 30 years. (Only 2004 had a lower violent crime rate.) The 2005 National Crime Victimization Survey (NCVS), which measures both reported and unreported crime, showed no change in the number of violent crimes or in the violent crime rate between 2004 and 2005 when released on September 10, 2006. Like the UCR, the NCVS showed a decline in property crime.

The NCVS and UCR are complementary programs measuring an overlapping but not identical set of crimes. Data from the two programs taken together show that while the recent declines in crime have halted, at least temporarily, it is too early to tell whether this is a one year phenomenon or the beginning of a new trend.

The UCR data do not identify any reasons for the observed increases. While the Nation experienced a 2.4 percent increase in the murder rate from 2004 to 2005 (to the second-lowest rate ever recorded, identical to the murder rate in 2003), the Northeast experienced a 5.3 percent increase in the murder rate and the Midwest a 4.3 percent increase. At the same time the South experienced a 0.8 percent increase and the West experienced a 1.7 percent increase in the murder rate. Trends varied by size of city. While all cities combined experienced a 5.7 percent increase in the number of homicides from 2004 to 2005, cities between 100,000 and 249,999 experienced a 12.4 percent increase and cities between 50,000 and 99,999 experienced an 11 percent increase. However, cities over 1,000,000 in population experienced a 0.6 percent increase, and cities between 10,000 and 24,999 experienced a decline of 0.9 percent.

Preliminary UCR estimates for the first half of 2006 indicated that the number of violent crime offenses from January through June 2006 increased 3.7 percent when compared to the reported level for the first half of 2005. The number of property crime offenses for the same period was down 2.6 percent. The numbers reported are preliminary, based on the submissions of 11,535 law enforcement agencies that submitted three to six months of data to the UCR program for January through June of both 2005 and 2006. Because of the preliminary nature of these numbers, they may well change before the final report on 2006 violent crime is released next fall. The preliminary crime statistics do not take into account population increases, and thus do not measure the rate of violent crime. It is too soon to determine whether the increase in the violent crime offenses from the first half of 2005 to the first half of 2006 signals a change in the downward trend in violent crime rates.

74. One concern is that the rise in crime is directly related to the Administration's $2 billion cut in aide to state and local law enforcement programs. Given the FBI's own figures showing a dramatic rise in crime, how do you justify cutting $2 billion to aide law enforcement officials at the state and local levels?

ANSWER: There are many factors that can play a role in the rise of violent crime, and there is little reason to believe that a decline in federal aid to state and local law enforcement programs is responsible for the recent uptick. Indeed, it is unlikely that a decline in federal aid is responsible because federal aid represents a very small portion of the total funding spent on law enforcement activities by state and local governments. Department of Justice spending on state and local law enforcement has never accounted for more than a small percentage, less than 5% of state and local law enforcement spending. At the same time, state and local expenditures for police protection have increased every year since 1982, regardless of the size of the federal contribution. And ongoing federally funded partnerships among federal, state, and local law enforcement,

such as the Project Safe Neighborhoods (PSN) gun-crime reduction initiative, continue to be highly effective at combating serious and specific crime problems.

All across the federal government, the Administration was required to make difficult choices in the FY 2007 budget proposal. We note that the President's 2007 budget request reduced grant programs by $1.3 billion, rather than by $2 billion as asserted in this question.

75. According to a July 13, 2006, article in *USA Today*, 42% of robbery suspects in Washington this year have been juveniles – up 25 % from 2004. That article also notes that juvenile arrests in Boston rose 54% in 2005 and weapons arrest involving juveniles rose 103%. What impact have the deep cuts in juvenile justice programs had on the rising crime rate? What is the Department doing to address the increase in crime involving juveniles?

ANSWER: Indicators show that violent juvenile crime is at historically low levels. In 2005, law enforcement agencies in the United States made an estimated 1.6 million arrests of persons under age 18. According to the FBI, juveniles accounted for 16 percent of all arrests and 15 percent of all violent crime arrests in 2005. Specifically, between 1996 and 2005, the number of juvenile arrests for Violent Crime Index offenses fell 25.2 percent. The number of arrests of juveniles for murder fell 46.8 percent from 1996-2005. As a result, the juvenile Violent Crime Index arrest rate in 2004 was at its lowest level since at least 1980. From its peak in 1993 to 2004, the juvenile arrest rate for murder fell 77 percent.

Some cities have reported anecdotal evidence that offenders, including juveniles, are getting younger and more violent. Some cities have reported dramatic jumps in arrest rates of juveniles in recent months. These recent increases in juvenile violent crime arrests in various jurisdictions should still be viewed in the overall context, where a small increase still represents a historically low level of juvenile violence.

Although the overall trends in juvenile crime are encouraging, we must remain vigilant, especially in light of the recent anecdotal reports on juvenile crime, in ensuring that communities have the tools necessary to identify at-risk youth and address juvenile risk behavior crime and victimization with effective prevention, intervention, and treatment programs, as well as proven enforcement strategies.

Because the federal government's role in prosecuting juvenile offenders is limited, the Attorney General has emphasized prevention efforts. For example, the Attorney General directed each U.S. Attorney to convene a Gang Prevention Summit in his or her district to explore opportunities in the area of gang prevention. These summits bring together law enforcement and community leaders to discuss best practices, identify gaps in services, and create a prevention plan to target at-risk youth within their individual communities. These summits have already reached over 10,000 law enforcement officers,

prosecutors, community members, social service providers and members of the faith-based community.

At the national level, the Department has hosted two gang prevention webcasts that are accessible to the public. These webcasts share best practices on gang prevention, identify resources, and support and complement the Department's anti-gang initiative. The Department has also played a major role in the President's Helping America's Youth initiative led by First Lady Laura Bush. This initiative features an online Community Guide that aids community coalitions in developing strategic prevention programs, and provides a database of effective prevention programs.

The Department, through the Bureau of Justice Assistance (BJA) in the Office of Justice Programs (OJP), administers the Gang Resistance Education and Training (G.R.E.A.T.) Program, a school-based, law enforcement officer-instructed classroom curriculum. The program's primary objective is prevention and is intended as an immunization against delinquency, youth violence, and gang membership. G.R.E.A.T. lessons focus on providing life skills to students to help them avoid delinquent behavior and violence to solve problems. In addition, the Department has long supported gang prevention activities such as the National Youth Gang Center, the Boys & Girls Clubs of America, and OJJDP's Gang Reduction Program.

Public Corruption/Border Security

76. At the July 18 hearing, I asked you about the recent report in the *Washington Post* of bribery, smuggling and other forms of corrupt activity by Border Patrol Agents assigned to protect our Southern border. Following our exchange, you promised to look into the matter. Please state whether the Department is actively investigating the allegations of corruption and misconduct by Border Patrol Agents? If so, what is the status of these investigations and what steps are being taken to ensure that there is not a culture of corruption developing on our Border?

ANSWER: The Department of Justice takes all allegations of criminal conduct very seriously and U.S. Attorneys' Offices (USAOs) carefully review any investigative evidence presented to support allegations of wrongdoing. The Department Homeland Security is responsible for investigating allegations of corruption and misconduct of Border Patrol Agents. However, due to legal and ethical considerations, neither Department can discuss the status of any matter that may be pending in a USAO, other than facts on the public record. As the series of press releases demonstrates, both Departments are committed to ensuring that there is not a culture of corruption developing on our border.

77. According to press reports, the allegations about corruption within the Border Patrol first surfaced because whistleblowers came forward to reveal this misconduct. These whistleblowers have also indicated that they have been discouraged from speaking out about this problem. Please describe what steps are being taken by the Department to protect the whistleblowers who first alerted us to this illegal activity.

ANSWER: Retaliation against whistleblowers is a prohibited personnel practice. Border Patrol Agents and others within the Department of Homeland Security who suspect they have been retaliated against in violation of law have a variety of administrative remedies available, including but not limited to the Department of Homeland Security's Office of Inspector General, the Office of Special Counsel, and the Merit Systems Protection Board.

Presidential Signing Statements

78. During his five years in office, President Bush has made extensive use of his bill signing statements B presenting more than 750 constitutional challenges to various provisions of legislation adopted by Congress. You testified at the hearing that President Bush has issued only 110 to 125 signing statements challenging laws passed by Congress. You further stated that the *Boston Globe* had retracted its story reporting that the President has issued more than 750 constitutional challenges to laws.

(A) On July 19, 2006, the *Boston Globe* published a story stating that the newspaper has not retracted any stories or figures on the President's signing statements. (A copy of this article is attached.) The *Boston Globe* also reported that, as of two weeks ago, President Bush's signing statements covered 807 laws, according to Christopher Kelley – a government professor at Miami University of Ohio who has studied the use of presidential signing statements through history. Will you now concede that the President has made more than 750 constitutional challenges to the laws enacted by Congress, and that this figure far exceeds the comparable figures for any other President in U.S. history?

ANSWER: On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as "750 laws." The correction, a copy of which is attached, reads: "Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills." Even the July 19, 2006 article you cite concedes that "[t]he [Globe] corrected an editing error . . . that referred to Bush challenging 750 'bills'." Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or "laws enacted since he took office."

The ABA Task Force Report on Signing Statements also acknowledges that "these [higher] numbers refer to the number of challenges to provisions of laws rather than to the number of signing statements." ABA Task Force Report on Signing Statements 14-15 n.52 (2006).

We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than his predecessors' signing statements. President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, *Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act* (Dec. 21, 2000) ("The Act includes an *additional number* of provisions regarding the conduct of foreign affairs that raise serious constitutional concerns. My Administration's objections to these and other language provisions have been made clear in previous statements of Administration policy. I direct the agencies to construe *these provisions* to be consistent with the President's constitutional prerogatives and responsibilities and where such a construction is not possible, to treat them as not interfering with those prerogatives and responsibilities.") (emphases added); *Statement on Signing the Consolidated Appropriations Act, FY 2001* (Dec. 21, 2000) ("There are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*." "*Several provisions* of the Act also raise concerns under the Recommendations Clause. These provisions purport to require a Cabinet Secretary or other Administration official to make recommendations to Congress on changes in law. To the extent that *those provisions* would require Administration officials to provide Congress with policy recommendations or draft legislation, I direct these officials to treat any such requirements as precatory.") (emphases added); *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2001* (Nov. 6, 2000) ("I will not interpret *these provisions* to limit my ability to negotiate and enter into agreements with foreign nations.") (emphasis added); *Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act* (Oct. 28, 2000) ("there are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* v. *Chadha*.") (emphases added); *Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, *certain provisions* seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because *these provisions* appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory.") (emphases added); *Statement on Signing the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century* (Apr. 5, 2000) ("*certain provisions* of this legislation must be interpreted

and applied in a manner that avoids violating the constitutional separation of powers.") (emphasis added); *Statement on Signing the Open-market Reorganization for the Betterment of International Telecommunications Act* (Mar. 17, 2000) ("The President's constitutional authority over foreign affairs necessarily entails discretion over these matters, and I will therefore construe *these provisions* as advisory.") (emphasis added); *Statement on Signing the Intelligence Authorization Act for Fiscal Year 2000* (Dec. 3, 1999) ("I am concerned about *several parts* of the legislation as well as segments of the accompanying joint explanatory statement. Although not law, classified language in the statement accompanying the bill, entitled 'State Department Restrictions on Intelligence Collection Activities,' could, if required to be implemented, interfere with my responsibilities under the Constitution to conduct foreign policy and as Commander in Chief.") (emphasis added); *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret ***such provisions*** to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha.*") (emphases added); *Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act* (Oct. 22, 1999) ("there are *provisions* in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha.*") (emphases added); *Statement on Signing the Treasury and General Government Appropriations Act* (Sept. 29, 1999) ("*Several provisions* in the Act purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court's ruling in *INS* v. *Chadha.*") (emphases added); *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act* (Oct. 23, 1998) ("*several provisions* in the Act purport to condition my authority or that of certain officers to use funds appropriated by the Act

on the approval of congressional committees. My Administration will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha.*") (emphases added); *Statement on Signing the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999* (Oct. 17, 1998) ("I am also concerned that *several provisions* of the Act could be interpreted to intrude unconstitutionally on the President's authority to conduct foreign affairs and to direct the military as Commander-in-Chief. *These provisions* could be read to regulate negotiations with foreign governments, direct how military operations are to be carried out, or require the disclosure of national security information. I will interpret *these provisions* in light of my constitutional responsibilities.") (emphases added); *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998* (Nov. 26, 1997) ("This Act contains *several provisions* that raise constitutional concerns, such as requirements that the United States take particular positions in international organizations. I will apply *these and other provisions* in the Act consistent with my constitutional responsibilities.") (emphases added).

The Department of Justice believes the accurate number of the President's constitutional signing statements in May was 100, not 125. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain" some type of constitutional concern, "as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of signing statements President Bush has issued is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Finally, we note that signing statements do not represent "constitutional challenges to the laws," as your question erroneously suggests. As Assistant Attorney General Walter Dellinger explained during the Clinton Administration, such signing statements can serve to "guide and direct executive officials in interpreting or administering a statute." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (*available at* www.usdoj.gov/ olc/signing.htm). "Relatedly, a signing statement may . . . explain[] that the President will construe [a provision] in a certain manner in order to avoid constitutional difficulties." *Id.* at 133. As Assistant Attorney General Dellinger explained, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." *Id.*

(B) When I asked you about the President's signing statement for the USA PATRIOT Act reauthorization bill, you testified that the President "will follow his oath of office." Given the Administrations track record of simply ignoring the laws passed by Congress, I am not reassured by your response. So let me rephrase my question: Will you comply with the audit and reporting requirements contained in the PATRIOT reauthorization legislation, yes or no?

ANSWER: We take exception to the statement that the Administration "simply ignor[es] the laws passed by Congress." There is no basis for any claim that the Administration has done anything but scrupulously follow the letter of the law.

The Administration will comply with the requirements of the PATRIOT Act reauthorization with the understanding, shared by numerous past Presidents interpreting similar provisions of law, that those requirements do not require the President to abandon his constitutional duties. The President's constitutional reservation about the PATRIOT Act echoes those made consistently by prior Presidents. Presidents routinely assume that when Congress passes a bill requiring the disclosure of information, it does so against the backdrop of what President Clinton called the "President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999). President Clinton used signing statements to construe similar provisions in light of that responsibility on numerous occasions during his presidency. *See, e.g., Statement on Signing the Intelligence Authorization Act for Fiscal Year 2000* (Dec. 3, 1999) ("H.R. 1555 provides that '[n]o department or agency of the Government may withhold information from the [National Commission for the Review of the National Reconnaissance Office] on the grounds that providing the information to the Commission would constitute the unauthorized disclosure of classified information or information relating to intelligence sources or methods.' I do not read this provision to detract from my constitutional authority, including my authority over national security information."); *Statement on Signing Legislation To Locate and Secure the Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action* (Nov. 8, 1999) ("section 3 of the bill would require the Secretary of State to report to the Congress on efforts taken with regard to section 2(a) and additional information obtained about the individuals named in section 2(a). I sign this bill with the understanding that this section does not detract from my constitutional authority to withhold information relating to diplomatic communications or other national security information."); *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000* (Oct. 5, 1999) ("A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise. . . . Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164)."); *Statement on Signing the Strom Thurmond National Defense Authorization Act of Fiscal Year 1999* (Oct. 17, 1998) ("I am also concerned that several provisions of the Act could

be interpreted to intrude unconstitutionally on the President's authority to conduct foreign affairs and to direct the military as Commander-in-Chief. These provisions could be read to . . . require the disclosure of national security information. I will interpret these provisions in light of my constitutional responsibilities."); *Statement on Signing the Intelligence Authorization Act for Fiscal Year 1998* (Nov. 20, 1997) ("So that this provision cannot be construed to detract from my constitutional authority and responsibility to protect national security and other privileged information as I determine necessary, and so that the provision does not require the release of information that is properly classified, I direct that it be interpreted consistent with my constitutional authority and with applicable laws and executive orders."); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1998* (Nov. 18, 1997) ("Other provisions of H.R. 1119 raise serious constitutional issues. Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch (section 1305). . . . Th[is] provision[] will be construed and carried out in keeping with the President's constitutional responsibilities."); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1997* (Sept. 23, 1996) ("Provisions purporting to require the President to enter into or report on specified negotiations with foreign governments, as well as a provision that limits the information that could be revealed in negotiations, intrude on the President's constitutional authority to conduct the Nation's diplomacy and the President's role as Commander in Chief. I will interpret these provisions as precatory."); *Statement on Signing Legislation on United States Policy on Haiti* (Oct. 25, 1994) ("Section 2 of the resolution calls, inter alia, for a detailed description of 'the general rules of engagement under which operations of the United States Armed Forces are conducted in and around Haiti.' I interpret this language as seeking only information about the rules of engagement that I may supply consistent with my constitutional responsibilities, and not information of a sensitive operational nature."); *Statement on Signing the National Defense Authorization Act for Fiscal Year 1995* (Oct. 5, 1994) ("section 101 directs that the Secretary of Defense provide a weekly National Operations Summary to the Committees on Armed Services of the House and Senate. Implementation of this provision must be consistent with my constitutional authority as Commander in Chief and my constitutional responsibility for the conduct of foreign affairs. While I understand the interest of the two Defense oversight committees in receiving this sensitive information, there are questions of scope that need to be resolved.").

In a similar context, President Eisenhower wrote:

> I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.

Pub. Papers of Dwight D. Eisenhower 549 (1959).

(C) Do you think that the President's use of signing statements to interpret the law in ways narrower than, or contradictory to, the actual text of the statute is an unconstitutional infringement on the legislative power given to Congress under the Constitution?

ANSWER: Both Congress and the President are bound by the Constitution as the Supreme Law. Presidents are sworn to "preserve, protect, and defend the Constitution," U.S. Const., art. II, § 1, cl. 8, and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America's founding document. For this reason, Presidents have long used signing statements for the purpose of "informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications," *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 131 (1993), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid constitutional infirmities. *Id.* at 132-33. Moreover, Presidents, like courts, assume that Congress does not intend to legislate unconstitutionally. Therefore, Presidents routinely assume that when Congress passes a law, it is the intent of Congress that the bill be construed in keeping with the requirements of the Constitution. Doing so does not infringe on the legislative power given to Congress because Congress does not have the power to override the Constitution through ordinary legislation.

79. Please provide a comprehensive list of each provision of law that the President has determined not to enforce or carry out and the basis for his decision not to faithfully execute the laws passed by Congress.

ANSWER: The President always faithfully executes the laws consistent with his obligation to "preserve, protect, and defend the Constitution." U.S. Const., art. II, § 1. If a statute enacted by Congress is inconsistent with fundamental law, the President's duty to "take care that the Laws be faithfully executed," *id.*, art. II, § 3, requires that the Constitution take precedence.

It is not practicable for the Department to identify and to respond with respect to provisions of law enforced by other agencies. In recognition of that fact, 28 U.S.C. § 530D(a)(1)(A)(i), which provides that the Attorney General shall report any formal or informal policy of the Department of Justice to refrain from "enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law . . . on the grounds that such provision is unconstitutional," applies only to those laws "whose enforcement, application, or administration is within the responsibility of the Attorney General" or another official of the Department. For policies not to enforce provisions of law administered or enforced by other agencies, section 530D provides that "the head of each executive agency or military department that establishes or implements [such] a policy" shall submit such a report. *Id.* § 530D(e). Thus, our response will be limited to any formal or informal policies adopted by the Department of Justice since January 20, 2001 to refrain from enforcing, applying, or administering a

provision of a Federal statute, rule, regulation, or other law, on the ground that such provision is unconstitutional. The only such policy of which we are aware (which does not, strictly speaking, appear to be covered by section 530D(a)(1)(A)) is listed below. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement, because Congress is already aware of those policies.

> **11 U.S.C. § 526(a)(4).** On December 15, 2006, the United States District Court for the Northern District of Texas entered a final judgment and order in *Hersh v. United States*, No. 3:05-CV-2330-N (N.D. Tex. Dec. 15, 2006), enjoining the United States from enforcing 11 U.S.C. § 526(a)(4) on the ground that it violates the First Amendment to the United States Constitution. Section 526(a)(4), in general, prohibits those who provide bankruptcy assistance to certain types of debtors from advising them to incur more debt in contemplation of filing bankruptcy. The United States is bound by that injunction while the Department considers whether to appeal; the United States would have to file a notice of appeal in the case by February 13, 2007. Because the Department is simply obeying the injunction while a decision is made whether to appeal, this matter does not appear to be covered by section 530(a)(1)(A), but we report it in the interest of completeness.

Internet Privacy and CALEA

80. In January, we learned that the Justice Department issued subpoenas to three major Internet companies seeking information about what millions of law-abiding Americans search for on the Internet. There are also recent reports that the Department has asked Microsoft, Google, AOL and other Internet companies to retain records on their customers= web-browsing activities to aid law enforcement. What sorts of records has the Department asked these companies to retain and for how long? Will the Department propose new legislation in this area?

ANSWER: Other than specific requests in specific cases under 18 U.S.C. § 2703(f), the Department has not made any formal requests of Internet companies to retain particular data for a specified length of time. The Department has engaged in discussions with Internet companies about the need to preserve certain information to enable the investigation and prosecution of certain crimes, especially those involving child exploitation. The Department is continuing to review possible solutions to the challenges of investigating and prosecuting crimes committed through the Internet.

The subpoenas to Google and to other search engine providers are separate. Those subpoenas were for random samples of web pages from their indexes, as well as random samples of queries. Both sets of web pages were used to test Internet content filtering software against those pages to determine whether the software succeeded at

blocking adult material and at avoiding the blocking of non-adult material. That testing was the subject of expert testimony in the trial of ACLU v. Gonzales, E.D. Pa. No. 98-5591, concerning the constitutionality of the Child Online Protection Act.

81. In July, there were several press reports indicating that the FBI intends to propose sweeping new legislation that would amend the Communications Assistance for Law Enforcement Act ("CALEA") to, among other things, expand CALEA's wiretapping capabilities to commercial Internet services and eliminate the current requirement that the Department publicly disclose the number of communications interceptions that it conducts each year. Such a proposal could have a negative impact on the privacy rights of the millions of law-abiding Americans who use the Internet. First, are the reports that the Department is proposing sweeping new legislation to amend CALEA true, and if so, what is the proposal? Second, has the Department considered the privacy and civil liberties implications of such legislation?

ANSWER: The ability to conduct authorized electronic surveillance is a critical law enforcement tool in investigating and preventing our country's most serious crimes, including terrorism, organized crime, drug trafficking and child exploitation. Because constantly changing communication technologies could put this vital investigative tool at risk, Congress enacted the Communications Assistance for Law Enforcement Act ("CALEA"), 47 U.S.C. §§ 1001 – 1021, to "preserve the government's ability ... to intercept communications involving advanced technologies" and "to insure that law enforcement can continue to conduct authorized wiretaps in the future." In the past three years, the Department has considered possible revisions in the statutory language of CALEA to clarify that its wiretapping provisions extended to internet service providers. Even though the Federal Communications Commission has issued opinions in recent years interpreting current law to include the broadband transmission facilities that increasingly connect end users to their ISPs, the Department believes that revision of the statute may be desirable to clarify the scope of the coverage. Although the Administration does not intend to introduce its own legislation this year, it would welcome the opportunity to work with members of Congress and relevant private sector interests on possible modifications to CALEA. The Department has already initiated discussions with the private sector and state and local law enforcement on this issue. We believe that new legislation will not have a negative impact on the privacy rights of American citizens using the Internet, it will simply preserve law enforcement intercept capabilities in today's world of advancing technologies. Any such effort will include careful consideration of privacy and civil liberty implications of proposed statutory changes.

FOIA

82. The Department of Justice is still operating under a 2001 directive from former Attorney General John Ashcroft encouraging all federal agencies to use the exemptions under FOIA to withhold information sought under that law. According to a recent study by the Coalition of Journalists for Open Government, even when the Government does release information, it is taking longer and longer for the public to get a response to FOIA requests. Will you rescind former Attorney General Ashcroft's directive encouraging federal agencies to withhold information under FOIA and if not, why not?

ANSWER: Attorney General Ashcroft's October 2001 memorandum encourages compliance with the Freedom of Information Act (FOIA) by reminding federal agencies to consider carefully the interests underlying the FOIA's exemptions, and to make discretionary disclosures of information falling within those exemptions when appropriate. This memorandum represents an appropriate step by the Justice Department to discharge its government-wide role in administering the FOIA. FOIA memoranda such as the one issued by Attorney General Ashcroft have commonly been issued by Attorneys General at the beginning of new presidential administrations. Such FOIA memoranda were issued in May 1977 by Attorney General Griffin B. Bell; in May 1981 by Attorney General William French Smith; and in October 1993 by Attorney General Janet Reno. As the October 2001 memorandum is consistent both with good FOIA practice and with Executive Order 13,392, entitled "Improving Agency Disclosure of Information" (Dec. 14, 2005), the Department plans to leave the memorandum in effect.

83. Under the Department's 2001 directive, federal agencies are encouraged to assert the exemptions under FOIA to keep from having to disclose information to the public – including Exemption 2, which relates to the internal personnel rules and practices of federal agencies and Exemption 5, which covers inter-agency and intra-agency documents. How many times did the Department defend FOIA cases based upon Exemptions 2 and 5 of the Freedom of Information Act in the last two years (2004 - 2006)? Does this figure represent an increase or decrease in the number of cases relying upon these exemptions during the previous two years (2002 - 2004)?

ANSWER: The 2001 directive encourages federal agencies "to carefully consider the protection" of the values and interests underlying the FOIA exemptions" when making disclosure determinations under the FOIA. The Civil Division, which, together with the United States Attorneys' Offices, defends litigation challenging exemptions, does not keep statistics tracking the use of particular exemptions. You can be assured, however, that no exemption is defended without careful consideration that it is well-founded and necessary to protect the important governmental interests underlying the exemption.

Schering-Plough Case

84. I was stunned recently when I learned that the Department of Justice refused to support the position of the Federal Trade Commission in the Schering-Plough case before the Supreme Court. The FTC was acting to protect American consumers and the Department of Justice sided with the big drug companies. In that case, in which the FTC recommended that the Supreme Court grant review of whether a large pharmaceutical company paid a potential generic competitor not to offer a generic version of the medicine. The choice by your Department was to side with the big drug companies over seniors and families. A number of us have introduced a bill, S.3582, to correct the situation. It is no secret that prescription drug prices are a source of considerable concern for seniors and American working families. In a marketplace free of manipulation, generic drug prices can be as much as 80 percent lower than brand name versions. This is the first time in history that I know of when the Solicitor General has opposed an FTC request for *certiorari* before the Supreme Court.

(A) Why did you take that position and oppose Supreme Court review?

ANSWER: In responding to an invitation from the Supreme Court to file a brief expressing the views of the United States regarding a pending petition for a writ of certiorari, the Solicitor General has traditionally sought to provide the Court with an assessment of the "certworthiness" of the case, measured against the criteria applied by the Court itself in deciding whether to grant certiorari. See Sup. Ct. R. 10. Applying those criteria in this case, the Solicitor General concluded – and the Court agreed – that the petition for certiorari did not satisfy the demanding standards for Supreme Court review.

Rather than side with any one interested party, the brief filed by the United States took a balanced approach to the question presented. As the brief explained, some patent settlements involving pioneer and generic drug companies "may pose a risk of restricting competition in ways that are not justified by a lawful patent, to the detriment of consumers." But as the brief also recognized, some patent settlements can be procompetitive, resulting in more choices and lower prices for consumers. Because any Supreme Court ruling discussing the ways to distinguish between pro- and anti-competitive patent settlements under the antitrust laws is likely to have a significant impact on this critical part of our economy, it is important that any case reviewed by the Supreme Court present the relevant issues squarely and without undue complications.

The Eleventh Circuit's decision in Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005), did not present that opportunity. The important and unsettled issues of federal law that the FTC raised in its certiorari petition were not well-presented in that case, which was marked by evidentiary disputes that the Supreme Court typically does not resolve. Moreover, the Eleventh Circuit's decision did not conflict with any decisions

of the Supreme Court or any other Court of Appeals, which are usual grounds for supporting a certiorari request. Accordingly, in response to the Supreme Court's order inviting the Solicitor General to express the views of the United States regarding the FTC's certiorari petition, the Solicitor General recommended that it be denied.

(B) Did the White House or the Department of Justice meet with Schering-Plough on this matter? If yes, please supply the Committee with notes or summaries of these meetings.

ANSWER: In the course of responding to Supreme Court invitations for views of the United States regarding whether a matter is appropriate for certiorari for the Supreme Court, it is common practice for lawyers from the Solicitor General's Office and other interested components of the Department to meet with representatives of the parties and hear their views in order to increase understanding of relevant issues. In accordance with that typical practice, lawyers from the Department heard from representatives of Schering-Plough, as well as from FTC officials, in the course of determining how to respond to the Supreme Court's order. Any notes of those meetings would be privileged.

Senator Kennedy

85. After both the 2000 and 2004 Presidential elections, there were widespread reports of disenfranchisement of African-American voters. Yet, the Department did not file a single lawsuit related to either of those elections on behalf of African-American voters. The Bush Civil Rights Division has litigated only three lawsuits on behalf of African-American voters, two of which were initiated by Attorney General Janet Reno. A week ago, the Department filed a complaint against Euclid, Ohio, the first voting rights lawsuit investigated and filed on behalf of African-American voters on President Bush's watch. The Department is also in the process of litigating the Department's first-ever case alleging discrimination against white voters by African Americans.

Is it really the case that there have been just three meritorious claims of voting discrimination against African-American voters since 2001?

ANSWER: In this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States* v. *Crockett County* (W.D. Tenn.); *United States* v. *Euclid* (N.D. Ohio); *United States* v. *Miami-Dade County* (S.D. Fla.); and *United States* v. *North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States* v. *Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We are interested in allegations of possible Voting Rights violations from all sources, and have solicited such information widely.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During fiscal year 2006, the Voting Section filed 17 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States* v. *Long County* (S.D. Ga.) and *United States* v. *City of Boston* (D. Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian-Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

86. In light of the 28 percent African-American voting age population in Euclid, Ohio, the existence of racially polarized voting in elections for the Euclid City Council, the fact that not a single African American has ever been elected to the Euclid City Council, and the fact that an investigation was initiated in 2003, why did it take until July 2006 to file this lawsuit?

ANSWER: In general, the Division conducts a careful investigation and, where suit is authorized, engages in a period of negotiations with a potential defendant before filing a lawsuit. The *Euclid* case was filed as promptly as possible, consistent with the Division's historical practice.

87. In recent years, serious concerns have been raised about the impartiality of the administration by the Department of Justice of Section 5 of the Voting Rights Act, which requires covered jurisdictions to submit voting changes to you or to the District Court in the District of Columbia for approval before they can go into effect. This provision has been a powerful force in preventing jurisdictions from implementing discriminatory voting practices, and it is one that Congress has just voted to reauthorize.

We have to be certain that a reauthorized Section 5 will be applied impartially and vigorously, without partisan favor. Yet, we know that the Texas redistricting of 2003 was precleared by the Civil Rights Division after political appointees overruled career attorneys who unanimously recommended an objection. That plan was later found by the Supreme Court to violate Section 2 of the Voting Rights Act.

We also know that the Civil Rights Division precleared Georgia's recent law requiring voters to present one of a restricted group of photo identifications. For those who didn't have the appropriate identification, the state agreed to provide one for $20. Career attorneys recommended an objection, but were overruled by political appointees. A federal court had no trouble striking the law down as imposing an unconstitutional poll tax. Yet, the Department saw no problem with it. When Georgia re-enacted the law without the poll tax, you precleared it again, even though it was apparent that minorities were less likely than whites to have the appropriate identification, such as a driver's license and, therefore, would be less likely to vote. The federal court struck down the law again. This troubling history only scratches the surface regarding the recent problems in the Civil Rights Division.

In Judge Murphy's order enjoining enforcement of Georgia's 2005 photo identification law as an unconstitutional burden on voting and an unconstitutional poll tax, he stated the following: "[T]he Photo ID requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom

obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting." *Common Cause/Georgia v. Billups*, 406 F. Supp.2d 1326, 1365 (N.D. Ga. 2005). How do you reconcile this finding with your conclusion that Georgia's 2005 photo identification law did not have a retrogressive impact upon African-American voters in Georgia?

ANSWER: With respect to the Supreme Court's decision in *Lulac v. Perry*, we are pleased that the Court agreed with the Department's principal argument that the State did not violate Section 2 of the Voting Rights Act by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in 97% of Texas' plan. The Supreme Court's decision – which reversed the decision of a three-judge panel that upheld the plan *in toto* -- produced six separate opinions from six different Justices and 120 pages of discussion. A 5-4 majority of the Court concluded that the State had violated Section 2 (not Section 5) by redrawing former congressional district 23 in southwest Texas. As the Chief Justice explained in his dissent, the majority's decision on this aspect of the plan was based entirely on a new principle, under Section 2 of the Voting Rights Act, that the creation of a majority-minority district is not sufficient to remedy the redrawing of a minority district in the same part of the State, if the new district is not compact enough to preserve communities of interest. That new compactness inquiry issue was not the subject of briefing and was not addressed by the Department. In any event, the Court's decision in no way questions the Department's decision to preclear the Texas redistricting plan under Section 5 of the Voting Rights Act. Indeed, only one Justice suggested that Section 5 had been violated; no other Justice joined him in that portion of his opinion.

The Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared under Section 5 of the Voting Rights Act after a careful analysis that lasted several months. The decision took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver's license cards. The data showed, among other things, that the number of people in Georgia who already possess a valid photo identification greatly exceeds the total number of registered voters. In fact, the number of individuals with a valid photo identification is slightly more than the entire eligible voting age population of the State. The data also showed that there is no racial disparity in access to the identification cards. The State subsequently adopted, and the Department precleared, a new form of voter identification that will be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did *not* conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act.

Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision.

88. When you precleared Georgia's 2006 photo identification law, what law did you use as the benchmark against which to determine the retrogression question? Did you use the 2005 law, which Judge Murphy had enjoined as unconstitutional? Or, did you use the identification requirements in place in Georgia prior to enactment of the 2005 photo identification law? Please explain the basis for making the benchmark determination that you did.

ANSWER: As in all matters subject to preclearance under Section 5 of the Voting Rights Act, the benchmark plan included those new (post-1964) legally enforceable provisions that had not previously been precleared under Section 5.

89. In light of the controversy surrounding your decisions to preclear the Georgia and Texas submissions and given the subsequent court findings raising serious questions about these determinations, have you reviewed the Civil Rights Division's administration of Section 5?

If you have not reviewed the administration of Section 5, please do so and report back to the Committee within 30 days. Please include in the report a description of all personnel changes affecting the administration of Section 5 since 2004, including a description of any involuntary transfers from the Voting Section. Please, also provide copies of all communications from the Chief of the Voting Section to employees of the Section addressing the procedures for administering Section 5.

ANSWER: On many occasions, the Attorney General has discussed the application of Section 5 of the Voting Rights Act with senior officials in the Civil Rights Division. We are confident in the proper administration of Section 5 by the Department.

90. The Bush Administration supports reauthorization of the Voting Rights Act. However, in light of the above-cited controversies surrounding the Department's recent enforcement of the Act, what assurances can you give us that the Department will enforce Section 5 in a non-partisan and vigorous manner?

ANSWER: The Administration strongly supported reauthorization of the Voting Rights Act, and is currently vigorously defending the Act's constitutionality in court. When Congress reauthorized the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the Attorney General stated that: "The Department of Justice is proud to have supported the passage of this historic legislation. The Voting Rights Act of 1965 was a critical chapter in the still-unfolding story of American freedom. As President Johnson said when he signed that bill, the right

to vote is the lifeblood of our democracy. The reauthorization of this act is an important and proud American moment, and I know that President Bush looks forward to signing the bill. The Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections." The Department will continue to enforce Section 5 in a non-partisan and vigorous manner.

91. An article on July 23 in the Boston Globe, "Civil Rights Hiring Shifted in Bush Era: Conservative Leanings Stressed," documented a hiring policy change for the Civil Rights Division initiated by Attorney General Ashcroft. According to the article, career civil servants had primary responsibility for decades for hiring Civil Rights Division attorneys, but Attorney General Ashcroft shifted hiring responsibilities to political appointees of the administration. One result of this shift has been the hiring of attorneys without civil rights experience. A former Voting Section attorney interviewed for the article stated, "If anything, a civil rights background is considered a liability."

There has also been a shift in priorities. Cases alleging discrimination against whites and religious discrimination against Christians have replaced cases alleging discrimination against African Americans. Those interviewed for the article attributed plunging morale in the Division to the new hiring practices and accompanying shift in the Department's civil rights enforcement agenda. Department figures reveal that 63 attorneys left the Civil Rights Division in 2005, nearly double the average annual attrition rate since the late 1990's.

ANSWER: We respectfully disagree with many of the assertions made in the Boston Globe article. The Civil Rights Division, like every other component of the Department of Justice, is charged with enforcing the laws passed by Congress. As such, we seek to hire outstanding attorneys with demonstrated legal skills and abilities. The Department considers attorneys from a wide variety of educational backgrounds, professional experiences, and demonstrated qualities. Career civil servants continue to play a central role in hiring attorneys to work in the Civil Rights Division. Attorneys from an extremely wide variety of backgrounds have been hired to work in the Division under this Administration.

92. Please explain the current hiring process in the Civil Rights Division. Have you continued the hiring policy of Attorney General Ashcroft? What role, if any, do career attorneys play in the process?

ANSWER: The Attorney General's Honors Program (HP) is one of the most prestigious and competitive hiring programs in the country. It is administered by the Office of Attorney Recruitment and Management (OARM). This is a career office with administrative oversight of all career attorneys within the Department. OARM promotes

and administers the HP and screens the electronic applications for initial eligibility based on factors such as graduation date and citizenship. Applicants are then referred to components (such as the Civil Rights Division) based on the applicant's stated preference.

The current system for HP hiring offers several improvements to the previous program. Prior to 2002, HP applicants paid their own way to interview in various locations across the country; they often met with a single representative from the Justice Department. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political and career attorneys for an interview. *More* individuals are now typically involved in the hiring process, not fewer. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program.

93. Please describe the process for reviewing applications and interviewing applicants.

ANSWER: The Office of Attorney Recruitment and Management (OARM) manages the applications and conducts the initial screening process to make certain that all applicants are eligible for participation in the Attorney General's Honors Program. The applications are then reviewed by both career and political appointees. Certain applicants are selected for interviews. Applicants are then interviewed by both career employees and political appointees and recommendations are made to the Assistant Attorney General.

94. What are the roles of the career attorneys (such as Section Chiefs and Deputy Section Chiefs) and political appointees in the process of evaluating attorney performance?

ANSWER: The standard form used to evaluate attorney performances requires approval by both a rating official and a reviewing official. In the Civil Rights Division, the rating official is typically the Section Chief who, along with the Deputy Section Chiefs, works directly and regularly with the attorneys. The reviewing official is typically a Deputy Assistant Attorney General to whom the Section reports. These evaluations are important tools for attorneys and Division management to measure an attorney's progress and work performance.

95. Career attorneys have complained that they have been penalized in their job evaluations for making recommendations that differ from the views of political appointees. Please provide all of the performance evaluations for every member of the teams that worked on the Texas redistricting preclearance and the Georgia photo identification preclearances. This

request includes evaluations for the periods before and after these preclearance determinations.

ANSWER: Performance evaluations are not adversely affected by virtue of an attorney's difference of opinion on a matter. There is always opportunity for healthy debate amongst colleagues over the legal and factual issues involved in the Department's work. Issues are often debated extensively before a decision is reached, and differences of opinion are expected. Furthermore, the Department of Justice has a robust system in place for employees to appeal negative performance evaluations.

In light of the privacy interests of the attorneys referenced in this question, we will provide the following information. Both the Texas redistricting and Georgia identification submissions were precleared after a deliberate and careful review of every relevant fact. No attorney's performance evaluation was adversely affected because of his or her opinions on these matters.

96. What steps have you taken to slow the attrition of experienced career attorneys from the Civil Rights Division?

ANSWER: The attrition rate in the Civil Rights Division during this Administration is almost identical to that of the previous Administration. We nevertheless make every effort to retain our talented and experienced attorneys. The current head of the Civil Rights Division has worked hard to create an environment of hard work, mutual respect, open dialogue and professionalism. In this vein, the Division recently created a new Office of Professional Development that is focused on the needs of individual attorneys for training and career resources. The Division also recently created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns.

97. The Boston Globe article also discusses three matters in which the Civil Rights Division assigned new hires with conservative credentials to advance arguments unprecedented in the Division. One case involved a lawsuit challenging a paid fellowship program at Southern Illinois University for minorities and women. A second case involved the Division's review of Georgia's photo identification law under Section 5 of the Voting Rights Act, in which a recent law school graduate's view that the law did not discriminate against African Americans prevailed over that of four other career staff with longer tenures in the Division. In the third case, the Division filed an amicus brief arguing that a public library violated a Christian group's civil rights by preventing religious groups from using the library for worship services.

Is it the Civil Rights Division's practice to hire attorneys whose ideological views are in keeping with the Department's apparent shift in priorities?

ANSWER: Without accepting the characterization of those three matters presented in the preamble, it should be noted that these three cases are hardly representative of the many hundreds of matters litigated by the Civil Rights Division in the past six years. The Civil Rights Division has worked hard to vigorously enforce the laws passed by Congress on behalf of all Americans. The Division's broad efforts in this area are unprecedented in scope; we have brought cases on behalf of African Americans, Hispanic Americans, Asian Americans, Native Americans, and women, as well as members of the Muslim, Christian, and Jewish faiths, among others.

The attorneys in the Civil Rights Division are among the best and the brightest in the country. While the Civil Rights Division employs a number of talented attorneys with a wide variety of backgrounds, there is no political litmus test used in deciding to hire or promote attorneys.

98. It appears to be the practice of the Civil Rights Division to assign attorneys to particular matters based on ideology. Is this consistent with your view of the manner in which the Department should staff investigations and litigation?

ANSWER: A career Section manager's decision to assign an attorney on a particular assignment or case involves many factors, including an attorney's experience, caseload, interests, and potential conflicts. The Department's goal is the even-handed enforcement of the laws passed by Congress. Political ideology plays no role in proving, as we must, that the facts of a specific case violate the requirements of federal law.

99. Where the career staff function effectively as an extension of the political appointees, what checks exist to ensure that the law and not ideology motivates the legal advice of the career staff?

ANSWER: The career section chiefs, who each have on average some two decades of experience in the Civil Rights Division, provide advice and recommendations in every case before it is brought. The Civil Rights Division, moreover, litigates its cases against competent counsel before independent courts. Our exemplary record of enforcement reflects the soundness of our litigation decisions. During this Administration, for example, the Appellate Section has an 87% success rate in filing amicus briefs in civil rights cases, as compared to just 61% during the previous Administration. Nor has the Division, during this Administration, ever been sanctioned by a court and ordered to pay damages, a record that compares favorably to the previous Administration's.

100. Please list all of the attorneys who left the Civil Rights Division from 2004 to the present and the date on which each began work in the Civil Rights Division.

ANSWER: In light of the individual privacy interests implicated by this request, we are providing the following responsive information. The rate of attorney attrition during this Administration is almost identical (less than a 1.5 % difference) to a comparable period of the prior Administration.

During FY 2004, 36 attorneys left the Division. Of those 36 attorneys, ten began work in the Division during the period from Calendar Year (CY) 2001 to 2004, 15 began work in the Division during the period from CY 1995 to 2000, five began work in the Division during the period from CY 1989 to 1994, three began work in the Division during the period from CY 1983 to 1988, two began work in the Division during the period from CY 1977 to 1982, and one began work in the Division during the period from CY 1971 to 1976. A number of Civil Rights Division attorneys accepted a retirement package offered to multiple Justice Department components in FY 2005. This explains a spike in the number of attorneys departing the Civil Rights Division in FY 2005.

During FY 2005, 63 attorneys left the Division. Of those attorneys, 25 began work in the Division during the period from CY 2001 to 2005, 25 began work in the Division during the period from CY 1995 to 2000, four began work in the Division during the period from CY 1989 to 1994, one began work in the Division during the period from 1983 to 1988, two began work during the period from CY 1977 to 1982, five began work in the Division during the period from CY 1971 to 1976, and one began work in the Division during the period between CY 1965 and 1970.

Finally, in FY 2006, 52 attorneys left the Division. Of those, 30 began work in the Division during the period from CY 2001 to 2005, while 16 began work during the period from CY 1995 to 2000, three began work in the Division during the period from CY 1989 to 1994, and three began work in the Division during the period from CY 1983 to 1988. The Division has been and remains strong, with each section chief, for example, averaging nearly two decades of experience in the Civil Rights Division. This experience, dedication, and practical knowledge continue to serve the Division well.

101. Please provide for each section of the Civil Rights Division the employment applications of the attorneys hired between 2004 and the present.

ANSWER: The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

102. Robert S. Berman, a long-time veteran of the Civil Rights Division, was overseeing the Voting Section's administration of Section 5 when political appointees overruled the recommendations of career attorneys to deny preclearance to Texas for its 2003 redistricting plan and to Georgia for its 2005 photo identification law. Mr. Berman agreed with the career staff that Section 5 objections were warranted. My understanding is that Mr. Berman

was recently reassigned and not permitted to return to the Voting Section after completing a detail to another office.

Please explain the circumstances of Mr. Berman's reassignment.

ANSWER: Mr. Berman requested and received a detail with the Administrative Office of the United States Courts, which he completed from September 26, 2005 to January 27, 2006. Mr. Berman decided to pursue this detail in connection with a program designed to better prepare employees for becoming a candidate for the Senior Executive Service. When Mr. Berman completed this detail and returned to the Civil Rights Division, it was decided that he would serve in a senior position in the Office of Professional Development.

Presidential Signing Statements and Executive Nonenforcement

103. On June 27th, 2006, Deputy Assistant Attorney General Michelle Boardman testified before this committee on the disturbing frequency with which President Bush has disregarded portions of duly enacted laws through his use of signing statements. The American Bar Association convened a special Task Force on Presidential Signing Statements and the Separation of Powers Doctrine made up of respected legal scholars and professionals from across the ideological spectrum. The Task Force recently issued its report, indicating that the President's use of signing statements fundamentally flaunts the basic constitutional structure of our government. The President of the ABA, Michael Greco, has said that the report "raises serious concerns crucial to the survival of our democracy."

In light of the ABA report, do you still maintain that there are no differences between this President's practice with regard to signing statements and the practices of prior Presidents in this area? If so, please indicate the flaws in the ABA's methodology that led it to an erroneous conclusion.

ANSWER: The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force suggests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g.*, *Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as

precatory."). Indeed, Assistant Attorney General Dellinger made clear early in the Clinton Administration that if "the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994).

The conclusions of the ABA Task Force Report have been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel during the Clinton Administration, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service ("CRS") recently reviewed the ABA Report and concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006) Moreover, the CRS found that while there is controversy over the number of statements, "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Id.* at CRS-9; *accord* Prof. Curtis Bradley and Prof. Eric Posner, "Signing statements: It's a president's right," The Boston Globe, Aug. 3, 2006 ("The constitutional arguments made in President Bush's signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton's statements.").

The ABA Report was also mistaken in suggesting that the President has issued significantly more constitutional signing statements than his predecessors. Indeed, the ABA Report claimed that the President had "produced signing statements containing . . . challenges" to more provisions than all other Presidents in history combined. See ABA Task Force Report at 14-15 & n. 52. That was done by separately counting each provision mentioned in a signing statement rather than by counting only the number of bills on which the President had commented. We believe that the number of individual provisions referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question. *See, e.g.*, *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy.

Other provisions raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha*.") (emphases added). Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

Because the ABA report did not present any new factual information or constitutional analysis, the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman continues to represent the position of the Administration on signing statements.

104. In 2002, Congress passed a law that requires the Attorney General to "submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice" either formally or informally refrains from "enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." 28 U.S.C. § 530D. This law requires the Attorney General to inform Congress both in the case of a signing statement for a new law and in situations where the President declines to enforce <u>existing laws</u>.

At the hearing before the Senate Judiciary Committee on June 27, 2006, Ms. Boardman committed to providing the Committee with a full accounting of the Justice Department's compliance with this provision over the last four years. We have yet to receive a follow-up from Ms. Boardman consistent with that commitment, and have not received any response to our written questions highlighting and restating this request. As the Attorney General,

you are specifically charged with fulfilling statutory reporting requirements outlined in 28 U.S.C. § 530D.

Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001.

ANSWER: For a full accounting, please see our response to question 79. As set forth in our response to question 106, below, we disagree that section 530D "requires the Attorney General to inform Congress . . . in the case of a signing statement for a new law."

105. As the Attorney General, have you complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that you have complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: Section 530D comprises three basic reporting provisions for the Department: a provision stating that the Attorney General or any officer of the Department shall report any formal or informal policy to refrain from enforcing or applying any Federal statute, rule, regulation, program, policy or other law within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional, or a policy to refrain from adhering to, enforcing, applying, or complying with a binding rule of decision of a jurisdiction respecting the interpretation, construction, or application of the Constitution, any statute, rule, regulation, program, policy, or other law, *see* 28 U.S.C. § 530D(a)(1)(A); shall report determinations to contest affirmatively in a judicial proceeding the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or a decision to refrain on the grounds that the provision is unconstitutional from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of such a provision of law, *see id.* § 530D(a)(1)(B); and shall report certain settlements against the United States involving more than $2 million or injunctive or nonmonetary relief that exceeds 3 years in duration, *id.* § 530D(a)(1)(C).

The Department takes the reporting provisions of section 530D very seriously. It is the practice of the Department to provide Congress with quarterly reports under 28 U.S.C. § 530D(a)(1)(C). Copies of those reports are attached; note that we have not yet located a copy of the report for the first quarter of 2004, but will provide a copy of that report when we do. The original of that report is in the possession of several Members of Congress, the Senate Legal Counsel, and the General Counsel of the House of Representatives.

To ensure compliance with the reporting provisions of section 530D(a)(1)(A), the Department periodically sends to components a reminder of the reporting provisions of section 530D(a)(1)(A) and a solicitation of relevant information. We are not aware of any

Department policy adopted since January 20, 2001, that implicates section 530D(a)(1)(A)(I). See our response to question 79. We do not understand your question to ask us to identify such policies adopted by previous Administrations that were the subject of formal congressional notice or public notice at the time of adoption and that this Administration has continued to implement.

Finally, the Solicitor General has sent reports to Congress pursuant to section 530D(a)(1)(B) with respect to the following provisions of law.

> **11 U.S.C. § 106.** In *In re: Robert J. Gosselin*, No. 00-2255 (1st Cir.), the Solicitor General declined to intervene to defend the constitutionality of this provision, and notified Congress about it in a letter dated October 25, 2001. A copy of that letter is attached. Section 106 abrogates state sovereign immunity in certain bankruptcy matters, and, at the time of the Solicitor General's letter, the Third, Fourth, and Fifth Circuits each had held that section 106(a) violated the Eleventh Amendment because Congress lacked the power validly to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4. *See generally Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings*, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] makes clear that Congress may not abrogate state sovereign immunity pursuant to Article I powers."). In the letter, the Solicitor General noted that in 1997 and 1998, his predecessor had declined to file a petition for certiorari in the Fourth and Fifth Circuit cases and notified Congress of that decision.
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> In *Tennessee Student Assistance Corp. v. Hood*, No. 02-1606, the Supreme Court granted certiorari in a case presenting the question whether 11 U.S.C. § 106 violated the Eleventh Amendment of the Constitution. In a letter dated November 26, 2003, the Solicitor General notified Congress that he had decided against intervening to defend the challenged provision, on the ground that no valid basis existed on which the provision could legitimately be defended. We are seeking to obtain a copy of that letter. The Court did not reach the question in *Hood* because it concluded that the facts of that case did not implicate the State's Eleventh Amendment immunity. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). The Court again granted certiorari to address that question in *Central Virginia Community College v. Katz*, No. 04-885 (S. Ct.). In a letter dated August 3, 2005, the Solicitor General again notified Congress that he had decided against intervening in the case to defend the constitutionality of 11 U.S.C. § 106(c). A copy of that letter is attached. *See also Central Virginia Community College v. Katz*, 126 S. Ct. 990 (2006).
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> **18 U.S.C. 2257.** In *Free Speech Coalition v. Gonzales*, 406 F. Supp. 2d 1196 (D. Colo. 2005), the district court largely declined to enjoin a federal record-keeping statute (18 U.S.C. § 2257) and implementing regulations requiring the producers of sexually explicit material to keep records showing that depicted sexual performers are adults. The court, however, preliminarily enjoined a particular

regulatory provision, 28 C.F.R. § 75.2(a)(1), requiring producers to keep a copy of the depictions of live Internet "chat rooms," reasoning that such a requirement would likely be unduly burdensome in light of applicable First Amendment considerations. The Solicitor General notified Congress of his determination not to appeal the adverse portion of the district court's ruling. We are seeking to obtain a copy of that letter. Note that after the decision of the district court, Congress amended the law in the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. v, and the Department is preparing a proposed revision to the regulation to reflect the amendments made to the statute.

29 U.S.C. § 2612(a)(1)(D). Following the Supreme Court's 2001 decision in *Bd. of Trustees of Univ. of Alabama v. Garrett*, and a series of adverse decisions from the courts of appeals for the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, the Solicitor General notified Congress on December 20, 2001, in connection with *Bates v. Indiana Department of Corrections*, No. IP01-1159-C-H/G (S.D. Ind.), that he would no longer intervene in cases to defend the abrogation of Eleventh Amendment immunity effected by the individual medical leave provision of the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(D), as "appropriate legislation" within the meaning of section 5 of the Fourteenth Amendment. The letter noted that "[t]he Supreme Court's analysis and holding in *Garrett* have left the Department with no sound basis to continue defending the abrogation of Eleventh Amendment Immunity" in cases of this sort. At the same time, the Solicitor General stated that the Department would continue to defend the constitutionality of the *substantive* medical leave provision, and that "no corresponding decision has been made to discontinue defense of the abrogation of Eleventh Amendment immunity for cases arising under the parental and family leave provisions of the Act." Indeed, the Department later successfully defended the abrogation of Eleventh Amendment immunity in the family care provisions of the FMLA. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003). A copy of that letter is attached.

42 U.S.C. § 14011(b). Section 14011(b), which was enacted as part of the Violence Against Women Act ("VAWA"), states that a victim of a sexual assault that was criminally prosecuted in state court may apply to a federal court for an order requiring the criminal defendant to undergo a test for HIV infection. In *In re Jane Doe*, 02-Misc.-168 (E.D.N.Y), the victim of an alleged sexual assault sought an order under section 14011 requiring the criminal defendant to be tested for HIV infection. In light of *United States v. Lopez*, 514 U.S. 549 (1995), and the Supreme Court's more recent decision in *United States v. Morrison*, 529 U.S. 598 (2000), which held that Congress lacked authority under the Commerce Clause to enact another provision of VAWA that provided a federal civil remedy for victims of gender-motivated violence, 42 U.S.C. § 13981, the Solicitor General determined not to defend the provision. We are seeking to obtain a copy of the letter notifying Congress.

Pub. L. No. 108-199, div. F, tit. II, § 177, 118 Stat. 3 (2004). In *ACLU v. Mineta*, 319 F. Supp. 2d 69 (D.D.C. 2004), the Solicitor General determined not to appeal, in light of First Amendment and Spending Clause concerns, a decision holding unconstitutional a congressional appropriations provision placing a condition on transportation grants that precluded local transport authorities from permitting display of advertising or other messages advocating the legalization or medical use of marijuana. By a letter dated December 23, 2004, a copy of which is attached, the Solicitor General notified Congress of that decision.

Regulations implementing 42 U.S.C. § 6971(a). *State of Florida v. United States*, No. 01-12380-HH (11th Cir.), involved Department of Labor regulations used to resolve certain whistleblower complaints. In that case, a state employee filed an administrative complaint alleging prohibited retaliation in employment. The State of Florida then filed suit in federal district court seeking an injunction against the administrative proceedings. The district court enjoined the administrative proceedings on the ground that the claimant's claims were barred by the Eleventh Amendment. The government filed an appeal and the Eleventh Circuit affirmed, relying on *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that "state sovereign immunity bars [the federal agency involved in that case] from adjudicating complaints filed by a private party against a nonconsenting State." Similarly, *Ohio EPA v. United States*, No. 01-3237 (6th Cir.), involved a former employee of the Ohio EPA who claimed he had been retaliated against. The district court there granted the state partial relief from administrative proceedings, and held that future proceedings could go forward "only if" the federal Government itself joined the action, apparently to overcome Eleventh Amendment concerns. In light of the Supreme Court's decision in *South Carolina State Ports Authority*, the Solicitor General notified Congress in an August 21, 2002 letter that he had decided not to file a petition for a writ of certiorari in *State of Florida*, and to dismiss the Government's appeal in *Ohio EPA*. A copy of that letter is attached.

Other: Notification letters also were sent to Congress in the following instances, although the intervention and review decisions at issue did not reflect any judgment by the Department that provisions were constitutionally infirm.

2 U.S.C. § 441b. In *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001), the court of appeals held that, in light of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), section 441b could not be constitutionally applied to the National Rifle Association with respect to payments made during one of the years in question. In a letter dated December 21, 2001, the Solicitor General notified Congress that he had decided against seeking certiorari in that case "primarily because I do not believe that it meets the principal criteria that the Supreme Court applies in deciding whether to grant certiorari," because the decision "does not squarely conflict with the decision of other courts of appeals on an issue on which the FEC lost." The letter also detailed several other considerations counseling against seeking certiorari.

The letter explicitly noted that the decision "[wa]s not based on any determination that Section 441b is constitutionally infirm."

8 U.S.C. § 1226(c). Section 236(c) of the Immigration and Nationality Act, 8 U.S.C. § 1226(c), prohibits the Attorney General, except in limited circumstances, from releasing aliens who have committed specified offenses and are removable from the United States. Two courts of appeals, and district courts in various circuits, held in habeas corpus proceedings that this provision violated due process because it does not provide for individualized bond hearings. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001); *Kim v. Ziglar*, 276 F.3d 523 (9th Cir. 2002). The Department appealed some of the adverse district court decisions in cases that became moot for various reasons. In those mooted appeals, the Department requested that the appellate court vacate the adverse district court judgment and remand the case to the district court with instructions to dismiss the case as moot. The Department succeeded in obtaining such a vacatur and remand order in only a few cases; in the majority of cases, the courts of appeals simply dismissed the appeal. Because the filing of such appeals involved a significant expenditure of government resources and because the individual district court cases had no binding effect on other cases, the Solicitor General determined not to file a motion for vacatur and remand routinely in all section 1226(c) appeals that became moot. In a letter dated January 23, 2002, a copy of which is attached, the Solicitor General notified Congress of that decision, and of his decision not to pursue an appeal in two related district cases, one of which he determined was an unsuitable vehicle for appellate consideration of the constitutionality of section 1226(c) and the other of which had no continuing effect. The Solicitor General continued to defend the constitutionality of the statute, and succeeded in persuading the Supreme Court that the statute was constitutional in *Demore v. Kim*, 538 U.S. 510 (2003).

8 U.S.C. § 1229b(b)(1)(A). The Solicitor General decided not to file a petition for a writ of certiorari in *Ramirez-Landeros v. Gonzales*, 148 Fed. Appx. 573 (9th Cir. 2005), in which the Ninth Circuit held, in an unpublished decision, that the Board of Immigration Appeals' denial of eligibility for cancellation of removal to an alien violated her constitutional right to equal protection. The Ninth Circuit's decision did not state that it was holding a provision of the statute unconstitutional, but rather that the BIA's application of its own adjudicatory precedent to the petitioner violated the alien's right to equal protection. The Solicitor General determined that the decision did not merit filing a petition for a writ of certiorari, because it was unpublished and did not create a conflict with any other court of appeals, and because the court had remanded to the BIA for further proceedings. Noting that "it is unclear whether the court's ruling is of the sort for which a report to Congress is contemplated by 28 U.S.C. 530D," the Solicitor General nevertheless submitted a letter informing Congress of his action on December 23, 2005, because he "thought it would be appropriate to bring this matter to [Congress's] attention." A copy of the letter is attached.

Pub. L. No. 108-21, § 401(*l*), 117 Stat. 650 (2003). The Solicitor General decided not to appeal the district court's opinion in *United States v. Robert Mendoza*, No. CR 03-730 DT, 2004 WL 1191118 (C.D. Cal. Jan. 12, 2004), holding that section 401(*l*) of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 unconstitutionally interfered with judicial independence and violated the constitutional separation of powers. In a letter dated May 11, 2004, the Solicitor General indicated that his decision was based on the unusual facts of that case: section 401(*l*) had never gone into effect (because the Department had implemented a statutory alternative procedure instead), the district court had sentenced the defendant within the Sentencing Guideline range, and other cases appeared to be better vehicles for defending the constitutionality of section 401(*l*). The letter noted that the decision not to appeal "does not reflect a determination on the part of the Executive Branch that Section 401(*l*) is unconstitutional," and observed that "the government has vigorously defended the provision's constitutionality." A copy of the letter is attached.

106. At a minimum, this statute requires the submission of a report to Congress every time a signing statement is issued. If there have been no transmittals, please indicate why you believe you can ignore the plain meaning of duly enacted provisions of law.

ANSWER: Signing statements are publicly issued documents published in the *Federal Register*, but the statute, 28 U.S.C. § 530D, does not require a separate submission to Congress when the President issues a signing statement. The President's signing statements that raise points of constitutional law generally do not "establish[] or implement[] a formal or informal policy to refrain" from enforcing a statute on constitutional grounds. 28 U.S.C. § 530D(a)(1)(A). Instead, they typically state in general terms that a particular provision will be construed consistent with the President's duties under the Constitution. In addition, a signing statement is a statement of the President, not an Executive Order or a memorandum that might fall under 28 U.S.C. § 530D(e). Therefore, not until the Department of Justice or the Attorney General has occasion to make an enforcement decision would the requirements of 28 U.S.C. § 530D apply. If the time comes when a potential constitutional violation would be realized by a statute's enforcement, Congress then would receive a report under the statute.

107. When you testified before Congress on July 18, 2006, Senator Leahy referred to 750 distinct provisions of law that have been disclaimed by this President through the use of signing statements. At the time, you testified under oath that the statistic of more than 700 was incorrect and had been disclaimed by the Boston Globe. Specifically, you said, "[t]hat's not true. That number is wrong", and later that "the Boston Globe retracted that number."

A follow-up article in the Boston Globe on July 19th entitled "Bush Blocked Probe, AG Testifies" disputes your claim, indicating that the Globe stands by

its claim that the president has challenged more than 750 laws. Christopher Kelly, one of the foremost scholars on the topic, claims that 807 challenges have been issued to individual provisions of law by this President through July 11, 2006. The ABA Taskforce report indicates that the President has challenged over 800 provisions of law; more than the roughly 600 total challenges issued by every previous president combined. In addition, most estimates are likely to be on the low end since the vague and sweeping language in many of these statements could theoretically touch on a wide range of provisions in a given bill. The statement issued in conjunction with the Consolidated Appropriations Act of 2004 contains 116 specific constitutional challenges. Contrast this with the 95 total constitutional challenges issued by the Reagan Administration, which supposedly accelerated the pace of constitutional challenges in signing statement.

Why did you claim that the Boston Globe retracted its estimate?

ANSWER: On May 4, 2006, the Boston Globe issued a correction of its misleading use of phrases such as "750 laws." The correction, a copy of which is attached, reads: "Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills." Although inartfully stated, this correction reveals that the Globe intends in these articles to refer to 750 individual provisions, as included in 125 bills, and does not intend to refer to 750 individual bills or "laws enacted since he took office." We believe that counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush's signing statements tend to be more specific in identifying provisions than those of his predecessors. As noted in response to questions 78 and 103 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns without enumerating the particular provisions in question.

Accordingly, we think the only accurate comparison is to count the number of bills concerning which the President has issued constitutional signing statements. As of September 20, 2006, the Congressional Research Service calculated that the President "has issued 128 signing statements, 110 (86%) [of which] contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-9 (Sept. 20, 2006). The number of bills for which President Bush has issued signing statements is comparable to the number issued by Presidents Reagan and Clinton, and fewer than the number issued by President George H.W. Bush during a single term in office.

108. As you know, it is possible to issue multiple challenges to discrete provisions of law in a single signing statement. Aside from the question of how many physical statements have been issued, what is your best estimate of how many *discrete provisions of law* have been challenged by this President through his

use of signing statements? Please also provide the source and methodology you have used to provide us with that number.

ANSWER: The Department has not counted the individual provisions mentioned by the President in his signing statements and it is not sensible to do so. In our extensive review of the statements of this and prior Presidents, it became apparent that this President is much more specific in detailing the provisions that could raise constitutional concern than other Presidents have been. Where other Presidents often referred generally to "several provisions" that raised constitutional concerns, this President specifically lists each provision. As noted in response to question 78 above, President Clinton, for example, routinely referred in signing statements to "several provisions" that raised constitutional concerns. *See, e.g.*, *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000* (Nov. 29, 1999) ("to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it would be inconsistent with my constitutional authority"; "This legislation includes *a number of provisions* in the various Acts incorporated in it regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration's objections to most of *these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities." "Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS* vs. *Chadha*.") (emphases added). The precision of President Bush's statements is a benefit, not a detriment, to Congress and the public. Thus, even if one wanted to count the number of specific provisions each President noted and compare them one to another, the statements of prior presidents do not allow for such a comparison, as discussed above.

Prison Rape Elimination Act

109. In response to the 2003 Prison Rape Elimination Act, the National Institute of Justice commissioned a study on prison rape by Case Western Reserve University Professor Mark Fleisher. The purpose of the Act was to create and implement a zero-tolerance policy toward rape and sexual abuse in

prisons. The clear legislative intent was that the Institute would commission a large-scale study of the issue.

From the outset, the choice of Professor Fleisher was troubling. Based on interim press reports on his findings, he appears to have used the study to advance drive an ideological agenda. Fleisher claims that rape rarely happens in prison and that prison sexual activity is consensual – rejecting out of hand the plain evidence that led to the enactment of the law in the first place.

Despite early and persistent criticism of the selection of Professor Fleisher by my office and others, he completed his study with the use of substantial department funds. We have yet to receive a full accounting of how and why someone with his far outside-the-mainstream agenda was selected to lead this critical research.

Please provide any information you have on the process by which Professor Fleisher was awarded over $900,000 by National Institute of Justice for a study on prison rape issues.

ANSWER: Immediately following the passage of the Prison Rape Elimination Act of 2003 (PREA), the National Institute of Justice (NIJ) began a program of research aimed at understanding the nature of prison sexual violence and what effective means could be used to prevent and eliminate it. NIJ's work is the counterpart to the large-scale statistical work sponsored by the Bureau of Justice Statistics (BJS), which will measure the incidence and prevalence of prison rape on a facility level basis in all correctional settings.

NIJ began work on this complementary effort by commissioning an ethnographic study on prison rape. Ethnography, a method drawn from anthropology, is designed to provide a qualitative description of a social phenomenon, based on field observations and/or interviews. This approach provides a means to understand human behavior and the context in which behavior occurs. In this case, the proposed research would study the culture of sexuality and rape in prisons from the perceptions of the inmates themselves.

NIJ staff recommended that Professor Fleisher of Case Western Reserve University be invited to submit a proposal for the study. This recommendation was based on the recognition of Professor Fleisher's record on prison research and his unique qualifications to conduct the proposed ethnographic studies. Following review of the submitted proposal, former NIJ Director Sarah V. Hart made the decision to make the research award to Professor Fleisher.

110. Was the process by which Professor Fleisher was awarded the grant noncompetitive? If so, please explain why other bids were not solicited. If not, please provide a list of rejected bids.

ANSWER: NIJ is committed to competitive processes for research awards. Most of NIJ's research awards are made through a competitive process. In a very few situations, however, a broad competition is not feasible or desirable. In the case of the ethnographic study, NIJ sought a specific type of study (ethnography) with specific research parameters.

In the fields of criminal justice and anthropology, there are many scholars who have successfully conducted ethnographic research and others who have conducted research on violence in male prisons. But very few researchers are experienced in both. NIJ staff reviewed Professor Fleisher's previous research and work and consulted with research scholars who had undertaken other types of research in prisons. Through these consultations, NIJ staff determined that Professor Fleisher was uniquely qualified by having successfully conducted research that intersects ethnography and violence research in male prisons. His book, *Warehousing Violence*, was an ethnographic study of violence in prisons and was recognized as an authoritative study by researchers in both criminology and anthropology. Professor Fleisher had the added credentials of having worked previously as a corrections officer at the Federal Bureau of Prisons. He brought real-life experience working in the very type of environment he proposed to study.

111. In a letter dated March 20, 2006, Assistant Attorney General William Moschella responded to an inquiry I made and indicated that an advisory panel was convened *after* Professor Fleisher was selected to lead the research, and did not appear inclined toward intensive oversight. The foremost advocacy group on this issue, Stop Prisoner Rape, is listed by [Assistant] AG Moschella as a participant on this advisory panel, but they have informed us that they were not present at this meeting and were told of Professor Fleisher's selection to lead this study by an email exchange between Professor Fleisher and Professor Robert Weisberg of Stanford University. When finally learning about the Fleisher study, they immediately objected.

How was this advisory panel constituted?

ANSWER: For many research projects, particularly for large-scale nationally based research, NIJ often recommends to its grantees that advisory panels be created to provide guidance to them for their proposed research. These panels are not intended to be oversight panels or to direct the researcher on how to conduct their work; rather, they function as a consulting team, providing guidance and reviews to the principal investigator, who is ultimately responsible for all aspects of the study. For that reason, they are usually comprised after NIJ makes a research award.

The advisory panel on Professor Fleisher's project was first convened in October, 2003, to review his initial research design. The panel examined his proposed research methods and study design and provided substantive recommendations to improve his research plan, including the recommendation to limit the study to examining only non-consensual and forcible sex rather than a broader range of prison sexual activity. The panel gave an overall endorsement to the project and to Professor Fleisher.

The advisory panel included prison administrators, prison researchers, criminal justice researchers, prisoner advocates, former inmates, and staff from NIJ, the Bureau of Justice Statistics, and the Federal Bureau of Prisons. As with most advisory panels on NIJ-sponsored research, NIJ staff made specific recommendations as to the membership of the panel, and the final composition of the panel was agreed to by both NIJ and the principal investigator.

112. Why was Stop Prisoner Rape listed as a participant in the advisory panel when in fact it played no role in overseeing Professor Fleisher's research?

ANSWER: The letter dated March 20, 2006 to Senator Kennedy from Assistant Attorney General William Moschella misstated that Lara Stemple, then Executive Director of the Stop Prisoner Rape (SPR) organization, was a member of the project advisory panel. This incorrect information was provided in error by an NIJ staffer who assisted in preparing the letter. NIJ learned of the error on March 28, 2006, when Kathy Hall-Martinez, Co-Executive Director of SPR, called NIJ to ask why Ms. Stemple's name had been included as a member of the advisory board in Mr. Moschella's letter.

The NIJ staffer responsible for the error immediately acknowledged the mistake. On March 30, 2006, the staffer contacted Mrs. Hall-Martinez to apologize for the error and to explain how it had been made. Mrs. Hall-Martinez accepted the apology. During the call, Mrs. Hall-Martinez asked the staffer to meet with her during an upcoming trip to Washington. On May 1, 2006, Mrs. Hall-Martinez and Ms. Cynthia Totten, Senior Policy Associate at SPR, met with NIJ staff managing the project to inquire further about Professor Fleisher's study, and to receive a summary of the research results. Both Mrs. Hall-Martinez and Ms. Totten seemed satisfied by their discussions with NIJ. Following the discussions, NIJ considered the matter of the error closed.

113. If the advisory panel met after Professor Fleisher was selected to conduct this research, who was directly involved in selecting him and what was the purpose of the panel?

ANSWER: As stated in the responses to questions 109 and 111, following passage of the Prison Rape Elimination Act of 2003 (PREA), NIJ began a program of research aimed at understanding the nature of prison sexual violence and what effective means could be used to prevent and eliminate it. An ethnographic study was commissioned by

former NIJ Director Sarah V. Hart to study the culture of sexuality and rape in prisons from the perceptions of the inmates themselves.

NIJ staff recommended that Professor Fleisher of Case Western Reserve University be invited to submit a proposal for the study. This recommendation was based on the recognition of Professor Fleisher's record on prison research and his unique qualifications to conduct the proposed ethnographic studies. Following review of the submitted proposal, Director Hart made the decision to make the research award to Professor Fleisher.

NIJ often recommends to its grantees that advisory panels be created to provide guidance to them for their proposed research. The advisory panel examined Professor Fleisher's research methods and study design and provided substantive recommendations to improve his research plan, including the recommendation to limit the study to examining only non-consensual and forcible sex rather than a broader range of prison sexual activity.

Geneva Convention / Torture

114. If we want other nations to respect us, we have to respect the law of nations, which means full compliance with the Geneva Conventions. I'm deeply concerned about the direction you have led President Bush to take on one of the basic principles of international law. By refusing to follow the plain language of the Geneva Conventions at Guantanamo Bay, you are unnecessarily jeopardizing our respect in the world and endangering the safety of our own military personnel.

Until now, our nation has always complied with the Geneva Conventions, because doing so is so clearly in our national interest. Those rules guarantee legal protections to soldiers of all nations, including American soldiers. Every other country in the world, including our closest allies in the war on terrorism, knows that we are violating the plain language of these historic treaties. We're making up our own laws of war as we go along. The Administration's actions at Guantanamo have damaged our reputation abroad, caused serious tensions with our allies, made the war on terrorism harder to win, and violated a fundamental principle of international law that has long protected American soldiers serving abroad.

You've called the Geneva Conventions "quaint." Recently, one of your top Assistants, Steven Bradbury, called them "vague and ambiguous." During your confirmation hearings, many of us on this Committee were concerned with your role in the Bybee Memo, which made outrageous justifications for the use of torture, even though the Convention Against Torture, which Congress ratified in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture.

You played a key role in the promulgation of this Administration's policies on torture. You were part of a legal analysis that concluded that techniques such as 20-hour interrogations, excessive sleep deprivation, the use of dogs, slaps to a person's face or stomach and forced nudity were "lawful."

Isn't it true that the Supreme Court held in Hamdan that Common Article 3 of the Geneva Conventions applies to al Qaeda detainees? Isn't it true that Common Article 3 prohibits imposing on any detainee "inhumane treatment," or "humiliating or degrading treatment?"

ANSWER: Let us be clear first that the United States remains, as it always has, committed to complying with our obligations under the Geneva Conventions, including Common Article 3. Neither the Attorney General nor any other Administration official has ever stated that the Geneva Conventions, taken as a whole, are "quaint" or that the United States remains anything but deeply committed to the Geneva Conventions. Rather, what we have stated, and what we believe to be indisputable, is that the Conventions, which were drafted shortly after World War 2, were not drafted with a conflict against an international terrorist organization in mind. Indeed, some provisions in the Third Geneva Convention, which governs the treatment of prisoners of war, appear ill-suited to apply to captured terrorists. For instance, the treaty requires that prisoners of war be provided commissary privileges, scrip (i.e, advances of monthly pay, ranging from the equivalent of eight Swiss Francs per month for prisoners below the rank of sergeant to seventy-five Swiss Francs per month for generals), athletic uniforms, and scientific instruments. These are not the kind of materials that one would expect to provide to captured members of al Qaeda. The President has concluded that such unlawful enemy combatants are not entitled to the protections that the Geneva Conventions provide to prisoners of war.

In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Supreme Court did hold that Common Article 3 of the Geneva Conventions applies to the armed conflict with al Qaeda. *Id.* at 2794-96. Common Article 3 imposes an overarching requirement of humane treatment, and then imposes specific prohibitions that implement the humane treatment requirement. Its explicit prohibitions include bans on torture and murder. Contrary to the suggestion in your question, Common Article 3 does not contain an unspecified prohibition on "humiliating and degrading treatment." Rather, Common Article 3 bars "outrages upon personal dignity, *in particular, humiliating and degrading treatment or punishment.*" The terms used by Common Article 3 are important, as they refer to the humiliating and degrading treatment that constitutes an outrage upon personal dignity. As authoritative commentators have noted, this prohibition is directed at conduct that is universally condemned. Jean Pictet, III *Commentary on the Geneva Convention* at 39 (the "outrages upon personal dignity" prohibition "concern[s] acts which world public opinion finds particularly revolting").

The President, as well as senior members of his Administration, have expressed concern about the lack of definition in certain of Common Article 3's terms. Address of the President (Sept. 6, 2006). As you note, Acting Assistant Attorney General Steve Bradbury described Common Article 3's prohibition against "outrages upon personal dignity, in particular, humiliating and degrading treatment" to be "vague and ambiguous." Indeed, the Attorney General made the same point in his August testimony before this Committee. Many Members of Congress have reached the same conclusion. The Administration worked with Congress to address the problems created by this uncertainty, a dialogue that resulted in Congress's enactment of the Military Commissions Act of 2006 ("MCA"). The MCA amended the War Crimes Act to provide nine specific criminal offenses covering the grave breaches of Common Article 3 on which signatories are obligated to impose criminal sanctions. MCA §§ 6(a)(2), 6(b). To address the remaining requirements of Common Article 3, Congress restated its prohibition on the cruel, inhuman, and degrading treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. MCA § 6(c). Also, Congress confirmed the President's power to issue an authoritative interpretation of the Geneva Conventions, outside of the grave breaches prohibited by the nine specific offenses in the War Crimes Act. MCA § 6(a)(3). These actions were essential, because we owe our brave intelligence personnel "clear rules, so they can continue to do their jobs and protect the American people." Address of the President (Sept. 6, 2006).

Your assertion therefore that this Administration has displayed contempt for the Geneva Conventions is plainly incorrect. The President always has endeavored to uphold our international commitments, including those under the Geneva Conventions. As an initial matter, he determined that members of al Qaeda—terrorists who do not wear uniforms, are not commanded by a responsible authority, and do not abide by the laws of war—are not entitled to the protections due prisoners of war under the Third Geneva Convention. *See* Statement of White House Press Secretary Ari Fleischer (May 10, 2003). As discussed above, that determination is consistent with the opinion of the Supreme Court in *Hamdan*, which did not accord detainees in the armed conflict against al Qaeda prisoner-of-war status.

That determination is also fully consistent with the Geneva Conventions themselves. One of the bedrock principles underlying the Geneva Conventions is reciprocity. State Parties abide by the Convention in return for ensuring that their soldiers will receive similar treatment. Al Qaeda, however, has not, cannot, and would not sign the Conventions. To the contrary, as we know from the brutal execution videos that they release for propaganda, al Qaeda tortures, beheads, and executes those who fall into their hands. It is beyond question that they would not respect the Geneva Conventions no matter how we treat their combatants. Despite the President's determination that the United States had no international law obligation to afford the protections of the Third Geneva Convention to al Qaeda detainees, he directed the Department of Defense to treat all al Qaeda and Taliban detainees held at Guantanamo Bay humanely and, where practical, consistent with the principles of the Geneva Conventions. Members of Congress from both parties have recognized in fact that the

detainees at Guantanamo Bay have been treated humanely. *See* David D. Kirkpatrick, *Senators Laud Treatment of Detainees In Guantanamo*, N.Y. Times, June 28, 2005, at A15.

The President also determined that Common Article 3, which applies only to "conflict[s] not of an international character" did not apply to the armed conflict with al Qaeda. Memorandum of the President (Feb. 7, 2002). After all, the United States was engaging al Qaeda forces throughout the world, and the vicious attacks of September 11th were conducted by foreign terrorists, trained abroad, who infiltrated the United States to cause massive civilian casualties. These facts supported the President's determination that the conflict with al Qaeda was "of an international character." Although five members of the Supreme Court ultimately disagreed with the President, the Court of Appeals (including now-Chief Justice Roberts) accepted that reading, and thus we disagree with your assertion that the President's interpretation violated the "plain language" of the Geneva Conventions. Indeed, the international community has recognized that the text of Common Article 3 does not plainly extend so far and thus sought Additional Protocol I to the Geneva Conventions to accomplish this task. As you know, the United States consistently has declined to ratify Additional Protocol I precisely because it would have extended the protections of the Geneva Convention to terrorist organizations. Message of President Ronald Reagan Transmitting to the Senate a Protocol to the 1949 Geneva Conventions (Jan. 29, 1987). In this context, the President's interpretation of the text of the Geneva Conventions was entirely reasonable.

The application of the Geneva Conventions to the war on terror raises difficult and novel questions. The war on terror is unlike any this Nation has faced before. We have an enemy that owes allegiance to no nation state, that lacks any responsible command, that wears no uniforms, and that has no regard for the laws of war. Moreover, this is an enemy whose very purpose is to attack innocent civilians and instill fear in the American people, rather than to engage and defeat our military. This type of conflict "was not envisaged when the Geneva Conventions were written in 1949." Statement by the White House Press Secretary on the Geneva Conventions (May 7, 2006). The dedicated men and women who are prosecuting the war on terror are not, as you state, "making up our laws of war as we go along." Rather, they are conscientiously and in good faith striving to apply treaties that were written for an entirely different type of conflict.

115. What is your view now? Would you now say that such techniques are "degrading and humiliating" and violate Article 3 of the Geneva Convention? Should the United States obey Article 3?

ANSWER: It is unclear what you mean by "such techniques," but your question here touches upon several assertions made in Question 114 about particular forms of treatment and interrogation techniques that you state are part of the Administration's "policies on torture." To be clear: The President has not authorized torture and will not do so. As the President has recently re-affirmed: "I want to be absolutely clear with our people and the

world: The United States does not torture. It's against our laws, and it's against our values. I have not authorized it, and I will not authorize it." (September 6, 2006 speech); *see also, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, Public Papers of the Presidents (July 4, 2005) ("[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law."). It is strictly prohibited by United States law, and by the policies of the Administration. The Supreme Court has determined that Common Article 3 applies to the armed conflict with al Qaeda, and the United States will abide by it.

116. Article 3 of the Geneva Convention requires that tribunals be independent and impartial. It also requires that the accused should be present at all stages of the proceeding. What is your view on legislation proposed by Chairman Specter that fails to include these basic safeguards which are fundamental requirements of human rights law and the laws of war?

ANSWER: Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Nothing in that text specifies any particular procedural rights for the accused. The MCA, however, does provide that the accused will be present at all stages of the proceeding (except where the accused is disruptive or threatens the physical safety of other participants, *see* 10 U.S.C. § 949d(b), (e)), and it gives the accused the ability to see and challenge any evidence introduced against him, *see id.* § 949d(f). At the same time, the MCA grants the Government robust protection for the sources and methods used to collect classified evidence. *See id.* § 949d(f)(2)(B). We believe that Chairman Specter's bill, like the MCA, would have fully satisfied Common Article 3. Congress now has enacted the MCA, which will provide the United States with the tools to conduct full and fair trials of captured al Qaeda terrorists.

117. Follow-Up: Fundamental due process safeguards must exist to identify the guilty and protect the innocent. As Dean Koh testified before this Committee last week, 156 countries – including the United States – have ratified Article 14 of the International Covenant on Civil and Political Rights, which demands basic procedural guarantees. They include:

- **an independent and impartial tribunal,**
- **the presumption of innocence,**
- **proof "beyond a reasonable doubt,"**
- **open and public trials, with exceptions only for demonstrable reasons of national security or public safety,**
- **representation by independent and effective counsel,**
- **the right to examine and challenge evidence offered by the prosecution,**

- **the right to present evidence of innocence,**
- **the right to cross-examine adverse witnesses and to offer witnesses,**
- **fixed, reasonable rules of evidence, and**
- **fair appellate review of convictions and sentences.**

What is your position on whether these requirements must met in any legislation authorizing trials of detainees accused of terrorism?

ANSWER: We agree that military commissions conducted by the United States should provide the accused with full and fair trials. We reach this conclusion not because the constitutional guarantees provided to our Nation's citizens necessarily apply to the trials of unlawful enemy combatants, but because our Nation's commitment to the rule of law demands no less. We believe that the MCA authorizes military commissions that provide full and fair trials, while preserving the flexibility required by the circumstances surrounding the capture and detention of unlawful enemy combatants. And, indeed, the Act specifically provides for every one of the safeguards that you have identified above.

That said, we would emphasize that while the MCA includes the rights you have identified, we would disagree with the suggestion that the International Covenant on Civil and Political Rights ("ICCPR") provides an appropriate body of law for military commissions. The legal framework for the War on Terror is the law of armed conflict, and the ICCPR does not apply to the military commission prosecutions of enemy combatants, particularly if those trials are conducted outside the United States. Military commissions established under the MCA do comply fully with the law of armed conflict, including Common Article 3.

118. If you object to the inclusion of any of these requirements, could you please provide the Committee with your specific objections and your rationale for them within one week of today's hearing?

ANSWER: Please see answer to question 117, above.

Authorization for Use of Military Force

119. I hope that you would agree with me on one very clear point made by the Supreme Court – the Executive Branch is bound to comply with the rule of law. As Justice Breyer stated in *Hamdan v. Rumsfeld*, "Congress has not issued the Executive a "blank check." Yet, the Administration continues to rely on the Authorization for the Use of Military Force passed by Congress in 2001 for its unprecedented and reckless expansion of its powers, while refusing to work with Congress on important issues relating to national security. Yet the Joint Resolution says nothing about detention of terrorist suspects or about domestic electronic surveillance.

We cannot let the President misuse fear of terrorism as an excuse for seizing absolute power. Instead of working with Congress to modernize the law, the President has chosen to ignore the rule of law.

In light of the *Hamdan* decision, the Administration continues to insist that the Supreme Court's ruling has no impact on the Terrorist Surveillance Program. A wide range of bipartisan constitutional law scholars and former government officials strongly disagrees.

ANSWER: Please see the response to question 120, below.

120. How can the Administration continue to assert that the Authorization for Use of Military Force authorized these activities of questionable legality? Where do you draw the line on the President's inherent powers under Article II?

ANSWER: We assume for the purpose of answering this question that the Terrorist Surveillance Program involves electronic surveillance as that term is defined in FISA.

The suggestion that the Administration has "chosen to ignore the rule of law" or would use "fear of terrorism as an excuse for seizing absolute power" is demonstrably false. The Administration is acutely aware that we are a nation of laws, and that no matter how barbaric our enemies, all actions taken by the United States in the war on terror must follow the rule of law. To that end, the Administration has carefully and consistently scrutinized all programs that are part of the war on terror to ensure that they comply with the Constitution and other laws. Nor has the Administration avoided "working with Congress" in waging the war on terror. To the contrary, since September 11, 2001, the Administration has, consistent with its responsibilities to protect national security information and long-standing Executive Branch practice, regularly briefed congressional leaders from both political parties, the leaders of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, and members of the Intelligence Committees on various intelligence activities. The Administration also has worked with Congress time and again on legislation relevant to the war on terror, including the PATRIOT Act, the PATRIOT Act reauthorization, the MCA, and other more discrete pieces of legislation; and for months, it has sought legislation to modernize FISA for the 21st Century.

With respect to your specific question, we do not believe that the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), negates the legal basis for the Terrorist Surveillance Program. In *Hamdan*, the Court concluded that the Military Commission Order Number 1 ("MCO") conflicted with the Uniform Code of Military Justice ("UCMJ"). Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—in the UCMJ and in ensuing regulations—were impracticable for the trial of alien terrorists and also held that certain of the procedures in the MCO, if ultimately implemented in a military

commission, would not be consistent with the UCMJ, including a provision that incorporated standards in Common Article 3 of the Geneva Conventions. As the Court recognized, the Government did not argue that the President's inherent constitutional authority to conduct military commissions would overcome statutory restrictions, but rather that the military commissions complied with the Force Resolution. *See id.* at 2777 n. 29.

For several reasons, we continue to believe that the Court's opinion does not undermine our analysis of the Terrorist Surveillance Program. First, as we have explained, section 109 of FISA expressly contemplates that Congress may authorize electronic surveillance through a subsequent statute without amending or referencing FISA. *See* 50 U.S.C. § 1809(a)(1) (prohibiting electronic surveillance "except as authorized by statute"); *see also Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 20-23 (Jan. 19, 2006) (explaining argument in detail). Indeed, historical practice makes clear that section 109 of FISA incorporates electronic surveillance authority outside the procedures of FISA and Title III. *See id.* at 22-23 & n.8 (explaining this point with respect to pen registers, which would otherwise have been unavailable in ordinary law enforcement investigations).

The primary point of analysis in our *Legal Authorities* paper is *not* that the Force Resolution altered, amended, or repealed any part of FISA. Rather, the Force Resolution is best understood as another congressional source of electronic surveillance authority (specific to the armed conflict with al Qaeda), and surveillance conducted pursuant to the Force Resolution is consistent with FISA. In this regard, FISA is quite similar to the provision at issue in *Hamdi v. Rumsfeld*, 542 U.S. 519 (2004). In *Hamdi*, five Justices concluded that the Force Resolution "clearly and unmistakably authorized detention," even of U.S. citizens who fight for the enemy, as a fundamental and accepted incident of the use of military force, notwithstanding a statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," 18 U.S.C. § 4001(a). *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Although, as you note, the Force Resolution "says nothing about detention of terrorist suspects," Justice O'Connor wrote that "it is of no moment that the Force Resolution does not use specific language of detention." *Id.* at 519. Instead, what mattered was the fact that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." *Id.* So it is with signals intelligence as well. FISA and section 4001(a) operate similarly, incorporating authority granted in other statutes. Article 21 of the UCMJ, the primary provision at issue in *Hamdan*, by contrast, has no provision analogous to section 109 of FISA or section 4001(a).

Second, the UCMJ expressly deals with the Armed Forces, and with armed conflicts and wars. By contrast, under FISA, Congress left open the question of what rules should apply to electronic surveillance during wartime. *See Legal Authorities* at 25-27 (explaining that the underlying purpose behind FISA's declaration of war provision, 50 U.S.C. § 111, was to allow the President to conduct electronic surveillance outside FISA procedures while Congress and the Executive Branch would work out rules applicable to the war). It is therefore more natural to read the Force Resolution to supply

the additional electronic surveillance authority contemplated by section 111 specifically for the armed conflict with al Qaeda than it is to read the Force Resolution as augmenting the authority of the UCMJ, which, as noted, is intended to continue to apply for the duration of any armed conflict or war. Indeed, there is a long tradition of interpreting force resolutions to confirm and supplement the President's constitutional authority in the particular context of electronic surveillance of international communications. Both Presidents Wilson and Roosevelt ordered the interception of electronic communications during the two World Wars, based only on general force authorization resolutions and their inherent powers under the Constitution. *See Legal Authorities* at 16-17; *cf. id.* at 14-17 (describing long history of warrantless intelligence collection during armed conflicts). The words of the Force Resolution should be interpreted in light of that historical practice.

Third, the punishment of violations of the laws of war through military commissions is a matter closer to explicit grants of constitutional authority to Congress, such as its authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I. § 8, cl. 10. The Terrorist Surveillance Program does not concern matters of retrospective punishment, but rather involves a choice of tactics—the interception of enemy communications—in the armed conflict with al Qaeda. There is no clear authority for Congress to regulate the President's collection of intelligence against an enemy during an armed conflict. Indeed, the Court in *Hamdan* expressly contrasted matters of military justice at issue there with the authority to direct military campaigns, which is a matter exclusively for the President's control. *See* 126 S. Ct. at 2773 (quoting approvingly *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment)) ("Congress cannot direct the conduct of campaigns."). Moreover, nothing in *Hamdan* calls into question the uniform conclusion of every federal appellate court to have addressed the issue that the President has constitutional authority to collect foreign intelligence within the United States, consistent with the Fourth Amendment. *See, e.g.*, *In re Sealed Case,* 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . ."). Indeed, the conclusion of the Foreign Intelligence Court of Review that "FISA [cannot] encroach on the President's power," *id.*, is supported by *Hamdan*'s reliance on Chief Justice Chase's opinion in *Ex Parte Milligan*.

Fourth, the Government did not argue and the Court did not decide in *Hamdan* that the UCMJ would be unconstitutional as applied if it were interpreted to prohibit Hamdan's military commission from proceeding. *See* 126 S. Ct. at 2774 n.23. In order to sustain this argument, the Court would have had to conclude that the UCMJ, so interpreted, unduly interfered with "the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97. Such a showing would be considerably easier in the context of the Terrorist Surveillance Program, where speed and agility are so essential to the ongoing defense of the Nation.

Finally, statutes must be interpreted, where "fairly possible," to avoid raising serious constitutional concerns. *INS v. St. Cyr,* 533 U.S. 289, 299-300 (2001) (citations

omitted); *Ashwander v. TVA,* 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). This canon of constitutional avoidance has particular importance in the realm of national security, where the President's constitutional authority is at its highest. *See Department of Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security"). Although we believe that FISA is best interpreted to allow statutes such as the Force Resolution to authorize electronic surveillance outside traditional FISA procedures, this interpretation is at least "fairly possible," and, in view of the very serious constitutional questions that otherwise would be presented, must therefore be accepted under the canon of constitutional avoidance. *See also Legal Authorities* at 28-36.

Hate Crime Legislation

121. During your confirmation hearings, I asked you if you would be willing to publicly support our efforts to expand hate crime legislation to protect victims of discrimination-based violence. You promised that you would "commit the Department to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law." Yet, the Department has consistently declined to take action, or even state a formal position on pending hate crime legislation.

How do you account for the Department's inability to make hate crimes investigations and prosecutions a priority? Are you willing to make it one?

ANSWER: The Civil Rights Division has compiled a significant record on criminal civil rights prosecutions. Since 2001, we have increased the staffing of criminal prosecutors within the Division by 13 percent. During this Administration, we have filed a record number of criminal civil rights cases, and charged a record number of such defendants, in a single year. And in the area where the Division has historically brought the bulk of its criminal prosecutions, cases involving the willful use of excessive force by law enforcement officials, in the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000) we have increased prosecutions by 25 percent (238 v. 190) -- and convicted 50 percent more defendants (327 v. 219). Also, in FY 2006, the Division charged more defendants in bias-motivated cases than the previous year (20 v. 16) and convicted more defendants than the previous year (19 v. 13). In addition, from FY 2001 through FY 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division convicted 58 defendants during that same period.

Prosecuting hate crimes remains a priority of the Department. The Civil Rights Division is committed to the vigorous enforcement of our nation's civil rights laws and, in recent years, has brought a number of high profile hate crime cases. Examples of recent prosecutions include:

United States v. *Coombs* (M.D. Florida): In August 2006, a defendant in Florida pleaded guilty to burning a cross in his yard to intimidate an African-American family that was considering buying a house located next door to the defendant's residence.

United States v. *Saldana, et al.* (C.D. California): In July 2006, four Latino gang members were convicted of threatening and assaulting African Americans in a neighborhood that the defendants and their gang members sought to control. All four defendants, members of the notorious Avenues street gang, were convicted of a conspiracy charge that alleged numerous violent assaults against African-Americans, including murders that took place in 1999 and 2000. Specifically, the jury found that the defendants caused the death of Christopher Bowser, an African-American man who was shot while waiting at a bus stop in Highland Park on December 11, 2000. The jury also found that the defendants caused the death of Kenneth Kurry Wilson, an African-American man who was gunned down while looking for a parking place in Highland Park on April 18, 1999. Three of the defendants were also convicted of murdering Wilson because he was African-American and because he was using a public street, and using a firearm in furtherance of a conspiracy to commit hate crimes. Three of the four defendants received life sentences and one defendant is scheduled to be sentenced in January 2007.

United States v. *Oakley* (District of Washington, D.C.): In April 2006, the defendant entered a guilty plea to emailing a bomb threat to the Council on American Islamic Relations.

United States v. *Baird* (W.D. Arkansas): In April 2006, the defendant entered a guilty plea to burning a cross near the home of a woman whose white daughter's African American boyfriend was living with her and her daughter. Three additional defendants were charged in May 2006 with participating in the cross burning. The defendant was sentenced in November 2006. Three additional defendants were tried in September 2006, two of whom were convicted on charges of conspiracy and are awaiting sentencing.

United States v. *Nix* (N.D. Illinois): In March 2006, the defendant entered a guilty plea to igniting an explosive device that damaged a van owned by a Pakistani family and parking near their house in an attempt to interfere with their housing rights.

United States v. *Baalman, et al.* (District of Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pled guilty to assaulting an African-American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.

United States v. *Fredericy and Kuzlik* (Northern District of Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.

United States v. *Hobbs, et al.* (Eastern District of North Carolina): In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

United States v. *Hildenbrand, et al.* (Western District of Missouri): In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

United States v. *May* (Western District of North Carolina): On March 4, 2004, in a case personally argued by then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.

In addition to these cases, the Division has worked in recent years with local prosecutors in an effort to investigate Civil Rights era murders. In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants who subsequently admitted guilt were acquitted in state court four weeks after the murder. Both men are now deceased. Although the investigation showed that there was no federal jurisdiction, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi for her consideration.

In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American sharecropper in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

Moreover, after September 11, 2001, the Civil Rights Division implemented an initiative to combat "backlash" crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. This initiative has led to numerous prosecutions involving physical assaults, some minor and some involving dangerous weapons and resulting in serious injury, as well as threats made over the telephone, on the internet, through the mail, and in face-to-face interactions. We have also prosecuted cases involving shootings, bombings, and vandalism directed at homes, businesses, and places of worship. The Department has investigated more than 750 bias motivated

incidents since September 11, 2001. Our efforts have resulted in 32 federal convictions in "backlash" cases. The Department also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

Additionally, the Community Relations Service (CRS) of the U.S. Department of Justice launched proactive information and conflict resolution efforts with Arab American, Muslim, and Sikh communities. CRS created a series of educational law enforcement protocols for Federal, State, and local officials addressing racial and cultural conflict issues between law enforcement and Arab American, Muslim American, and Sikh American communities. CRS also created a law enforcement roll-call video titled, "The First Three to Five Seconds," that addresses cultural behaviors and sensitivities, stereotypes, and expectations encountered in interactions and communications with Arab, Muslim, and Sikh communities.

CRS established the Arab, Muslim, Sikh Cultural Awareness Train the Trainer Program, which has created a group of community-based Arab, Muslim, and Sikh trainers capable of delivering law enforcement training across the country. This program has been implemented in numerous cities across the nation. As a result of this training effort, as well as direct training of law enforcement by CRS, Federal, state, and local law enforcement and local communities have reported increased cultural knowledge and awareness, a newly developed cooperative spirit within the community, and decreased community anxieties.

CRS instituted a Rapid Response Team, which aims to defuse rumors and prevent escalation of violence when there are allegations of racial profiling, discrimination, or when a hate incident has taken place by facilitating dialogue between law enforcement and the community and facilitating rapid and accurate dissemination of information.

122. The current federal hate crime law was passed soon after the assassination of Martin Luther King. Today, however, it is a generation out of date. It still does not protect many marginalized and vulnerable groups in society from increasing bigotry and hate. These hate crimes often pass unnoticed. Currently, there are no statistics on these crimes. These are few – if any – investigations, and rarely a prosecution.

In light of reported and confirmed hate crimes against Arab and Middle Eastern communities since 9/11, why hasn't the Department included a specific category in its annual hate-crimes report that reflects the number of hate crimes targeting these communities? As I am sure you know, some Arab Americans are Christians, so the existing category for anti-Muslim attacks is insufficient. Is the Department willing to provide more information beyond "Anti-Other Ethnicity" to at least include "Anti-Arab Crimes?"

ANSWER: The annual FBI hate crime report has to date included a sub-category for Muslims under "religion," but not a category for persons of Arab or Middle Eastern national origin. The Department is always seeking ways to better track patterns of hate crimes, and will continue to consider ways to make its reporting more effective. Both the FBI and the Civil Rights Division currently keep, and regularly publicize, records on the number of hate crime cases they have investigated that can be considered possible post-9/11 backlash. This category includes attacks on Muslims, Arabs, Persians, and South Asians. It also includes attacks on Sikhs, who have faced attacks because they are mistakenly believed to be Muslim or Middle Eastern. The Civil Rights Division has opened files on 760 incidents of hate crimes against these groups since 9/11.

123. Would you also be willing to report [on] more specific data on attacks against transgender individuals? Would you be willing to include information on gender-based crimes which is now collected by many states? If you are unwilling or unable to provide detailed statistics, can you please provide a detailed response explaining why you object to the inclusion of such statistics?

ANSWER: The issue of victimization of transgender individuals is an emerging concern, especially in correctional settings. The Bureau of Justice Statistics is addressing this issue, by including in its surveys of sexual violence in prisons, jails and juvenile facilities, a question to determine if an inmate is a transsexual. The survey question is self-administered using computer assisted technology, to avoid any social stigma in reporting such a status.

Sample surveys, which depend on a relatively small, randomly selected group of respondents to produce national estimates, are generally not well suited to measuring the experiences of numerically small populations. Consequently, inclusion of questions on victimization of transgendered individuals in most BJS surveys would not provide reliable (or even usable) data. The studies being done under the Prison Rape Elimination Act, however, are very large (with nearly 80,000 sample prisoners expected to be interviewed each year); and as a result, we will be able to determine if the studies will produce any reliable statistics.

Gun Control (Vitter Amendment / CJS Approps)

124. In the aftermath of Hurricane Katrina, law enforcement and public safety officials worked to restore the peace and security of the people in New Orleans. Recently, the Senate voted to adopt an amendment offered by Senator Vitter that will prevent law enforcement from using funds appropriated under the Act to create safe zones and will also reduce the ability of these communities to protect themselves or disaster. Technically, first responders won't even be able to collect abandoned guns if they are receiving federal funds from the Department of Homeland Security.

Has the Department taken a position on Senator Vitter's amendment? What impact would this amendment have on the effectiveness of first responders during an emergency or natural disaster?

ANSWER: The Department of Justice has not taken a position on Senator Vitter's amendment. The Department has been unable to identify any instance in which its agents or personnel confiscated any lawfully possessed weapons from any person in the aftermath of Hurricane Katrina. Therefore, the Department does not believe this amendment will have a significant impact on its operations in similar circumstances. A limitation on the use of appropriated funds would likely have no impact on state and local law enforcement officials' authority to conduct operations as they deem appropriate.

125. Follow-up: Recently, Senator Feinstein offered an unsuccessful amendment to a Commerce, Justice State appropriations bill that would allow state and local governments and law enforcement agencies to obtain crime gun trace data for certified law enforcement, counterterrorism, national security or intelligence purposes.

What is the position of the Justice Department on whether local law enforcement should have access to this data?

ANSWER: The Department's position on firearms trace data is expressed in its two views letters on H.R. 5005, which were transmitted to House Judiciary Committee Chairman Sensenbrenner. Copies of those two letters are attached for your information.

126. What about creating explicit provisions in federal law to guarantee that sufficient information-sharing is available to ensure that guns are not sold to individuals on the FBI's Terrorist Watch List?

ANSWER: The Department is still studying the issues presented by the purchase of firearms by individuals in the FBI's terrorist organization database to ensure both that any new authority to deny a firearm transfer to a person in the database does not prematurely compromise ongoing investigations and that the process that would be available to any person so denied does not unduly compromise sensitive intelligence information, sources, or methods.

Use of confidential informants:

127. Recently, the House Judiciary Committee approved significant legislation that responds to the Boston FBI office's use of confidential informants. For decades, unchecked and unaccountable rogue FBI agents in Boston failed to follow the Attorney General's Guidelines in handling confidential

informants. The Guidelines require state and local prosecutors to be notified by the FBI if the FBI learns that confidential informants are engaging in criminal activity. We now know that there were over twenty murders by such informants in Massachusetts, and the FBI never told state and local law enforcement what it knew.

On your watch, what steps are you taking to ensure that past misuse of confidential informants will not happen again? What safeguards are in place to prevent abuses from occurring?

ANSWER: After the misconduct and criminal activity involving the use of confidential informants in the Boston Field Office was uncovered, the Department of Justice revised the Guidelines governing the FBI's use of confidential informants. Since that time, the Department has endeavored to scrupulously enforce those Guidelines, while continuing to assess their efficiency and to anticipate the emergence of new operational challenges.

The Guidelines provide basic standards and procedures on the use of confidential informants, including rules for such matters as determining the suitability of an individual for use as an informant, the instructions that should be given to informants, special approval requirements for the use of individuals in certain sensitive categories as informants, payment of informants, authorization of otherwise illegal activity, and the reporting of unauthorized illegal activity. Specifically, all FBI confidential informants are subjected to a rigorous validation process. An FBI Agent must document extensive background information on a person intended to be opened as an informant. This includes the person's criminal history, motivation for providing information, and any promises or benefits that may be provided. The FBI is also required to repeatedly instruct an informant as to the proper scope of his or her activities. An FBI Supervisor must review the documentation and approve the use of the person as an informant. The Guidelines provide special approval requirements for informants who are: high-level confidential informants; under the obligation of a legal privilege or affiliated with the media; federal or state prisoners, probationers, or parolees; and for "long-term informants" - - that is, informants who have been registered with the FBI for more than five years. These informants present unique and highly-sensitive circumstances which require increased scrutiny and oversight. The approvals for the continued use of such informants in a criminal investigation or prosecution are considered by a "Confidential Informant Review Committee" (CIRC), which is jointly comprised of representatives from the FBI and attorneys from the Department of Justice. Further, an FBI Agent is prohibited from authorizing an informant to engage in any activity that would otherwise constitute a criminal violation under federal, state, or local law unless the activity has the prior, written authorization of the FBI Special Agent-in-Charge and, in the case of more serious criminal activity, the authorization of the Chief Federal Prosecutor as well. In any event, the authorization for that criminal activity is generally limited to 90 days, and is required to be extensively monitored to minimize any adverse effect on innocent persons, and to ensure that the informant does not realize undue profits from his or her participation in the activity. Should an FBI Agent learn that the informant has engaged in

unauthorized criminal activity, the Agent must notify his supervisor and the appropriate federal prosecutor.

Currently, the Department of Justice is in the process of finalizing the FBI's multi-faceted project to "re-engineer" its Confidential Human Informant Program. We are pleased to report that this project is making great progress in its principal objective: to standardize the policies and procedures applicable to all FBI confidential human sources (including not only confidential informants, but also cooperating witnesses and intelligence assets). As part of the project, the FBI has dedicated considerable resources to the development of an automated system to maintain standardized records required for determining the suitability of an individual to be used as a source, and for documenting required procedures providing continual oversight of the source's activities. In addition, the Attorney General recently signed and issued a revised version of the Attorney General Guidelines relating to confidential FBI sources, entitled "The Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources." These new Guidelines, drafted jointly by the FBI and Department of Justice attorneys, will significantly facilitate the re-engineering project by streamlining administrative requirements and will also serve to improve compliance with established rules addressing the use of human sources.

128. What measures are you implementing to improve information-sharing with state and local law enforcement? Has the Justice Department taken a position on the House bill, H.R. 4132, sponsored by Congressman Delahunt?

ANSWER: Information-sharing is a top priority of the Department of Justice. The Department has a strong commitment to exchanging law enforcement information with state and local governments and other federal agencies and departments. As reiterated in a recent memorandum from Deputy Attorney Paul J. McNulty to the Departments' United States Attorneys and law enforcement components, the Department continues to implement its Law Enforcement Information Sharing Program (LEISP) strategy and to transform the way we share information with our federal, state, and local partners.

A guiding principle of the LEISP strategy is the concept of OneDOJ. As its name implies, OneDOJ embodies the Department's commitment to presenting a single face to our information-sharing partners by enabling components' information to be presented in a uniform and consistent manner through the use of common tools, systems, and other sharing mechanisms. Our OneDOJ approach enables and indeed obligates Department components to move forward aggressively to expand existing information-sharing capabilities. Our LEISP strategy and OneDOJ approach also recognize the reality of resource limitations and the fact that different components possess different capabilities. Accordingly, the Department is fully committed to moving forward aggressively and efficiently, while recognizing the limits of available resources and capacities, to achieve its information sharing objectives.

The Department has made significant progress in recent years by, for example, launching information-sharing pilot programs in Seattle, Washington, and San Diego, California. In addition, the FBI has used the Regional Data Exchange System (R-DEx) to facilitate information-sharing in Jacksonville, Florida, and St. Louis, Missouri. These efforts, among others, have resulted in the Department and state and local law enforcement agencies exchanging valuable information and achieving operational successes within communities. The Department intends to expand its regional sharing initiatives in 2007 and beyond.

The Department of Justice's Review of Immigration Courts

129. As you know, public criticism of immigration judges has increased, especially by federal court judges. There have been complaints of judicial misconduct, due process violations and abusive behaviour towards immigrants appearing before them.

In January, you wrote to the immigration judges and members of the Board of Immigration Appeals expressing our concern that persons coming before the immigration courts are not being treated with the respect and consideration they deserve. I commend you for acknowledging this problem and ordering a comprehensive review of the immigration courts.

I understand that Department officials have been meeting with personnel from the Executive Office for Immigration Review, the private bar, as well as non-profit organizations representing immigrants as part of this review.

Can you give us an update on the review of the immigration court system? Will you have recommendations for areas of improvement?

ANSWER: As noted in our answer to question 30, above, on August 9, 2006, the Department announced the completion of the review together with twenty-two measures that the Attorney General has directed as a result of the review that are designed to improve the performance and quality of work of the immigration courts. That same day, Assistant Atttorney General Moschella also sent the Committee a letter summarizing the results of the review and attaching a description of the twenty-two measures. We believe those documents answer these questions and we are pleased to provide a copy of them for inclusion in the record of this hearing.

Senator Biden

Justice Assistance Grant and COPS Funding.

130. During your testimony before the Senate Judiciary Committee, you stated that the massive cuts in federal assistance to state and local law enforcement did not demonstrate a lack of support for local law enforcement. Rather, you argued that this decision was reluctantly made in the face of a tough budget climate. You also stated that funding from the Department of Homeland Security can be used for crime prevention programs, but at the same time the Administration has advocated the complete elimination of the Law Enforcement Terrorism Prevention Program – the only DHS guaranteed for law enforcement. Local cops have told me for years the value of the Justice Assistance Grant, and the Government Accountability Office recently released a report concluding what you testified to before the House Appropriations Committee last years – cops on the streets helps to deter crime. Given that the FBI's Uniform Crime Report has begun to reflect the anecdotal evidence of rising crime in our communities, it is my hope that you the Administration will reverse course and begin to re-build the Federal, state and local law partnership that helped drive crime rates down to the lowest levels in a generation.

A) Do you believe that programs such as the Justice Assistance Grant and the COPS hiring program help local police agencies fight crime?

ANSWER: We do not dispute that historically local law enforcement agencies have found JAG and COPS funds useful . As was noted in the response to question 50, the decision to eliminate JAG was not made lightly. The Department was required to make many difficult choices, and JAG was one of them.

As was also reflected in the response to question 50, we decided to focus funding on initiatives in key priority areas where we have the best chance of making a difference. It should also be noted that JAG funding represents less than one percent of the total funding spent by state and local governments on law enforcement activities.

B) As the nation's top cop, do you believe that it is your role to fight for the interests of state and local law enforcement during the budget decisions that are made at the Office of Management and Budget? If yes, how do you explain the decision to cut over $1 billion in guaranteed funding for law enforcement over the past five years? If no, who should (or does) take on this responsibility in Bush Administration?

ANSWER: The Department of Justice most assuredly takes into account the interests of our state and local partners during the OMB budgeting process. However, Department

spending on state and local law enforcement has never accounted for more that a small fraction of total state and local law enforcement spending, at most five percent. Over the last two decades spending on police protection by states and localities has increased every year regardless of the size of the federal contribution.

The Department continues to make significant contributions to state and local law enforcement not only through grants but also through federal agency-led joint crime task forces. The Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the Drug Enforcement Agency, and the United States Marshal's Service each partner with state, and local law enforcement through joint task forces that continue to be highly effective at combating serious and specific crime problems. The Department also continues to fund numerous initiatives, such as Project Safe Neighborhoods, the Weed and Seed Program, the Anti-Methamphetamine Initiative, and the Comprehensive Anti-Gang Initiative, aimed at reducing drug and violent crime.

C) Do you believe that rising crime rates should lead to a shift in priorities at the Department of Justice?

ANSWER: Federal prosecutors continue to focus resources on the most serious violent offenders, taking them off the streets and putting them behind bars where they cannot re-offend. In FY 2006, the Department prosecuted 10,425 federal firearms cases against 12,479 defendants, an increase of more than 65 percent since the inception of Project Safe Neighborhoods.

The Department has also taken several important steps to address the prevalence of gang violence. The Department established an Anti-Gang Coordination Committee to organize the Department's wide-ranging efforts to combat gangs. Each United States Attorney has appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. The Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, have developed comprehensive, district-wide strategies to address the gang problems in their districts. The Department has also established a Comprehensive Anti-Gang Initiative, which focuses on reducing gang membership and gang violence through enforcement, prevention, and reentry strategies.

The Department has created a new national gang task force, called the National Gang Targeting, Enforcement and Coordination Center (GangTECC). GangTECC is composed of representatives from the Criminal Division, Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, United States Marshals Service, and the Department of Homeland Security, among others. The center targets national and international gangs, coordinates overlapping investigations, ensures that tactical and strategic intelligence is shared among law enforcement agencies, and serves as a coordinating center for multi-jurisdictional gang investigations involving federal law enforcement agencies. GangTECC itself works in close cooperation with the National Gang Intelligence Center,

an interagency entity that provides federal, state, and local law enforcement officers with access to timely intelligence about gangs, their activities and their members.

The Criminal Division's Gang Squad is a specialized group of federal prosecutors charged with developing and implementing strategies to attack the most significant national and international gangs in the United States. These prosecutors will not only prosecute select gang cases of national importance, they will also formulate policy, assist and coordinate with USAOs on legal issues and multi-district cases, and work with numerous domestic and foreign law enforcement agencies to construct effective and coordinated prevention and enforcement strategies.

The Department has established and leads numerous joint violent-crime-related task forces, including, among others, FBI-led Safe Streets Task Forces and Gang Safe Streets Task Forces that focus on dismantling organized gangs; U.S. Marshals Service-led Congressionally-mandated Regional Fugitive Task Forces and district-based task forces across the country that focus on fugitive apprehension efforts; ATF-led Violent Crime Impact Teams, which include federal agents from numerous agencies and state and local law enforcement, that identify, target, and arrest violent criminals to reduce the occurrence of homicide and firearm-related violent crime; and the DEA Mobile Enforcement Team (MET) Program that responds to requests from state, local, and tribal law enforcement officials to help stem the rise in drug-related violence and methamphetamine trafficking, often targeting violent gangs involved in drug trafficking activity, such as the Hell's Angels, Latin Kings, Bloods, Crips, Mexican Mafia, and Gangster Disciples.

D) Do you see any connections, as many local law enforcement officials do, between funding cuts and the increase in crime rates?

ANSWER: As was noted in the response to question 74, it would be premature to attribute a rise in the crime rate to a decline in federal aid to state and local law enforcement programs. This is especially true given that federal aid is a very small percentage of the total funding spent by state and local governments on law enforcement activities.

FBI Personnel

131. In the Administration's most recent budget proposal, the Administration does not request any funding for additional agents at the Federal Bureau of Investigation. Since 2000, you have added nearly 2,000 total agents and you have transitioned nearly 1,000 from crime to terrorism. Undoubtedly, this is an appropriate response, but it is my view that we need to add an additional 1,000 agents to, at a minimum, maintain our ability to combat crime and drugs. For example, new drug investigations have dropped nearly 60 percent; new white collar investigations are down by 32 percent and violent

crime investigations are down 40 percent. Given that we are asking so much more of local law enforcement and providing minimal assistance through federal grants, we need to ensure that our FBI has the resources and personnel to maintain its pre 9-11 capacity to combat crime.

A) In your view, is it possible to re-orient the FBI towards a counter-terrorism posture while maintaining its capacity to combat crime?

B) Is it possible to do this with 1,000 fewer agents focusing on the crime problem? If you answer "yes," please explain how this is possible in your view.

ANSWER: The Funded Staffing Level for FBI criminal case agents has decreased by 994 agents, or 18%, since the attacks of 9/11. Despite the loss of those agent positions, protecting the nation's citizens from traditional criminal offenses has always remained a core function of the FBI, and 48% of all FBI agents remain allocated to these criminal matters.

To compensate for the decrease in criminal agents, the FBI has made difficult choices in determining how to most effectively use the available agents. In 2002, the FBI established as its criminal program priorities: public corruption, civil rights, transnational and national criminal enterprises (which include violent gangs and the MS-13 initiative), white collar crimes (which include corporate fraud and health care fraud), and violent crimes (which include crimes against children).

Since public corruption was designated as the top criminal priority, over 260 additional agents were shifted from other criminal duties to address corruption cases. The FBI is singularly situated to conduct these difficult investigations, and our effectiveness is demonstrated by the conviction of more than 1,000 corrupt government employees in the past two years.

The FBI has also maintained a steady commitment to addressing civil rights matters, and the number of these cases has remained fairly constant even as the complexity of the cases has increased. For example, the number of complex human trafficking cases increased by almost 200% from 2001 to 2005, and the resolution of these cases has generally required both more time and more agents than the average non-human trafficking case.

The FBI has addressed violent street gang matters though its Violent Gang Safe Streets Task Force (VGSSTF) program, which leverages Federal, state, and local law enforcement resources to investigate violent gangs in urban and suburban communities. There are currently 128 VGSSTFs in 54 FBI field offices, composed of 561 FBI SAs, 76 other Federal agents, and 924 state/local law enforcement officers. The number of FBI SAs addressing gangs has increased, with a decrease in the number of SAs addressing bank robberies, although the FBI still addresses violent and serial bank robberies.

Although the FBI has had to reduce the number of SAs working Governmental fraud matters since 9/11/01, FBI agents still respond to serious crime problems, as exemplified by the FBI's current initiatives to address hurricane-related fraud and Iraq contract fraud. The FBI does not currently open Governmental fraud cases unless the loss exceeds $1 million.

The FBI also prioritizes investigations within its White Collar Crime Program, emphasizing corporate/securities fraud and health care fraud. The corporate fraud cases, in particular, are very labor intensive, but they are a priority for the FBI because so many represent the private industry equivalent of public corruption, where the dishonest actions of a few people in leadership positions cause tremendous monetary losses and undermine investor confidence, both of which can threaten economic stability.

The FBI has also compensated for the decrease in SAs addressing traditional criminal matters by leveraging resources through the Organized Crime Drug Enforcement Task Force and High Intensity Drug Trafficking Area initiatives. Following September 11, 2001, resources were diverted from FBI's drug enforcement efforts, and the Department of Justice, with Congressional support, has been restoring the drug agent level within DEA. Since September 11, 2001, DEA has continued to increase its Priority Target Organization (PTO) investigations and has repeatedly exceeded established targets for disrupting and dismantling those organizations, which includes the removal of ill-gotten revenues from trafficking drugs. In 2001, DEA disrupted or dismantled 94 PTOs and in FY 2006, DEA disrupted or dismantled 1,305 PTOs, an increase of 1,288%. Since 2001, DEA has increasingly focused its agent investigative work hours on disrupting and dismantling PTOs and Consolidated Priority Organization Targets (CPOTs) - the "Most Wanted" drug trafficking and money laundering organizations, believed to be primarily responsible for the nation's illicit drug supply.

The FBI has shifted criminal resources to implement the Child Prostitution and Violent Crime Task Force initiatives. The child prostitution initiative is a coordinated national effort to combat child prostitution through joint investigations and task forces that include FBI, state and local law enforcement, and juvenile probation agencies. This initiative has resulted in more than 500 child prostitution arrests (local and federal combined), 101 indictments, 67 convictions, and the identification, location, and/or recovery of 200 children. To address violent crime, the FBI has partnered with other state and local law enforcement agencies to create 24 Violent Crime Task Forces throughout the U.S. The FBI also funds and operates 18 Safe Trails Task Forces to address violent crime in Indian Country.

In addition to the above initiatives, the FBI has continuously worked to offset the effect of reduced personnel resources through technology, intelligence analysis, and enhanced response capability. In October 2005, the NCIC fugitive data base was integrated with the Department of State passport application system, resulting in automatic notification when fugitives apply for United States passports. In December 2005, eight Child Abduction Rapid Deployment Teams were established in four regions of the United States. These teams are available to augment field office resources during

the crucial initial stages of a child abduction. The FBI is currently developing a means of integrating sex offender registries and other public data bases to better identify sex offenders in the vicinities of child abductions and to "flag" sex offenders who have changed locations without satisfying registration requirements.

Finally, we note that in addition to the FBI, the Department deploys the resources of the Drug Enforcement Administration, especially its Mobile Enforcement Teams, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives, especially its Violent Crime Impact Teams, to combat violent crime around the country. The Marshals Service has a significant role to play as well through its fugitive apprehension functions in assisting state and local law enforcement in their efforts to address violent criminals.

132. I understand that beginning in May 1997 states began submitting protection orders records to the National Crime Information Center (NCIC). Please update me on the status of the federal collection of domestic violence protection orders and the ability of individual states to electronically access protection orders issued in other states.

ANSWER: As of August 1, 2006, the NCIC Protection Order File contained 959,772 records. Forty-seven of the 50 states contribute records to the file. These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, as well as the District of Columbia and the U.S. Virgin Islands.

The information contained in the NCIC Protection Order File is accessible to all 50 states, the District of Columbia, and the territories of American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

133. While the vast majority of domestic violence and sexual assault investigations and prosecutions are handled at the state and local level, federal law enforcement also plays a critical role. I am particularly interested in data on the following crimes: 18 U.S.C. § 2241 (aggravated sexual assault), 18 U.S.C. § 2242 (sexual abuse), 18 U.S.C. § 2244 (abusive sexual contact), 18 U.S.C. § 922(g)(8) and § 922(g)(9) (firearm possession by a batterer), 18 U.S.C. § 2261 and § 2261A (interstate domestic violence and stalking) and 18 U.S.C. §2262 (interstate violation of a protection order). For each of these provisions, for each year since 2002, please describe how many cases your Department investigated, how many were prosecuted and what were the outcomes (e.g., sentence duration, restitution, etc.).

ANSWER: Data from United States Attorneys' Offices (USAOs) is maintained by the Executive Office for United States Attorneys' (EOUSA) case management system. The Department of Justice keeps its statistical information by fiscal year (FY). Some cases might be received or opened as "matters" in one fiscal year and then become a "case" in another fiscal year. The term "matter" means investigatory matters referred to a USAO for prosecution. Not all matters ultimately have charging instruments (complaints, informations, or indictments) filed. A matter is opened in a USAO when an agency requests a prosecutive opinion, but no commitment is made by a USAO to actually prosecute. A matter becomes a "case" when a charging document (complaint, information, indictment) is filed with the court.

	Investigations (Matters received)	Prosecuted (Cases filed)	Outcome (Termination)
18 U.S.C. § 2261 (also includes 2261A)			
FY			
2002	35	20	16 guilty[3], 0 acquitted, 1 dismissed, 13 incarcerated (1 for a life term), 3 no imprisonment
2003	36	18	14 guilty, 3 acquitted, 1 dismissed, 14 incarcerated (1 for a life term), 0 no imprisonment
2004	31	18	14 guilty, 0 acquitted, 1 dismissed, 14 incarcerated, 0 no imprisonment
2005	33	19	17 guilty, 0 acquitted, 0 dismissed, 17 incarcerated (4 for life terms), 0 no imprisonment
2006	22[4]	11	18 guilty, 1 acquitted, 3 dismissed, 17 incarcerated (3 for life terms), 1 no imprisonment

[3] Guilty means that either a guilty plea was tendered by the defendant or that the defendant was convicted following a trial.
[4] FY 06 includes data received by EOUSA through July 31, 2006.

18 U.S.C. § 2262

FY			
2002	9	5	4 guilty, 0 acquitted, 1 dismissed, 4 incarcerated, 0 no imprisonment
2003	6	4	1 guilty, 0 acquitted, 0 dismissed, 1 incarcerated, 0 no imprisonment
2004	8	5	3 guilty, 0 acquitted, 2 dismissed, 3 incarcerated, 0 no imprisonment
2005	12	4	5 guilty, 0 acquitted, 0 dismissed, 5 incarcerated, 0 no imprisonment
2006	5	5	2 guilty, 0 acquitted, 0 dismissed, 2 incarcerated

18 U.S.C. 922(g)(8)

FY			
2002	106	75	64 guilty, 1 acquitted, 12 dismissed, 55 incarcerated, 9 no imprisonment
2003	113	84	63 guilty, 1 acquitted, 9 dismissed, 59 incarcerated, 4 no imprisonment
2004	128	88	75 guilty, 1 acquitted, 5 dismissed, 62 incarcerated, 13 no imprisonment

2005	109	78	61 guilty, 2 acquitted, 11 dismissed, 55 incarcerated, 6 no imprisonment
2006	75	46	62 guilty, 1 acquitted, 4 dismissed, 52 incarcerated, 10 no imprisonment

18 U.S.C. 922(g)(9)

FY			
2002	245	197	129 guilty, 2 acquitted, 13 dismissed, 110 incarcerated, 19 no imprisonment
2003	257	220	166 guilty, 5 acquitted, 20 dismissed, 142 incarcerated, 24 no imprisonment
2004	299	231	175 guilty, 3 acquitted, 20 dismissed, 144 incarcerated, 31 no imprisonment
2005	253	194	199 guilty, 3 acquitted, 15 dismissed, 174 incarcerated, 25 no imprisonment
2006	149	137	161 guilty, 3 acquitted, 16 dismissed, 142 incarcerated (2 for life terms), 19 no imprisonment

18 U.S.C. § 2241[5]

FY			
2002	419	197	128 guilty, 6 acquitted, 27 dismissed, 104 incarcerated (2 for life terms), 24 no imprisonment

[5] The crime of aggravated sexual abuse involves an act of penetration and can be used to charge cases where either an adult or child has been victimized. The statistics provided herein include cases where an adult, a child or both was sexually assaulted.

2003	397	198	155 guilty, 7 acquitted, 17 dismissed, 138 incarcerated (2 for life terms), 17 no imprisonment
2004	344	161	117 guilty, 8 acquitted, 14 dismissed, 107 incarcerated (5 for life terms), 10 no imprisonment
2005	311	147	145 guilty, 6 acquitted, 12 dismissed, 123 incarcerated (4 for life terms), 22 no imprisonment
2006	242	127	116 guilty, 4 acquitted, 11 dismissed, 100 incarcerated (6 for life terms), 16 no imprisonment

18 U.S.C. § 2242[6]

FY			
2002	98	48	35 guilty, 1 acquitted, 10 dismissed, 28 incarcerated, 7 no imprisonment
2003	89	58	47 guilty, 3 acquitted, 4 dismissed, 44 incarcerated, 3 no imprisonment
2004	95	34	28 guilty, 5 acquitted, 5 dismissed, 27 incarcerated, 1 no imprisonment
2005	89	43	34 guilty, 3 acquitted, 3 dismissed, 31 incarcerated, 3 no imprisonment

[6] The crime covers acts of sexual penetration against an adult or a minor over the age of 12. Thus, the statistics represented here reference cases where an adult, a minor over 12 years of age, or both were victimized.

2006	55	27	33 guilty, 2 acquitted, 3 dismissed, 33 incarcerated, 0 no imprisonment

18 U.S.C. § 2244[7]

FY			
2002	123	94	80 guilty, 4 acquitted, 12 dismissed, 62 incarcerated, 18 no imprisonment
2003	113	80	82 guilty, 3 acquitted, 7 dismissed, 65 incarcerated, 17 no imprisonment
2004	98	73	73 guilty, 2 acquitted, 4 dismissed, 62 incarcerated (1 for a life term), 11 no imprisonment
2005	102	74	78 guilty, 3 acquitted, 6 dismissed, 61 incarcerated, 17 no imprisonment
2006	80	53	49 guilty, 1 acquitted, 4 dismissed, 38 incarcerated, 11 no imprisonment

134. The Violence Against Women Act of 2005 contains several new and innovative programs, such as the court training and improvement program and privacy protection program in Title I, the sexual assault services program in Title II, several initiatives for young victims of violence in Title III, child-focused programs in Title IV, and targeted programs for Indian women in Title IX. What efforts is the Department taking to implement all of the Act's new programs? Is your Department actively seeking full funding for these new initiatives? Please include in your answer details on the new deputy director position in the Office on Violence Against Women who is charged with overseeing efforts to combat violence against Indian women.

[7] This statute pertains to sexual assault cases where sexual contact, the touching of an intimate body part, forms the basis of the offense. The statute can be used to charge cases where an adult or child is victimized. Thus, statistics included herein count cases where an adult, a child, or both were sexually assaulted.

ANSWER: . The President's 2007 Budget allocates $347,013,000 for the Department's Office on Violence Against Women (OVW). An additional $21,869,000 is requested for programs administered by the Office of Justice Programs that support victims of child abuse. These amounts do not include increased funding or new initiatives based on the recently enacted reauthorization of the Violence Against Women Act (VAWA) ("VAWA 2005"), due to the fact that the reauthorization was signed just prior to the release of the 2007 President's Budget. As the Administration prepares future budget proposals, the reauthorization will be considered.

OVW has implemented the changes that VAWA 2005 made to existing OVW grant programs. First, the Office will issue a letter to all FY 2006 grantees to notify them of certain changes that will take effect with their 2006 awards. Second, OVW has modified grant special conditions to reflect those statutory changes that took effect in FY 2006. Third, OVW program specialists have begun drafting FY 2007 solicitations that reflect statutory changes that take effect in FY 2007. Several of these solicitations are now available at www.usdoj.gov/ovw/currentsolicitations.htm.

In addition, OVW began to implement two of the new grant programs authorized by VAWA 2005 – Grants to Indian Tribal Governments and Enhancing Culturally and Linguistically Specific Services for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking – because the funding for these two programs is based on a percentage of funds appropriated for existing grant programs. In July 2006, OVW convened a focus group on culturally and linguistically specific services for victims. The information gained from this meeting will be used to develop the new program and to administer other programs. For example, information from the meeting will guide OVW and State formula grant administrators in implementing the new set-aside for culturally and linguistically specific services in the STOP Violence Against Women Formula Grant Program.

OVW held the first annual Tribal Consultation on September 19, 2006, in Prior Lake, Minnesota. OVW worked closely with numerous tribal leaders to develop the consultation's agenda. OVW also sought the advice of the National Congress of American Indians in planning the consultation. Over 100 tribal leaders and representatives attended the Consultation. OVW is using tribal input from the consultation to develop the new Grants to Indian Tribal Governments Program. OVW plans to post the solicitation for the Grants to Indian Tribal Governments Program in January, 2007. OVW has already begun the planning process for the 2007 Consultation.

The new Deputy Director for Tribal Affairs, Lorraine P. Edmo, joined OVW on October 30, 2006. Ms. Edmo comes to the Department with more than 25 years of experience working on behalf of American Indian and Alaska Native people in both the federal and nonprofit sectors. Ms. Edmo has directed several national organizations that advocate for tribal and national education issues. These include the National Indian Education Association, the American Indian Graduate Center, and the federally chartered National Fund for Excellence in American Indian Education. Prior to joining the Department of Justice, Ms. Edmo worked with the U.S. Department of the Interior as the

Executive Director for the National Fund for Excellence in American Indian Education. She has also contributed to research and policy issues as a specialist with the Office of Indian Education at the U.S. Department of Education. As Deputy Director for Tribal Affairs, Ms. Edmo will assist in the efforts to explore different innovations regarding violence against Native women and share knowledge that can be replicated nationwide.

135. The Violence Against Women Act contains important directives for your Department to collect and disseminate information and research on family violence. Please update me on the status of the following reports and when you expect them to issue.

Annual Report on Effectiveness of STOP Program
Biennial Report on Effectiveness of all VAWA Programs
Annual Report on Campus Programs
Annual Stalking Report
Report on Effects of Parental Kidnapping
Report on State Laws Regarding Insurance Discrimination Against Victims of Violence Against Women
Report on Workplace Effects from Violence Against Women
Biennial Safe Havens for Children Pilot Program Report
Annual Transitional Housing Program

ANSWER: Please see the list below indicating the status of reports listed in your question.

1. Annual Report on the STOP Program: The 2004 STOP formula grant program report was submitted to Congress on September 13, 2005. This report relied on data collected on a now-discontinued subgrantee reporting form through December, 2003. STOP Administrator and subgrantee data for calendar year 2004 was collected on a newly developed set of computerized reporting forms, which were distributed in August, 2005. Grantees were required to submit grantee and subgrantee reports by October 11, 2005. However, the process of reviewing and analyzing this data was significantly delayed. OVW plans to submit the 2005 and 2006 STOP Reports based on this data in early 2007.

2. Biennial Report on the Effectiveness of all VAWA Programs: The Effectiveness Reports for both October 2002 and October 2004 were submitted to Congress on September 13, 2005. The October 2006 Effectiveness Report will be submitted in 2007.

3. Annual Report on Campus Program: The 2004 Campus Report was submitted to Congress on September 13, 2005. The 2005 Campus Report was submitted on December 27, 2006. The 2006 Campus Report will be submitted in 2007.

4. Annual Stalking Report: A consolidated report for 2002-2004, which contained a state legislation update for 2001-2004, was submitted to Congress on September 13, 2005. OVW will submit a consolidated report for 2005-2006 in 2007.

5. Report on Effects of Parental Kidnapping: This one-time report, mandated by section 1303 of the Violence Against Women Act of 2000 (VAWA 2000), was submitted to Congress on September 14, 2005.

6. Report on State Laws Regarding Insurance Discrimination Against Victims of Violence Against Women: This one-time report, mandated by section 1206 of VAWA 2000, was submitted to Congress on December 30, 2004.

7. Report on Workplace Effects from Violence Against Women: This one-time report, mandated by section 1207 of VAWA 2000, was submitted to Congress on May 4, 2005.

8. Biennial Safe Havens for Children Pilot Program Report: On September 13, 2005, the Department submitted the first report to Congress on the status of a national survey regarding supervised visitation and Safe Havens grantee reporting. The 2005 Safe Havens report was sent to Congress on September 27, 2006. The third Safe Havens report will be submitted in 2007.

9. Annual Transitional Housing Program Report: Section 40299(f) of the PROTECT Act (codified at 42 U.S.C. 13975(f)) requires the Attorney General to report annually to Congress on the status of the Transitional Housing program. On March 2, 2006, the Department submitted a report to Congress on the implementation of the new grant program and the development of grantee reporting tools. Changes in VAWA 2005 require future Transitional Housing reports to be submitted on October 30 of even-numbered years. OVW submitted a preliminary report on November 16, 2006. Transitional Housing grantees have only recently submitted data for their first reporting cycle (October-December 2005) and are still in the process of submitting data regarding the January to June 2006 reporting period. OVW will submit a final report in 2007.

136. What efforts is the Department taking to edify, consult with and assist the Bureau of Citizenship and Immigration Services in the U.S. Department of Homeland Security with respect to the timely issuance of visas, i.e., the T and U-Visas, for battered and trafficked immigrant women and their immediate families? Please include in your answer the Office's consultations with the U.S. Department of Homeland Security regarding the issuance of relevant regulations.

ANSWER: The Department of Justice published regulations implementing the T nonimmigrant status requirements on January 31, 2002. Attorneys in the Civil Rights Division assigned to trafficking cases make every effort to interview potential victims

and to make a timely determination on whether to apply for continued presence or to file a I-914B supplement to a victim's I-914 T nonimmigrant status application, stating that the individual is likely a trafficking victim and has fulfilled the requirements for T nonimmigrant status. The Department has been working with DHS on their regulations implementing the U nonimmigrant status provisions of the Immigration and Nationality Act.

137. What steps, if any, is the Department taking alone, and/or in concert with the State Department, to review the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)? What is the status of that review, and when, if ever, do you expect the Department of Justice to complete the review and request Senate action on the treaty?

ANSWER: The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) remains under review by the Administration. While we strongly support the goal of eliminating discrimination against women, the Administration finds that the text of the treaty and the record of the UN's CEDAW Committee, including its controversial statements on issues such as abortion and prostitution, raise a number of concerns that need to be fully and carefully examined before the United States could become a party. For these reasons, the Administration is not currently seeking Senate action on this Convention. The Department of Justice stands ready to advise the State Department should passage of the treaty be made a priority by the Senate.

Of course, the United States does not need to be a party to CEDAW to be a leader in the promotion of women's rights and, conversely, many of the countries that are signatories of CEDAW deny women the most basic rights that we take for granted, such as the right to vote.

138. I am troubled by the surge of violent crimes committed by girls. What is your Department doing to address this recent increase of girls as perpetrators of crime? Is your agency supporting and initiating specialized programs for female delinquents, and if so, please describe. Also, please describe any targeted research and intervention your Department is supporting to deal with this alarming trend.

ANSWER: There has been, in recent years, a rise in the proportion of females entering the juvenile justice system. In 1980, 20 percent of all juvenile arrests were females; by 2003, this percentage had increased to 29 percent—with the majority of this growth since the early 1990s. The percentage of females among juvenile arrests increased between 1980 and 2003 for Violent Crime Index offenses (from 10 percent to 18 percent) and for Property Crime Index offenses (from 1 percent to 32 percent); however, the female

proportion of arrests for drug abuse violations was the same in 1980 and 2003 (16 percent).

Questions remain about whether these trends reflect an actual increase in girls' delinquency or are instead a reflection of changes in societal responses to girls' behavior. To help find answers, our Office of Juvenile Justice and Delinquency Prevention convened the Girls Study Group in 2004.

Initial research conducted by Girls Study Group members indicates that the increase in girls' violence, as reported by the arrest data from the FBI's Uniform Crime Reports, is not mirrored in other major sources of data on youth violence over the same period. These other data sources include the National Crime Victimization Survey (in which victims identify the sex of the offender), Monitoring the Future (self-reported violent behavior), and the National Youth Risk Behavior Survey. In other words, a comparison of the "official" (arrest) data with the "unofficial" (self-report) data indicates that the rise in girls' violence over this period (1980-2003) as counted in police arrests is not seen within these other datasets.

So far, the evidence does not suggest an actual increase in girls' violent behavior. Aside from more violence itself by girls, possible explanations for the increase in the proportion of girls entering the juvenile justice system might include societal and policy changes such as:

- Reclassification of offenses which were formerly considered "minor" or status offenses (such as incorrigibility) to more serious offenses (such as simple assault).

- The increasing willingness of law enforcement to arrest girls who may be assisting the criminal conduct of boys.

- The changing response of law enforcement to domestic violence incidents. A larger proportion of aggravated assault known to law enforcement in which the victim was a family member or intimate partner were committed by juvenile females (33 percent) than juvenile males (18 percent). Mandatory arrest laws for domestic violence, coupled with an increased willingness to report these crimes to authorities, would yield a greater increase in female than male arrests for assault, while having no effect on the other violent crimes.

Work continues in the Girls Study Group to continue to answer questions on girls' violence, and more importantly, to identify effective prevention, intervention and treatment programs for girls in the juvenile justice system

139. Myspace.com and facebook.com are fast becoming the most popular web sites for our nation's teenagers. Teenagers are using video- and picture-based methods of communication (like web cams and picture phones), and social networking web sites that combine these elements with instant messages, chat, and other technologies. It is marvelous technology that is changing the way we live, and I am certain that the creators of this new technology do not want it to be used to harm children. What steps, if any, is your Department taking to be familiar with social networking web sites and prevent possible risks to children?

ANSWER: The Attorney General is very concerned with the new and evolving ways that the Internet, including social networking sites, can be abused by sexual predators to target and cause harm to children. Earlier in 2006, the Attorney General announced the creation of Project Safe Childhood, an initiative to combat online child exploitation and abuse. The purpose of Project Safe Childhood is for federal law enforcement to work more closely with state and local law enforcement partners in investigating and bringing more child pornography and solicitation cases and obtaining longer sentences against those convicted. The first year of the initiative culminated with the Project Safe Childhood conference in Washington, D.C., which brought together 700 federal, state, and local prosecutors and law enforcement officers to focus their efforts on increasing the number of investigations and prosecutions of those who would use the Internet to target and abuse children.

The Department is very much aware of social networking web sites such as MySpace.com and facebook.com, as well as their popularity among our nation's youth. We are deeply concerned that predators will continue to find ways to misuse the ever-evolving technology of the Internet and computers to exploit children, and we are actively combating this abuse.

For example, the Department has specialized expertise in combating the use of social networking web sites to exploit children within the High Technology Investigative Unit (HTIU) of the Criminal Division's Child Exploitation and Obscenity Section (CEOS). This expertise and knowledge is disseminated nationwide by CEOS through a variety of means, greatly enhancing federal law enforcement's fight against child pornography. For example, at CEOS's annual advanced training seminar on the investigation and prosecution of child exploitation cases held this past July, HTIU computer forensics specialists conducted hands-on training for more than 100 Assistant United States Attorneys and federal law enforcement agents on the capabilities of social networking sites such as MySpace.com, how these sites are used by offenders to facilitate child exploitation crimes, and how to investigate and prosecute those crimes.

Law enforcement has been working with MySpace.com to address crimes involving the misuse of their system. Specifically, on August 4, 2006, representatives from MySpace.com addressed law enforcement at a meeting organized by the National

Center for Missing & Exploited Children (NCMEC). Law enforcement representatives from the Department of Justice, Internet Crimes Against Children Task Forces, Immigration and Customs Enforcement, the United States Postal Inspection Service, and the Federal Bureau of Investigation (FBI) attended this meeting. The meeting allowed federal law enforcement to learn about the steps MySpace.com is taking to detect and prevent illegal activity on its system, and to learn how to coordinate with MySpace.com concerning the information needed for law enforcement investigations. Based on that meeting, the FBI will shortly be disseminating information to its field offices concerning the investigation of cases involving MySpace.com. That information will include detailed investigative guidance as well as coordinating information allowing law enforcement quickly to obtain key information from myspace.com through their law enforcement contacts.

The Federal Bureau of Investigation has initiated multiple cases involving MySpace.com (we cannot provide an exact number, however, as the FBI does not specifically track cases involving MySpace.com). The United States Marshal's Service has also been involved in a number of investigations involving MySpace. Moreover, CEOS (in conjunction with federal law enforcement agencies) is currently coordinating at least 6 nationwide investigations that involve the use of other social networking web sites to commit child exploitation offenses.

The Department is also actively involved in making information available to parents on protecting their children online. For example, the Project Safe Childhood website provides information about online safety and links to additional resources http://www.projectsafechildhood.gov/. Additional information from CEOS is available at www.usdoj.gov/criminal/ceos/onlinesafety.html.

Senator Feingold

140. Chairman Specter recently announced a legislative proposal regarding the Foreign Intelligence Surveillance Act (FISA) and the National Security Agency (NSA) warrantless wiretapping program that he said he worked out with the White House.

A) Was anyone at the Justice Department involved in these negotiations? If so, who?

ANSWER: As has been publicly acknowledged, the Acting Assistant Attorney General for the Office of Legal Counsel was the primary Department official who participated in discussions with Senator Specter. In addition, numerous attorneys from the Department of Justice analyzed Senator Specter's proposed legislation (S. 2453). As demonstrated by our extensive answers to the many oral and written questions that have been posed to us, the Department is always available to address questions about the substance of legislation pending before the Senate.

B) The Specter bill would enact the following statement: "Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers." Congress in FISA in 1978 repealed a similar provision because, as the Senate Judiciary Committee report said at the time, Congress intended "to put to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained" in FISA and the criminal wiretap statute. The bill also repeals the statement in current law that FISA and the criminal wiretap laws are the "exclusive means" for conducting electronic surveillance. As the top lawyer for the government, if that type of language were to become law once again, would you rely on these changes to argue that Congress had affirmed the President's Article II authority, and that the President would be operating at the height of his powers under Justice Jackson's analysis in the *Youngstown* decision?

ANSWER: The provision of S. 2453 containing the language you recite in paragraph (B) of your question has undergone significant changes, and that language does not appear in a successor version of Sen. Specter's bill, S. 3931. Be that as it may, as the Department has indicated, nothing in the plain reading of that provision would have granted the President any new constitutional authority. This interpretation is strongly supported by the Supreme Court's decision in *United States v. United States District Court* ("*Keith*"), 407 U.S. 297 (1972), which construed a similar provision then codified at 18 U.S.C. § 2511(3), involving the issuance of wiretap orders in criminal cases, which stated that "[n]othing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect [against specified dangers]." The Court wrote:

> At most, this [language] is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection 'against actual or potential attack or other hostile acts of a foreign power.' But so far as the use of the President's electronic surveillance power is concerned, *the language is essentially neutral.*
>
> Section 2511(3) *certainly confers no power*, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. *In short, Congress simply left presidential powers where it found them.*

Keith, 407 U.S. at 307 (emphases added). The apparent purpose of the referenced provision in S. 2453 was to make clear that Congress did not seek a constitutional clash between the Executive and the Legislative Branches regarding the conduct of electronic surveillance for the purpose of collecting foreign intelligence information.

C) You indicated at the hearing that the Administration has agreed to "submit" the program to the FISA court to rule on it if Congress passes the bill the Administration agreed to. If the FISA court were to review the program, would it do so in secret, and with only the government participating? Who would argue the case on the other side?

ANSWER: The Government is the only party to the *ex parte* proceedings for electronic surveillance orders under FISA (as is the case with respect to wiretap orders in criminal investigations under Title III and generally in proceedings to secure search warrants). Proceedings before the FISA Court are held in secret because of the nature and sensitivity of the information presented to the Court.

D) Do you agree that if the bill became law, the President could choose whether to submit any particular surveillance program for judicial review or whether to go forward without judicial approval?

ANSWER: Although we do not read S. 2453 and S. 3931 to require the Attorney General to submit an electronic surveillance program to the FISC, both bills would create powerful incentives to do so, not all of which can be discussed in this setting. The innovative procedure created by proposed section 702(a) would enable the Attorney General to obtain a prompt judicial determination that a program is lawful, and to take advantage of the benefits that would be provided by the proposed Title VII of FISA. The FISC also would be authorized to review the programs brought before it, including the minimization procedures in place, to help ensure the surveillance is focused upon the international terrorist or foreign intelligence threat at issue and that information collected

about United States persons is treated properly. For these reasons, the President pledged to submit the Terrorist Surveillance Program to the FISC if S. 2453 were enacted. The availability of these procedures similarly would encourage future Presidents to bring electronic surveillance programs to the FISC for court review.

E) One provision of the Specter bill would amend the title of FISA that requires court orders before the government conducts secret searches of peoples' homes and offices. Currently, the statute prohibits these searches except as authorized by statute. The bill would amend that provision by adding "or under the Constitution." If enacted, could this be read to grant the government the authority to break into peoples' homes and search them with no court order whatsoever, not even from the secret FISA court? Why is the Administration seeking this change?

ANSWER: The provision of S. 2453 containing the "or under the Constitution" language you recite has undergone significant changes, and that language no longer appears in S. 3931.

The apparent purpose of the provision was to make clear that Congress did not seek a constitutional clash between the Executive and the Legislative Branches regarding the conduct of electronic surveillance for the purpose of collecting foreign intelligence information. We do not believe the phrase "or under the Constitution" could be construed as a blanket authorization for the Government to "break into" anyone's home. Any physical search conducted pursuant to FISA, another statute, or the "under the Constitution" provision must be consistent with the Fourth Amendment's basic requirement of reasonableness.

141. You have testified before this Committee that the NSA wiretapping program expires approximately every 45 days, and that the President has to reauthorize it personally. When will or did the first review after the Supreme Court's *Hamdan* decision occur?

ANSWER: Operational details about the Terrorist Surveillance Program are classified and highly sensitive and, therefore, cannot be discussed in this setting. Consistent with the notification provisions in the National Security Act of 1947, however, the Executive Branch has briefed the Intelligence Committees regarding the operational details of the Program. In addition, please see the enclosed letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

142. Michael Shaheen, who headed the Justice Department's Office of Personal Responsibility (OPR) for more than twenty years, stated in May 2006 that "[n]o one in OPR for the 24 years I was there was denied a necessary clearance, ever, and much less one that brought to a conclusion an investigation." Are you aware of any OPR investigations that have been denied security clearance, other than the recent investigation of the NSA's warrantless wiretapping program?

ANSWER: No. It bears mentioning, however, that the TSP is a highly classified and exceptionally sensitive intelligence-gathering program. The President decided that protecting the secrecy and security of TSP requires that a strict limit be placed on the number of persons granted access to information about the Program for non-operational reasons. TSP is subject to extensive oversight within the Executive Branch.

143. In his July 17, 2006 letter to Chairman Specter, [Assistant] Attorney General Moschella stated: "With regard to TSP, the President decided that protecting the secrecy and security of the program requires that a strict limit be placed on the number of persons granted access to information about the program for non-operational reasons."

i. When was this decision made?
ii. What precise limitations has the President now imposed on who is granted security clearance on this program?
iii. How many OPR lawyers would have needed clearance on the NSA program to participate in the investigation? Would any of OPR's document or interview requests involved documents or individuals not already inside the Justice Department?

ANSWER: The Terrorist Surveillance Program is a highly classified and exceptionally sensitive intelligence-gathering program. Its continuing success depends critically on keeping information about the Program's operations confidential. Other things being equal, the fewer individuals permitted access to the operational details of the Program, the lower the likelihood of damaging and irreversible leaks that could threaten national security by compromising the Program's effectiveness. Thus, the number of persons who have been granted security clearances to learn the operational details of the Terrorist Surveillance Program has been limited since the inception of the Program, and the clear focus has been on granting clearances to those people with a need to know operational details so they can participate in the actual *operations* of the Program. Accordingly, security clearances to learn the operational details of the Program generally have been limited to those who have a need to know for the purposes of implementing the Program or for conducting the periodic review procedure that has been in place since the Program's inception (by, among others, the Office of the Inspector General of the NSA, the Office of the General Counsel of the NSA, and certain attorneys of the Department of Justice). In addition, the Department's Inspector General, Glenn A. Fine, announced on November 27, 2006 that he will conduct "a program review that will examine the

Department's controls and use of information related to the program and the Department's compliance with legal requirements governing the program."

The Terrorist Surveillance Program is overseen a rigorous oversight regime. Since its inception, the Program has been subject to several rigorous and extensive review processes within the Executive Branch. As we have noted previously, the internal review process begins with the Office of the Inspector General and the Office of General Counsel of the NSA, which have conducted several reviews of the Program since its inception in 2001. Attorneys from the Department of Justice and Counsel to the President also have reviewed the Program multiple times since 2001. Finally, the President, based upon information provided by the NSA, the Office of the Director of National Intelligence, and the Department of Justice, decides approximately every 45 days whether to continue the Program. In addition to that, Inspector General Fine recently indicated that he is conducting a review of the Department's activities in the operation of the Program.

In addition to Executive Branch scrutiny, the Terrorist Surveillance Program has been subject to extensive review by Members of Congress. Congressional leaders, including the leaders of the Intelligence Committees, have been given regular, extensive briefings since the Program's early days, and all Members of both Intelligence Committees have access to the operational details of the Program. Numerous Executive Branch officials have testified before several congressional committees about the Program and have answered literally hundreds of questions for the record about the Program.

144. H. Marshall Jarrett of OPR sent you a letter on April 21, 2006, regarding the investigation of the NSA program. He cited a number of examples of other employees obtaining clearances to learn about the program. For each of the examples cited in the letter and restated below, please confirm if clearances were, in fact, granted. Please provide details as to how many individuals were given clearance in each instance.

A) "[A] large team of attorneys and FBI agents investigating certain news leaks about the NSA programs."
B) "[I]ndividuals involved in the Civil Division's responses to legal challenges to NSA program and FOIA litigation."
C) "[T]he five private individuals who make up the Privacy and Civil Liberties Oversight Board."
D) "[I]nspector General (IG) Glenn Fine and two members of his staff."

ANSWER: As the Department has noted previously, we cannot disclose publicly the identities and numbers of specific individuals who have been briefed into the Terrorist Surveillance Program because of concerns about the security of the Program and such individuals. Consistent with the long-standing practice of the Executive Branch pursuant to the notification provisions of the National Security Act of 1947, the Intelligence

Committees have been briefed regarding the Terrorist Surveillance Program. We note, however, that we have confirmed that the Office of the Inspector General of the NSA, the Office of the General Counsel of the NSA, and certain attorneys of the Department of Justice have been involved in periodic reviews of the Program that are conducted as part of the reauthorization process. In addition, as noted above, the Department's Inspector General, Glenn A. Fine, announced on November 27, 2006 that he would review the Department's activities in the operation of the Program, and various members of the President's Privacy and Civil Liberties Oversight Board have spoken about their review of the Program.

145. In your written responses to questions following the February 2006 Judiciary Committee hearing on the NSA program, you stated the "the targeting process does not include, and never has included, consideration of whether a potential target is a political opponent of the president." That did not respond to the question asked, which was: "To be clear, have you, the President, or anyone else in the Administration, under this or any other program, engaged in warrantless surveillance of political opponents of the President?" Please respond to that question now, specifically with regard to any such individuals who have no links to terrorist organizations.

ANSWER: The Administration does not and would not target the Administration's political opponents for surveillance. We believe that the Attorney General already responded to your initial question, which was whether the Government would use the Terrorist Surveillance Program to "monitor private calls of its political enemies, people not associated with terrorism but people who they don't like politically." The Attorney General responded: "We're not going to do that. That's not going to happen." We reaffirm that response. The Terrorist Surveillance Program is not—and will not become—a program designed to engage in warrantless surveillance of domestic political opponents of the President. As the Executive Branch has stated repeatedly, the Terrorist Surveillance Program is exceedingly narrow, targeting only for interception those communications where one party is outside the United States and a professional intelligence officer determines there are reasonable grounds to believe that at least one party is a member or agent of al Qaeda or an affiliated terrorist organization. The Program does not target for interception wholly domestic communications, and it does not target the communications of persons who have no connection to al Qaeda or an affiliated terrorist organization. The purpose of the Program is solely to create an early-warning system to enable the United States to detect, prevent, and deter a catastrophic attack by al Qaeda or its affiliates upon the United States.

146. One of the major differences between the court-martial system and the military commission system authorized by the President is judicial review. An individual convicted through the President's military commission system could only appeal through the Defense Department, with final review by the President. An individual convicted through a court-martial, on the other

hand, can appeal to the Court of Appeals for the Armed Forces and ultimately seek review by the U.S. Supreme Court. What reason is there for not permitting independent judges to review the military commission process?

ANSWER: At the time of the Supreme Court's decision in *Hamdan*, the Detainee Treatment Act provided for the review of final military commission decisions in the U.S. Court of Appeals for the D.C. Circuit. We believe that such judicial review is appropriate, and the MCA provides for a formal appellate process that parallels the appellate process under the UCMJ. The UCMJ provides for an appeal to the Court of Criminal Appeals within each service, and then for discretionary review by the United States Court of Appeals for the Armed Forces. *See* 10 U.S.C. §§ 866-867. The MCA similarly provides two levels of appellate review, with review for all errors of law first by a Court of Military Commission Review to be established within the Department of Defense, *see id.* § 950f, and then a review by the U.S. Court of Appeals for the D.C. Circuit, *see id.* § 950g. The Act gives all convicted detainees an appeal as of right to the D.C. Circuit, regardless of the length of their sentence. *Id.* The Supreme Court retains jurisdiction to review the decisions of the D.C. Circuit through petitions for writs of certiorari. *See id.* § 950g(d). We believe this approach strikes the proper balance between sufficient appellate review of decisions by military commissions on the one hand and the need for flexible and efficient prosecution of unlawful combatants' war crimes on the other.

147. According to news reports, the Administration is going to propose legislation to Congress in response to the *Hamdan* case. The last time the President proposed a military commission system, news reports indicate that only a small number of aides in the White House and Vice President's Office were involved in the decision, and that the President issued the order without the knowledge of or consultation with the Secretary of State, the National Security Adviser, the Assistant Attorney General for the Criminal Division, or any of the top military JAG lawyers. Who in the Administration, and in particular at the Justice Department, is working on the proposal this time around?

ANSWER: The Administration's legislative proposal was developed through extensive interagency deliberations, as well as numerous consultations with individual Members of Congress. Our deliberations included detailed discussions with and input from attorneys and policy makers throughout the Executive Branch, including the Department of State, the National Security Council, and military lawyers in all branches of the Armed Services, including the TJAGs. Their comments were reflected throughout our legislative proposal. Similarly, within the Department of Justice, all relevant offices offered input, including the Acting Assistant Attorney General for the Office of Legal Counsel and the Assistant Attorney General for the Criminal Division.

148. In his concurrence in *Hamdan*, Justice Kennedy stated: "The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." Do you agree?

ANSWER: We agree with Justice Kennedy's statement, which reflects an important principle underlying the rule of law. We would emphasize, however, that military commissions themselves are entirely consistent with the constitutional standards tested over time by our Nation's experience. Presidents and military commanders since George Washington have convened military commissions as a necessary and appropriate instrument to administer justice during wartime. The Supreme Court repeatedly has recognized, including in *Hamdan* itself, that the President has the constitutional authority to establish military commissions for the trial of enemy combatants, and in Article 21 of the UCMJ, Congress expressly authorized the President to convene military commissions separate and apart from courts-martial. *Hamdan* did read Articles 21 and 36 of the UCMJ as imposing certain restrictions on the establishment of these commissions, and in light of that decision, we believe Congress appropriately clarified the President's authority to convene military commissions through the MCA.

149. In your written response to a written question from Sen. Feinstein asking if Executive Order 12333 has ever been amended or a non-public directive interpreting it been issued, you stated "to the extent that the President has issued any non-public directives regarding the collection of intelligence, it would not be appropriate to share them in this setting." Please respond fully to Sen. Feinstein's question, in a classified form if necessary.

ANSWER: As both you and Senator Feinstein are Members of the Senate Select Committee on Intelligence, we would be happy to ensure that the question is addressed in that setting.

150. In a November 2001 op-ed arguing for the need to try detainees in military commissions, rather than in established military courts, you wrote that these Bush military commissions would be able to "dispense justice swiftly, close to where our forces may be fighting."

A) Did you believe in November 2001 that military commissions were going to be predominantly used in military theaters, such as Afghanistan, rather than Guantanamo, 70 miles off the American shore?

B) Once it became clear that the commissions were going to be used at Guantanamo, did you reassess whether the deviations from the UCMJ were necessary or fair? If not, why not?

ANSWER: As the Attorney General explained in the editorial, the Administration designed military commissions because circumstances in a war zone can make it

impossible to follow civil-justice procedures. The Attorney General wrote that editorial two months after 9/11, and at that time, we certainly did believe that the military might need to hold commission trials near the battlefield. He also noted, however, that military commissions provide other advantages, sparing non-military jurors, judges and courts the risks associated with terrorist trials, permitting the finder of fact to consider the broadest range of evidence, and permitting the Government to use classified evidence without compromising intelligence or military efforts.

At that time, we did look to UCMJ procedures as a guide to setting up commission procedures, but the President made the determination that many of those procedures would not be feasible for military commissions. That judgment rested not simply upon the difficulties of holding commission proceedings near the battlefield, but upon the difficulties of conducting trials concerning events that themselves took place on the battlefield. For instance, court-martial rules provide for prophylactic *Miranda*-type warnings, strict requirements for the authentication of evidence, and prohibitions on the use of hearsay. These rules will often not be practicable in wartime conditions, and that remains true, no matter whether the trial is to be conducted in Afghanistan or in Guantanamo Bay. Thus, having considered current conditions, we consider the MCA procedures to be necessary and fair.

The initial President's Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001), specified that the accused must receive a full and fair trial. The procedures established pursuant to that order, which were revised on several occasions to accomplish better the President's mandate, borrowed from the UCMJ in many respects. Both before and after the decision was made to hold commission proceedings in Guantanamo Bay, the procedures for the military commissions relied on many of the UCMJ procedures. The Administration believes that Congress appropriately went further in the MCA by establishing a separate chapter of title 10, modeled in structure on the UCMJ, but adapted where appropriate for the special context of the military commission trials of terrorists.

151. I am sure you are aware that the most recent FBI crime statistics indicate an overall increase in crime rates across the country, and in particular in the Midwest. Recently I have started hearing from law enforcement officers in my state that they are concerned about an increase in the crime rates in their communities. Yet you defended the Administration's proposed cuts by saying that, "In fact, what it reflects is a decision by the administration that this is a program that either is no longer efficient or effective, that there is a better way to address the particular problem." Please provide a full and detailed explanation as to why you believe the COPS and Byrne grant programs are no longer efficient or effective.

ANSWER: The Byrne Discretionary Grant Program, in years past, was used to develop and test model programs for replication in jurisdictions across the country. It promoted the undertaking of educational and training programs of national and multi-jurisdictional scope. However, in recent years the level of earmarking within the Byrne

Discretionary Grant Program has severely limited the Department's ability to use it to address new and innovative criminal justice initiatives. It also curtails us from effectively evaluating the funded programs. Since Fiscal Year 2002, 100 percent of the appropriations for Byrne Discretionary grants were earmarked.

In the 2002 Program Assessment Rating Tool review, the COPS program was also rated "results not demonstrated." Since that time OMB approved new outcome measures that COPS will use to assess their grant programs in the future.

Senator Schumer

152. In your testimony, you referred my questions about the damage caused by the NSA warrantless surveillance leak to the intelligence community, and, specifically, to CIA Director Michael Hayden. Given the criminal investigation into that leak, I am curious to know:

- **Have you yourself asked him what damage was done to national security interests by that disclosure?**
- **Has your Department asked any other member of the intelligence community?**
- **If not, why not?**
- **If so, what damage to national security have they described?**

ANSWER: We continue to believe that General Hayden and Director of National Intelligence John Negroponte are the appropriate members of the Intelligence Community to respond to your questions on that point. As you know, the Department of Justice has confirmed that it is conducting an investigation into that particular unauthorized disclosure of classified information. As a result, we respectfully submit that it would be inappropriate to discuss the damage caused by that disclosure in this context, since it may be the subject of future prosecution and litigation.

153. In your testimony, you indicated that you do not know how many ongoing leak investigations exist within your department. As soon as possible, please advise of the following:

- **How many leak investigations are occurring in the Justice Department right now?**
- **How many leak investigations has your office declined to pursue?**
- **How does your office determine which leaks to investigate and which not to?**
- **Who makes the decision whether to investigate a leak?**
- **Have any leak investigations failed to proceed because the appropriate personnel could not get security clearances?**

ANSWER: Respectfully, we believe it would be inappropriate to comment on the number of leak investigations that currently exist or have been considered and declined in the past. As the Attorney General mentioned during his July 18, 2006, testimony, however, the Department of Justice takes all unauthorized disclosures of classified information very seriously.

The decision whether to pursue a leak investigation is made by career prosecutors, along with their supervisors, at the Department of Justice. A leak investigation typically starts with a referral from the victim agency (i.e., the Government agency whose classified information has been compromised). The Department of Justice asks the

victim agency to respond to an eleven-question questionnaire which is designed to assist prosecutors in determining whether a leak investigation is feasible. The factors which inform that decision include, but are not limited to, the sensitivity of the compromised information, the number of people who had access to that information, the scope of the dissemination of that information in documentary form, and whether the classified information could be confirmed in a public prosecution (giving due consideration to the protections afforded by the Classified Information Procedures Act).

After reviewing this response and considering the possibility of ultimately demonstrating a criminal violation, career prosecutors at the Department of Justice and the relevant U.S. Attorney's Offices, along with their supervisors, make the initial decision whether a particular leak investigation should be pursued. We do not keep any data on whether any particular leak investigation has not been pursued due to the inability to get security clearances. It is fair to say, however, that in the past certain leaks of classified information have not been referred to the Department of Justice by the victim agency and/or pursued by the Department due to the sensitivity of the classified information which was compromised.

154. On February 24, 2004, the *Washington Times* published an article specifying that "The Pentagon is moving elements of a super-secret commando unit from Iraq to the Afghanistan theater to step up the hunt for Bin Laden." Was the leak that led to this story ever investigated? If so, what is the status? If not, why not?

ANSWER: It is the long standing policy of the Department of Justice not to comment on the existence or non-existence of any particular leak investigation. As indicated in response to Question 153, there are numerous factors which could determine whether a particular leak is ever investigated and those decisions are made by career prosecutors and their supervisors at the Department of Justice in consultation with the victim agency.

155. On May 18th, Congressman Peter Hoekstra – in most matters a loyal ally of the President and a defender of his efforts in the war on terror – wrote a letter expressing concern about another Government program the President has kept secret from the Congress. He reportedly got that secret information from "government tipsters." In your testimony, you stated that you were unaware of whether the government has conducted any investigation into those tipsters, but you committed to looking into it. I am reiterating any request for that information in writing:

a) Is anyone in the Government investigating the leak of this information to Congressman Hoekstra?
b) Is the DOJ?
c) Is the CIA?
d) Is any other office, department or agency, to your knowledge?

e) If so, when did these investigation(s) begin?
f) Have they been concluded?
g) If not, why not?
h) Who was involved in making the decision about whether or not to investigate?

ANSWER: It is the long standing policy of the Department of Justice not to comment on the existence or non-existence of any particular leak investigation. As indicated in response to Question 153, there are numerous factors which could determine whether a particular leak is ever investigated and those decisions are made by career prosecutors and their supervisors at the Department of Justice in consultation with the victim agency.

156. In your testimony, you suggested that your office launches investigation into leaks "when we believe the circumstances, based upon the recommendations of the career folks, are warranted." Please provide a more specific answer about the criteria your department follows in launching an investigation. Are these criteria reduced to writing? If so, please provide these guidelines. Additionally, please provide a more specific explanation of who makes these decisions.

ANSWER: As set forth in our answer to Question 153, above, the Department of Justice considers a host of factors in making the determination whether to pursue a particular leak investigation and we work very closely with the victim agency in making those decisions. The factors which inform that decision include, but are not limited to, the sensitivity of the compromised information, the number of people who had access to that information, the scope of the dissemination of that information in documentary form, and whether the classified information could be confirmed in a public prosecution (giving due consideration to the protections afforded by the Classified Information Procedures Act). Career prosecutors at the Department of Justice and the U.S. Attorney's Offices, along with their supervisors, make the initial decision whether a particular leak investigation should be pursued.

157. Last week, I wrote a letter to your office with Congressman Delahunt requesting that you clarify the Administration's policy regarding the classification of sensitive national security information, as well as the role of the Department of Justice in investigating possible leaks of such information. That letter is attached. Please respond to the questions therein.

ANSWER: In a letter, dated September 6, 2006, the Director of National Intelligence, John D. Negroponte, responded to the questions posed in Congressman Delahunt's and your letter. The only remaining questions concern the number of "leak" referrals to the Department and the status of our investigations, if any, into those referrals. With all due respect, it would be improper to comment on the existence or non-existence of any

specific referral or investigation. The Department of Justice responded to Senator Schumer and Congressman Delahunt on January 3, 2007.

158. **I asked you during your February appearance before the Committee several simple questions, which you did not answer. I asked them again in writing. Your responses – received only after a five and a half month delay – also failed to answer the questions I asked. I ask them again, here. Have you, the President, or anyone else in the Administration, under the Terrorist Surveillance Program or any other program, done the following since the passage of the Authorization of the Use of Military Force ("AUMF"):**

a) Authorized the warrantless opening of mail of private citizens or residents in the U.S.?
b) Authorized the warrantless search of a home or office in the U.S.?
c) Authorized the warrantless placement of a listening device within a home or office in the United States?

Two months ago, I had the following exchange with FBI Director Mueller.

Senator Schumer: Would you have legal or constitutional concerns about the use of warrantless physical searches in the United States?

Mr. Mueller. Yes.

Senator Schumer. To your knowledge, has the FBI conducted any such searches?

Mr. Mueller. No.

If the Director of the FBI could answer quickly and straightforwardly, it is my belief that you can too. If you cannot, please explain why. Were Director Mueller's statements factually correct?

ANSWER: Yes, we believe that Director Mueller was correct in stating that the FBI had not conducted any warrantless physical searches in the United States. The answer to your other questions is no: since the enactment of the Force Resolution, neither the President, nor the Attorney General, nor, to the best of our knowledge, another member of this Administration, has authorized the warrantless opening of mail of private citizens or residents within the United States, authorized the warrantless search of a home or office in the United States, or authorized the warrantless placement of a listening device within a home or office in the United States.

We do not understand this question to be inquiring about warrantless searches of a home or office in the United States that occur during law-enforcement operations and that

are conducted under any of the many well-recognized exceptions to the Fourth Amendment warrant requirement, such as consent by a resident or a person having authority over the space, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), search incident to a lawful arrest, *Maryland v. Buie*, 494 U.S. 325, 334 (1990), exigent circumstances, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); *Warren v. Hayden*, 387 U.S. 294, 298-99 (1967), "hot pursuit," *United States v. Santana*, 427 U.S. 38, 42-43 (1976), or the plain view doctrine, *see Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion). Nor do we understand your question to be inquiring about any search without a court order of "premises, information, material, or property used exclusively by, or under the open and exclusive control of, a foreign power or powers," as authorized by 50 U.S.C. § 1822, or an emergency physical search pursuant to 50 U.S.C. § 1824(e). Nor do we understand your question to be inquiring about the warrantless placement of a listening device with the consent of a person with authority over the space. *See United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1460-61 (11th Cir. 1991). Nor do we understand your question to be inquiring about the placement of a listening device without a court order from "property or premises under the open and exclusive control of a foreign power," as authorized by 50 U.S.C. § 1802, or emergency electronic surveillance pursuant to 50 U.S.C. § 1805(f). Nor do we understand your question to involve the warrantless searching of mail entering or leaving the United States pursuant to the long-established border search exception to the Fourth Amendment, *see, e.g.*, *United States v. Ramsey*, 431 U.S. 606, 616 (1977), and which is specifically authorized by statute and regulation. *See, e.g.*, 19 U.S.C. § 1583(a)(1) (permitting warrantless search of "mail of domestic origin transmitted for export . . . and foreign mail transiting the United States"), (c)(1)–(2) (permitting search of first-class mail weighing more than 16 ounces if there is reasonable cause to believe that the mail contains specified contraband, merchandise, national defense or related information, or a weapon of mass destruction, but requiring a judicial warrant or consent to read any correspondence in first-class mail); 19 C.F.R. pt. 145 app. (authorizing Customs Service to examine, with certain exceptions for diplomatic and government mail, "all mail arriving from outside the Customs territory of the United States which is to be delivered within the [Customs territory of the United States]"); 19 C.F.R. § 145.3(a) (authorizing opening of mail that appears to contain matter besides correspondence "provided [that Customs officers and employees] have reasonable cause to suspect the presence of merchandise or contraband"); *see also* 31 U.S.C. § 5317(b) (authorizing search at border of, among other items, "envelopes" for evidence of currency violations). Nor do we understand your question to involve the warrantless opening of mail where the mail is reasonably suspected of posing an immediate danger to life or limb or an immediate and substantial danger to property. *See* 39 C.F.R. § 233.11(b).

159. Do you continue to believe that the Administration's NSA Surveillance Program is legal and Constitutional?

ANSWER: Yes.

160. Do you believe that this Supreme Court would agree with you, if they had the opportunity to decide the question?

ANSWER: Yes.

161. Last week, your office responded to my request for an update of the Administration's legal justification with a letter that said, effectively, *Hamdan* changes nothing, even though the Supreme Court made clear that the Administration's view of the scope of the AUMF was too broad. But commentators on both sides of the aisle vigorously disagree with you.

- **Conservative commentator Andrew McCarthy wrote in the National Review Online that: The *Hamdan* decision "is a disaster because it sounds the death knell for the National Security Agency's Terrorist Surveillance Program."**
- **A distinguished group of constitutional law scholars and former government officials gave their views on your office's letter to me, stating in a letter that the *Hamdan* decision "further refutes" the Administration's legal argument on this issue. The group of law experts went on to dismantle your department's updated legal argument piece by piece.**

My questions are:

a) **How does the Administration respond to the letter from constitutional law scholars?**
b) **In light of these concerns, does the Administration plan to fight the NSA surveillance program and other programs with even murkier legal justification after *Hamdan* all the way to the Supreme Court?**
c) **Is your department really conducting a fresh review of these issues?**

ANSWER: We have already responded to the first part of your question in responding to questions 6 and 120 above. Please see our responses to those two questions.

Furthermore, for the reasons given in our response to questions 6 and 120, the legal justification for the Terrorist Surveillance Program is not "murkier" after *Hamdan*. The Department believes that the Terrorist Surveillance Program is lawful. We will defend it against all legal challenges, and we believe that the federal courts, if they were to reach the merits of the question, would ultimately affirm the legality of the Program.

The dedicated men and women of the Department of Justice take very seriously our obligation to follow the law scrupulously even as we work to prevent another

catastrophic terrorist attack. Rest assured that the Department of Justice will continue to review all legal developments regarding the Terrorist Surveillance Program.

162. Please identify any individuals in the Department of Justice, the Department of Defense, and any other agencies, to the extent you know, who are reviewing the legal justification for the President's various programs on the war on terror.

ANSWER: We cannot catalogue all of the dedicated men and women throughout the Government who have been involved in ensuring the legality of the Government's activities in prosecuting the global war on terror. The Department's main focus for the past five years has been to prevent another terrorist attack and to bring terrorists to justice, and so numerous programs could be thought to constitute "programs on the war on terror." The same is true of other agencies, including the Department of Defense, the Department of the Treasury, the Central Intelligence Agency, the National Security Agency, and numerous others. Those programs could include the making of government grants for language programs, terrorist-finance tracking efforts, cryptographic analysis, computer security programs, immigration enforcement efforts, transportation and aviation, customs and international trade, electronic surveillance, and criminal law enforcement efforts, just to name a few.

163. As you know, the *Hamdan* decision specifically restricted the sweep of the Authorization to Use Military Force. In the wake of that decision, I sent a letter to your office on July 2nd urging the establishment of an independent commission to conduct a top-to-bottom legal review of all the Administration's ongoing anti-terror measures. I asked Steven Bradbury that question, and he said it was part of his job to do an ongoing review. That ongoing review has now been going on for five years and it has not gotten us very far. It has gotten you a rebuke from this conservative Supreme Court, and it has gotten people on the left and the right to question the legal justification for the NSA wiretapping program. Why will you not commit to a formal review process?

ANSWER: The Department of Justice is and has been engaged in an ongoing review process. The Department takes seriously its role as the chief legal counsel to the Executive Branch. *See* 28 U.S.C. §§ 511-513. With regard to the Terrorist Surveillance Program specifically, it is subject to extensive oversight at several levels within the Executive Branch and by the Intelligence Committees of Congress. The oversight of the Program includes review by lawyers in the Office of the Inspector General of the NSA and the Office of the General Counsel of the NSA, as well as review by lawyers from the Department of Justice and the Counsel to the President. In addition, with the participation of the Office of the Director of National Intelligence and the Department of Justice, the President reviews the program every 45 days and decides whether to reauthorize it. In addition, the Department's Inspector General, Glenn A. Fine,

announced on November 27 that he "will examine the Department's controls and use of information related to the program and the Department's compliance with legal requirements governing the program." Letter for the Hon. Maurice Hinchey, Member of Congress, from Glenn A. Fine, Inspector General, U.S. Department of Justice, at 1 (Nov. 27, 2006). Also, as we have noted, the Executive Branch continues to brief the Intelligence Committees regarding ongoing intelligence activities, including the Terrorist Surveillance Program, and the Intelligence Committees are carrying out extensive oversight of the Program.

164. Please detail to what extent you believe the holding of *Hamdi* has survived the holding of *Hamdan*.

ANSWER: The Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*, 542 U.S. 207 (2004), remains valid after the Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). At issue in *Hamdi* was, among other things, the President's authority to detain as an enemy combatant a U.S. citizen who had taken up arms against the United States in Afghanistan. *See* 542 U.S. at 517 (plurality opinion). Hamdi claimed his detention violated 18 U.S.C. § 4001(a), which prohibits the Government from imprisoning or detaining citizens, "except pursuant to an act of Congress," 18 U.S.C. § 4001(a), because Congress never explicitly authorized the detention of U.S. citizens as enemy combatants. The Supreme Court disagreed. In September 2001, it explained, Congress passed the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Force Resolution"), which gave the President authority to "use all necessary and appropriate force" against al Qaeda and its allies. *See* 542 U.S. at 518-19 (plurality opinion). Five Justices explained that "the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Id.* at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). Thus, the Court "found it of no moment that the [Force Resolution] does not use specific language of detention." *Id.* at 519 (plurality opinion). By authorizing the President to take all "necessary and appropriate force" against the Taliban, Congress "clearly and unmistakably authorized detention" as a fundamental and accepted incident to the use of force, five justices concluded. *See id.* at 519 (plurality opinion); *id.* at 587 (Thomas, J., dissenting). Accordingly, the Court held that the Force Resolution "satisfied § 4001(a)'s requirement that a detention be 'pursuant to an Act of Congress.'" *Id.* at 517 (plurality opinion).

Hamdan, by contrast, dealt with an entirely different statutory framework. It involved a statute, the Uniform Code of Military Justice ("UCMJ"), that, according to the Court, did not expressly contemplate that Congress might authorize military commissions outside the UCMJ. And it concerned an area of the law over which Congress has express constitutional authority, namely the authority to "define and punish . . . Offenses against the Law of Nations," U.S. Const. art. I., § 8, cl. 10, and to "make Rules for the Government and Regulation of the land and naval forces," *id.* cl. 14. Under these circumstances, the Court in *Hamdan* concluded that the President's military commission order conflicted with the UCMJ. Specifically, the Court held that the President had not made a statutorily required finding that the procedures governing courts martial—the

UCMJ and its related regulations—were impracticable for the trial of alien terrorists and that certain of the procedures in the Military Commission Order Number 1, if ultimately implemented in a military commission, would not be consistent with the UCMJ, including a provision that incorporated standards in Common Article 3 of the Geneva Conventions. *Hamdan* in no way, however, undercut *Hamdi's* central holdings that the Force Resolution authorizes the President to take actions that are fundamental and accepted incidents to the use of force.

165. I continue to be concerned about the Administration's refusal to consult with Congress on matters vital to our national security. This is not a Democratic issue or a Republican issue. Chairman Specter has repeatedly chided the Administration for ignoring Congress and failing to consult, as required by the Constitution. As mentioned above, on May 18th, Congressman Hoekstra wrote a letter expressing concern about another Government program the President has kept secret from the Congress. About that program, he wrote that the failure to brief Congress: "[M]ay represent a breach of responsibility by the Administration, a violation of law, and, just as importantly, a direct affront to me and members of the committee. . . . Congress simply should not have to play 'Twenty Questions' to get the information that it deserves under our Constitution."

Can you please confirm whether the secret program Congressman Hoekstra referred to exists? Is it true that the Intelligence Committees were not briefed about such activities, as alleged in the letter? Have the intelligence Committees since been briefed? Had there not been a letter from Mr. Hoekstra, would there have been any briefings? Are there other programs beyond the one that Congressman Hoekstra referred to that the Intelligence Committees have not been briefed on?

ANSWER: We wish to reiterate the Administration's commitment to keeping Congress appropriately apprised of intelligence activities, and our commitment to working with Congress in prosecuting the war on terror.

As you know, intelligence programs are highly classified and exceptionally sensitive. It therefore would be inappropriate for me to discuss in this setting the existence (or non-existence) of specific intelligence activities, though my inability to respond more fully should not be taken to suggest that such activities exist. Consistent with the National Security Act of 1947, the Executive Branch informs Congress about classified intelligence collection efforts through appropriate briefings of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

166. You and the Administration have endorsed Chairman Specter's bill on FISA. Would you prefer that Congress not legislate in this area? If the

surveillance program is legal and constitutional, from your perspective, what need is there to legislate?

ANSWER: . Essentially for the reasons set forth in the Department's January 19, 2006 paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* ("*Legal Authorities*"), the Terrorist Surveillance Program complies fully with the Constitution and statutes of the United States, including FISA. We have explained in response to questions 6 and 120 above why we do not believe that the Supreme Court's decision in *Hamdan* alters that conclusion.

The Administration supported legislative proposals in the last Congress that would have amended FISA to address concerns with the traditional FISA process. Those proposals would have amended FISA to provide additional authority for programs of electronic surveillance targeted at the international communications of the affiliates of our most dangerous adversaries. They also would have streamlined and augmented the FISA process by extending the period of emergency authorization from three to seven days, by increasing the number of national security officials who could make FISA certifications, and by streamlining the FISA application process. The Administration remains committed to working with Congress to advance these important reforms.

167. Senator Specter has characterized his bill as simply allowing the Court to decide the Constitutionality of the program, including whether the President has the authority to authorize this surveillance.

a) Why doesn't the Administration just submit the program to the FISA Court now, without any legislation?
b) If the Specter bill were to pass in its current form, and the Administration then voluntarily submitted the program to the FISC, would the Administration argue that the Specter bill authorized the NSA's Terrorist Surveillance Program?

ANSWER: **(a)** Please see the attached letter, dated January 17, 2007, from the Attorney General to Chairman Leahy and Senator Specter.

(b) Senator Specter's bill, S.2453, would add a new title to FISA that would expressly grant the FISA court "jurisdiction to issue an order . . . that authorizes an electronic surveillance program to obtain foreign intelligence information or to protect against international terrorism," where certain conditions are met.

168. As you know, President Bush has used signing statements to challenge more than 750 laws duly enacted by Congress. The design of most of these signing statements makes it very hard for anyone to challenge them in court because of standing and other procedural barriers.

a) Do you think the President should have the final word on deciding whether an act of Congress is constitutional?

ANSWER: As set forth in response to questions 78, 103, 107 and 108 above, the President has issued constitutional signing statements in signing approximately 125 bills, which is comparable to the records of every President since President Reagan. And as explained above, it is not accurate to describe signing statements as "challenges" to legislation.

Signing statements do not give the President "the final word on deciding whether an act of Congress is constitutional." Signing statements are part of a respectful dialogue between the Branches on statutory and constitutional matters, and Congress can respond to such statements in the passage of subsequent legislation and through numerous other mechanisms. That dialogue is a natural part of the system of checks and balances that the Founders provided under the Constitution. In addition, enforcement decisions implementing a signing statement may be subject to court challenge under appropriate circumstances, and under such circumstances, courts may be able to address the legal issues involved.

b) Do you have any reason to believe the statements have been intentionally designed to prevent judicial review of the President's decision not to follow a law?

ANSWER: No signing statement of which we are aware during this Administration has been designed to prevent judicial review of the President's decisions or actions. When a President construes a law in keeping with the Constitution, he is by necessity construing a law he has been charged with executing. Unlike the many federal laws that do not require Executive Branch involvement to be enforced, these laws tend to involve the interaction between branches of government or the internal workings of the Executive Branch. By their nature, these laws are often outside the scope of judicial review, but signing statements neither increase nor decrease the likelihood that an executive action will be judicially reviewable.

Whether a presidential action is reviewable in court does not turn upon the content of a signing statement or whether there is a signing statement. As the Congressional Research Service has stated, "If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-14 (Sept. 20, 2006).

c) If the Founders wanted to promote the type of activity engaged in by this President – that is, repeatedly issuing signing statements but choosing not to veto a bill when he believes a subpart of it is unconstitutional – why do you think they chose not to provide for a line item veto in the Constitution?

ANSWER: The Founders charged the President both with the execution of the laws and with the duty to uphold the supreme law—the Constitution. Making the President subject to the overriding obligation to comply with the supreme law of the land is far different from granting line-item veto authority. A President could in theory employ a line-item veto to nullify a provision for policy reasons or even for no reason at all in the exercise of the presidential prerogative, and such a line-item veto authority thus would give the President broad power with respect to Congress. By contrast, a President's signing statement is simply an explanation by the President of his interpretation of the law and, on occasion, may contain a construction adopted to avoid constitutional concerns that may arise under certain circumstances. Its application is much more narrowly circumscribed because it is simply an implementation of the President's duty to act in accordance with the Constitution. In addition, a line-item veto permanently would remove an entire provision from the law that would bind that President and all future Presidents. A provision addressed in a signing statement, on the other hand, ordinarily would continue to be enforced by that President and his successors and would remain enforceable in court. Because a signing statement and a line-item veto operate in markedly different ways, the Founders' choice to permit one but not the other is understandable.

d) When the President sees a bill he does not like, why does he not just veto it as the Founders intended?

ANSWER: It has never been the case that a veto is the President's only option when confronting a bill that contains an unconstitutional provision (or one capable of unconstitutional application). Presidents Jefferson (*e.g.*, the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, as well as George H.W. Bush and Clinton, have signed legislation rather than vetoing it despite concerns that the legislation posed constitutional difficulties. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 nn.3 & 5, 134, 138 (1993) (*available at* http://www.usdoj.gov/olc/signing.htm); *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds"). As Assistant Attorney General Dellinger explained early during the Clinton Administration: "In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision." 17 Op. O.L.C. at 135. Presidents in this way avoid rendering all of Congress's work a nullity by giving full effect to the vast bulk of the bill's provisions and giving effect to the problematic provision to the extent it is constitutional to do so. Because many signing statements discuss constructions of a statute to avoid constitutional issues only in certain applications, most provisions that are subject to signing statements are implemented as they are written.

169. A committee of the American Bar Association recently released a report opposing, "as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress." Please respond to the arguments raised in the ABA report.

ANSWER: The ABA Report did not accurately report either the history of signing statements or the signing statement practice of the current President. To give but one example, the Task Force suggests that the Clinton Administration's position was that the President could decline to enforce an unconstitutional provision only in cases in which "there is a judgment that the Supreme Court has resolved the issue." ABA Task Force Report at 13-14 (quoting from February 1996 White House press briefing). But President Clinton consistently issued signing statements even when there was not a Supreme Court decision that had clearly resolved the issue. *See, e.g., Statement on Signing the Global AIDS and Tuberculosis Relief Act of 2000* (Aug. 19, 2000) ("While I strongly support this legislation, certain provisions seem to direct the Administration on how to proceed in negotiations related to the development of the World Bank AIDS Trust Fund. Because these provisions appear to require the Administration to take certain positions in the international arena, they raise constitutional concerns. As such, I will treat them as precatory."). Indeed, Assistant Attorney General Walter Dellinger made clear early in the Clinton Administration that if "the President, *exercising his independent judgment*, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (emphasis added).

The ABA Task Force Report has been publicly rejected by legal scholars across the political spectrum, including Dellinger, the former Assistant Attorney General for the Office of Legal Counsel, and Professor Laurence Tribe of Harvard University. In addition, the Congressional Research Service ("CRS") recently reviewed the ABA Report and concluded that "in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves." *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1 (Sept. 20, 2006) Moreover, the CRS found that while there is controversy over the number of statements, "it is important to note that the substance of [President George W. Bush's] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Id.* at CRS-9.

Because the ABA report did not present any new factual information or constitutional analysis, you may continue to rely for our position on the Attorney General's testimony and the oral and written testimony of Deputy Assistant Attorney General Michelle Boardman.

170. The ABA task force also specifically recommended two pieces of legislation: (1) requiring the President to submit a report to Congress setting forth in full the reasons and legal basis for any signing statement he issues; and (2) enabling the President, Congress, or other entities or individuals to seek judicial review in any instance in which the President claims the authority to disregard or decline to enforce all parts of a law he has signed. Do you have any objection to these proposals, in principle?

ANSWER: The first proposal is unnecessary. In addition to the explanation the President provides in signing statements that raise a constitutional issue, the Department of Justice often sends letters to Congress while a bill is pending, noting the very same constitutional defects and asking that they be addressed. Moreover, many constitutional defects in bills are so commonly repeated as to be routine. For example, nearly every appropriations bill enacted by Congress continues to include at least one provision with a one-house veto, despite the Supreme Court's 1983 holding that one-house vetoes are unconstitutional. *See INS v. Chadha*, 462 U.S. 919 (1983). Such *Chadha* objections are common, and President Clinton made numerous such objections, as reflected in our answer to question 78(A) above. An explanation of such common defects need not be lengthy to be complete.

The second proposal raises serious questions about whether the parties would be able to fulfill the constitutional requirements of standing and cannot be evaluated in the abstract. As the Congressional Research Service has noted, "[i]t is not clear that" these attempts "would satisfy either the 'case or controversy' or standing requirements of Article III of the Constitution. *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-26 (Sept. 20, 2006).

171. You testified that the President himself decided to deny security clearances to OPR lawyers seeking to investigate the behavior of Administration lawyers in developing, implementing, and monitoring the Terrorist Surveillance Program. How many times in the past has the President caused a halt to a government investigation because of his refusal to grant security clearances to investigators?

ANSWER: To our knowledge, none.

172. As you may know, Congress established the Civil Rights Division in 1957 to respond to the South's strong resistance to the Supreme Court's decision in *Brown v. Board of Education*. The original mission of the Division, therefore, was to protect African Americans from racial discrimination and violence in the wake of court-ordered integration. Although Congress has since

broadened the scope of the Division's charge to include the enforcement of laws enacted to protect women, persons with disabilities, immigrants, and others, Congress never intended that the Division abandon its original mission. While I am pleased that enforcement of certain kinds of cases within the Division's jurisdiction has increased – in particular, the prosecution of human trafficking crimes and the rights of language minorities under the Voting Rights Act – I am disturbed by reports that enforcement of civil rights cases on behalf of African Americans has sharply declined. Indeed, your testimony fails to mention any lawsuits filed by the Department on behalf of African-American victims of race discrimination.

Therefore, please provide the name and a summary of the facts and legal issues involved in each enforcement action approved and filed by the Division's voting, employment, and housing sections to combat race discrimination against African Americans since January of 2002.

ANSWER: The Division has been active in enforcing the federal civil rights laws on behalf of all Americans, including African-Americans. Indeed, during this Administration, the Division has filed scores of cases on behalf of African-American victims. Some of these cases include:

- In November 2006, the Division filed a complaint against Tallahassee Community College (TCC) alleging that TCC failed to select an African American applicant for the position of HomeSafenet Trainer because of the applicant's race in violation of Title VII. Under a court-approved consent decree entered on November 7, 2006, TCC agreed to offer the applicant $34,363 in back pay and accumulated interest.

- In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial couple in an attempt to force them out of their Ohio home.

- In August 2006, the Division obtained a verdict against a former apartment manager for discrimination on the basis of race as a result of his refusal to rent to African-Americans in Boaz, Alabama. The Division conducted an investigation of the manager and his employer through the use of fair housing testers. The defendant was ordered to pay a civil penalty of $10,000. Earlier in the year, the defendant's employer agreed to pay a civil penalty of $17,000 and compensatory damages of $32,700 to individuals who were subjected to the alleged discriminatory housing practices.

- In July 2006, the Division filed suit against the City of Chesapeake, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination on the basis of race and national origin in violation of Section 707

of Title VII of the Civil Rights Act of 1964 by using a mathematics test to screen applicants for entry-level police officer positions in a manner that had an unlawful disparate impact against African-American and Hispanic applicants.

- In July 2006, the court entered a consent decree resolving our suit against the City of Virginia Beach, Virginia, alleging that the City had engaged in a pattern or practice of employment discrimination in violation of Section 707 of Title VII through its use of a mathematics test that disproportionately excluded African-American and Hispanic applicants for the position of entry-level police officer. The decree alters the City's method for selecting entry-level police officers in a way that will eliminate the disparate impact of the mathematics test. In addition, the decree requires the City to provide remedial relief, including money damages, priority job offers, and retroactive seniority, to identifiable African-American and Hispanic victims of the challenged test.

- In July 2006, the Division filed a complaint against the City of Euclid, Ohio, alleging that the mixed at-large/ward system of electing the city council diluted the voting strength of African-American citizens in violation of Section 2 of the Voting Rights Act. In its investigation, the Division found that while African-Americans composed nearly 30% of Euclid's electorate, and although there had been eight recent African-American candidacies for the city council, not a single African-American candidate had ever been elected to that body. Further, the Division found that in seven recent city council elections, white voters voted sufficiently as a bloc to defeat the African-American voters' candidates of choice.

- In December 2005, the Division filed a complaint alleging that a Wisconsin nightclub violated Title II by discriminating against African-Americans. According to our complaint, nightclub employees falsely told African-Americans they could not enter because a private party was underway or the club was full to capacity, while at the same time admitting whites. On December 29, 2006, the court approved a consent decree settling the case and requiring the nightclub to adopt new entry procedures designed to prevent racial discrimination, to pay for periodic testing to assure that discrimination does not continue, to post a prominent sign at the entries advising that the nightclub does not discriminate on the basis of race or color, to train its managers, to send periodic reports to the Department, and to adopt an objective dress code approved by the Department.

- In 2004, the Division entered into a consent decree resolving allegations that Cracker Barrel Old Country Store, Inc., a nationwide family restaurant chain, accommodated a severe and pervasive pattern of racial discrimination at its restaurants, including allowing its servers to refuse to serve African-American customers and treating such customers differently in terms of seating, service, and responsiveness to complaints. Cracker Barrel agreed to implement far-reaching policy changes and training programs to remedy these violations.

- In 2004, the Division announced that federal assistance would be provided to local officials conducting a renewed investigation into the 1955 murder of Emmett Till, a 14-year old African-American boy from Chicago. Till was brutally murdered while visiting relatives in Mississippi after he purportedly whistled at a white woman. Two defendants who subsequently admitted guilt were acquitted in state court four weeks after the murder. Both men are now deceased. Although the investigation showed that there was no federal jurisdiction, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi for her consideration.

- In April 2004, five white supremacists pleaded guilty to assaulting two African-American men who were dining with two white women in a Denny's restaurant in Springfield, Missouri. One of the victims was stabbed and suffered serious injuries. The defendants were sentenced to terms of incarceration ranging from 24 to 51 months.

- In February 2003, the Division successfully prosecuted Ernest Henry Avants for the 1966 murder of Ben Chester White, an elderly African-American farm worker in Mississippi who, because of his race and efforts to bring the Reverend Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

- In 2003, the Division successfully settled a racial discrimination and retaliation lawsuit against the city of Fort Lauderdale, Florida, for a total of $455,000 in compensatory damages. The lawsuit alleged that the city of Fort Lauderdale violated Title VII by denying an African-American employee promotion because of his race. The lawsuit further alleged that the city retaliated against the employee when he complained that he had been denied promotion for discriminatory reasons.

- In 2002, the Division filed a lawsuit under Section 208 of the Voting Rights Act that was the first ever to protect the voting rights of Haitian Americans.

- From FY 2001 through August 30, 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division convicted 58 defendants during that same period. For example, in September 2006, two defendants were convicted of conspiring to interfere with the housing rights of a family that included an African American by burning a cross in front of their house.

- In April 2006, an additional defendant pleaded guilty to the same offense. In a separate case, a defendant pleaded guilty on August 16, 2006 to intimidating and interfering with an African-American family that was negotiating for the purchase of a house by burning a cross on the property adjacent to the house.

- On April 13, 2004, a defendant in a different case pleaded guilty to building and burning a cross in the front yard of an African-American couple's home; that defendant was sentenced to 18 months of incarceration.

- In a case stemming from a series of racially-motivated threats aimed at an African-American family in North Carolina, four adults were convicted and one juvenile was adjudicated delinquent. Two of the adults were convicted at trial for conspiring to interfere with the family's housing rights and, on July 5, 2005, were sentenced to 21 months in prison. A third defendant pleaded guilty to a civil rights conspiracy charge, and the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

- On March 4, 2004, in a case personally argued by the then-Assistant Attorney General for the Civil Rights Division, the United States Court of Appeals for the Fourth Circuit agreed with the Division that the district court should have imposed a stiffer sentence on the perpetrator of a cross burning in Gastonia, North Carolina. On March 28, 2005, the defendant was re-sentenced by another district court judge to one year and one day in prison.

- Since 2001, the Division has obtained four consent decrees involving redlining of predominantly African-American neighborhoods by major banking institutions. The first, filed and resolved in 2002, involved a major bank in Chicago that will invest more than $10 million and open two new branches in minority neighborhoods to settle a lawsuit alleging that it had engaged in mortgage redlining on the basis of race and national origin. In May 2004, the Division obtained a consent decree requiring a bank to invest $3.2 million in small business and residential loan programs and to open three new branches in the City of Detroit. This was the first redlining case the Division had ever brought alleging discrimination in business lending. In July 2004, the Justice Department filed and resolved a lawsuit against another bank in Chicago. The suit alleged that the bank intentionally avoided serving the credit needs of residents and small businesses located in minority neighborhoods. The bank has agreed to invest $5.7 million and open new branches in these neighborhoods. On October 13, 2006, the Justice Department filed a complaint alleging that Centier Bank discriminated on the basis of race and national origin by avoiding serving the lending and credit needs of minority neighborhoods in the Gary, Indiana metropolitan area in violation of the Fair Housing Act and the Equal Credit Opportunity Act. The suit was resolved by a consent decree entered on October 16, 2006, which requires the Bank to: invest a minimum of $3.5 million in a special financing program for residential and CRA small business loans; commit at least $375,000 in targeted advertising; invest $500,00 to provide credit counseling, financial literacy, business planning, and other related educational programs targeted at the residents and small businesses of African-American and Hispanic areas and sponsor programs offered by community or governmental organizations engaged in fair lending work; open or acquire at least two full service offices within designated African-American neighborhoods; expand an existing supermarket branch in a

majority Hispanic neighborhood to provide full lending services; provide the same services offered at its majority white suburban locations to all branches regardless of their location; train employees on the requirements of the Fair Housing Act and Equal Credit Opportunity Act; as well as other remedial relief.

173. On Sunday, July 23, 2006, an article in the *Boston Globe* reported that "[t]he Bush administration is quietly remaking the Justice Department's Civil Rights Division, filling the permanent ranks with lawyers who have strong conservative credentials but little experience in civil rights, according to job application materials obtained by the Globe." The article ties this politicization of the workforce to former Attorney General John Ashcroft's decision to disband hiring committees made up of veteran career lawyers, a system that, according to Charles Cooper, a former deputy attorney assistant attorney general for civil rights during the Reagan Administration, "worked well." The article states that only 19 of the 45 lawyers hired under the new system into the Civil Rights Division's voting, employment, and appellate sections have any civil rights experience, and of those 19, "nine gained their experience either by defending employers against discrimination or by fighting against race-conscious policies." Consequently, the article notes that "the kinds of cases the Civil Rights Division is bringing have undergone a shift. The division is bringing few voting rights and employment cases involving systematic discrimination against African Americans, and more alleging reverse discrimination against white and religious discrimination against Christians."

a) Is the Globe report accurate?

ANSWER: No.

b) How do you respond to its allegations?

ANSWER: The Globe article, among other things, incorrectly suggests that a central hiring committee of career employees within the Civil Rights Division made all hiring decisions during previous Administrations; obtained limited information regarding attorneys hired in only three of the ten litigating sections in the Division; and did not obtain resumes of attorneys hired during previous Administrations in order to make an objective comparison. Most significantly, the Globe article was not based on any personal interviews of the attorneys hired by the Civil Rights Division to measure their interest in, and dedication to, enforcing the nation's civil rights laws.

The talented and accomplished individuals hired in the Civil Rights Division have a profound commitment to public service and law enforcement. Generalizations are often inaccurate and unhelpful in defining an individual. No attorney is hired based solely on his or her resume, but rather after a profoundly more comprehensive review, including detailed personal interviews.

c) **Will you consider reversing your predecessor's unprecedented politicization of the career ranks, and immediately reinstitute the hiring committee so that veteran career attorneys may make hiring recommendations in the Civil Rights Division, as they did for the last several decades?**

ANSWER: Veteran career attorneys continue to make hiring recommendations throughout the Department, and within the Civil Rights Division. The procedure implemented by Attorney General Ashcroft throughout the Department for hiring attorneys through the Attorney General's Honors Program (HP) offers several improvements to the previous program. Prior to 2002, HP applicants paid their own way to interview in various locations across the country; they often met with a single representative from the Justice Department. The Department of Justice now pays for candidates to come to Washington, D.C., or other major cities, where they meet with both political and career attorneys for an interview. *More* individuals are now typically involved in the hiring process, not fewer. And applicants who might have otherwise been prohibited from seeking an interview because of costs and location now have equal access to the program.

174. **In January 2002, Deputy Attorney General Larry Thompson commissioned a study on diversity at the Department. After refusing to release the results of the study to the public, the Attorney General and the Deputy Attorney General announced a new initiative to increase diversity in the Department's workforce by focusing on the economic and geographic background of job applicants. More than a year later, the study was finally released in response to a FOIA request; most of the study's key findings, conclusions, and recommendations, however, were redacted. The redacted portions, which were quickly revealed due to a computer glitch, demonstrated a need for more diversity on the basis of race and sex, not the factors emphasized by the new hiring initiative. I believe that a diverse workforce in the Civil Rights Division is critical to carrying out the work of the Division on behalf of this country's increasingly diverse population, and I am concerned that the new hiring initiative, together with the disbandment of the hiring committee, has had a negative impact.**

Please provide the number of African-American attorneys hired into the Civil Rights Division since the hiring committee was abolished in 2002, and please identify their position and section.

ANSWER: Since 2002, 17 African-American attorneys have been hired by the Civil Rights Division. These attorneys were hired to fill the positions of Trial Attorney, Supervisory Attorney, Deputy Chief, and Special Assistant to the Assistant Attorney General. They joined the Division's Disability Rights Section, the Housing and Civil Enforcement Section, the Special Litigation Section, the Educational Opportunities

Section, the Office of Special Counsel for Immigration-Related Unfair Employment Practices, the Criminal Section, the Employment Litigation Section, the Voting Section, and the Office of the Assistant Attorney General.

175. On November 4, 2004, Deputy Attorney General James Comey issued a memo calling on all of the Department's litigating components to temporarily assist the Civil Division's Office of Immigration Litigation in alleviating a backlog of deportation cases. The memo stated that the assistance would be required for only four months. More than 20 months later, however, Civil Rights Division attorneys continue to work on these cases. I am concerned that these cases are being disproportionately assigned to that Division in an effort to drive out career attorneys and deter them from working on civil rights matters. This appears to be true in the Appellate Section, where a small number of attorneys have filed hundreds of immigration briefs since the end of 2004. According to Assistant Attorney General Wan Kim, 120 out of 193 briefs, or 62% of the briefs, filed by Appellate Section attorneys in FY 2005 were deportation cases.

a) Please provide the number of immigration cases assigned to each of the Department's *appellate* offices (not each Division) and indicate the number of attorneys in those sections.

ANSWER: From November 2004 through December 2005, the Civil Rights Division received 215 briefs, which is 4.77% of the total number of briefs distributed nationwide. The total number of Civil Rights Division attorneys (344) represented 5.06% of the attorneys available nationwide for briefing immigration cases. By way of simple comparison, the Environment and Natural Resources Division received 234 briefs (400 attorneys), Antitrust Division received 222 (359 attorneys), Criminal Division received 217 briefs (451 attorneys), and Tax Division received 172 briefs (296 attorneys). The United States Attorneys, other than the Southern District of New York, collectively received 3,286 briefs. Overall, more than 4,500 cases were distributed to the litigating divisions and USAOs during the first year of this program. In the first six months of the 2006 calendar year, briefs have continued to be distributed in proportion to the total workforces of each component. The Civil Rights Division received 114 briefs, while the Criminal Division received 121, ENRD received 124, Antitrust received 188, and the Tax Division received 93. OIL additionally sent another 324 briefs to U.S. Attorney's Offices, and SDNY continued to distribute approximately another 200 cases per month to the USAOs.

The distribution of briefs within each component is determined by that component head. No directive has been issued requiring any particular appellate section to undertake the responsibility for briefing all the immigration cases assigned to the particular office or division. Because the work primarily involves preparing appellate briefs, and hence is work where appellate expertise may produce efficiencies, many component heads have chosen to have their appellate attorneys bear the primary burden imposed by the

immigration brief overload. However, it is important that each component head have flexibility to determine the best way in which to handle the work assigned.

b) Of the non-immigration briefs filed in the courts of appeals by attorneys in the Civil Rights Division's Appellate Section since November of 2004, please indicate how many of those briefs were *amicus* briefs and compare that number with the number of *amicus* briefs filed in 1996 (do not include *amicus* briefs filed by the Solicitor General in the Supreme Court). Please also list the name of each case and indicate the court, issue, and position of the government.

ANSWER: The Appellate Section of the Civil Rights Division during this Administration has an 87% success rate in filing amicus briefs in civil rights cases, as compared to 61% during the previous Administration. In Fiscal Year (FY) 2006, the Appellate Section achieved an 89% success rate in the federal courts of appeals as amicus curiae in civil rights cases. Notably, the Appellate Section also has an overall success rate of 90% during this period, which is the highest success rate the Section has had for any fiscal year since FY 1992. The overall success rate pertains to both amicus filings and direct appeals.

Since November 2004, the Appellate Section has filed 14 briefs as amicus curiae in the courts of appeals. Please see the attached chart for a description of these cases. Of the cases that have been decided so far, we have prevailed 83% of the time. In 1996, the Appellate Section filed 21 amicus briefs in the courts of appeals. The Section prevailed in approximately 50% of these cases, resulting in 10 successful amicus briefs.

c) Please provide the name of every attorney in the Civil Rights Division who has been assigned an immigration case. Please also indicate the number of cases assigned to each of those attorneys, and the date the attorney was hired into the Division.

ANSWER: A career Section manager's decision to assign an attorney to a particular matter or case involves many factors, including an attorney's experience, caseload, interests, and potential conflicts. In response to your specific question, approximately 417 immigration briefs had been assigned to 145 different attorneys in the Civil Rights Division through the end of 2006. Approximately 199 of those briefs were assigned to 77 attorneys who had less then 5 years of experience in the Civil Rights Division. Approximately 98 of those briefs were assigned to 48 attorneys who had between 5 and 14 years of experience in the Civil Rights Division. Approximately 74 of those briefs were assigned to 14 attorneys who had between 14 and 25 years of experience in the Civil Rights Division. Approximately 46 of those briefs were assigned to 6 attorneys with more than 25 years of experience in the Civil Rights Division.

d) The reassignment of immigration cases from the Office of Immigration Litigation to other components has now lasted five times longer than former Deputy Attorney General Comey initially stated. Will you commit to an end date for the reassignment of immigration cases to Civil Rights Division attorneys? If so, please provide that date.

ANSWER: The Department will not shirk from its responsibility to enforce the immigration laws passed by Congress. Until OIL has sufficient staff to manage the overwhelming workload, the Department must continue to share this responsibility. The Department is seeking to augment staffing and resource levels such that OIL ultimately will have sufficient staff to assume responsibility for all cases, including the Second Circuit cases formerly handled by SDNY. In this regard, OIL received a significant budget increase for the fiscal year that ended September 30, 2006. In addition, the President has sought another substantial budget increase for OIL in 2007. Finally, the Administration has proposed several much-needed legislative reforms that would help reduce the volume of immigration cases in the federal courts. Because OIL has not received the necessary budget increases and because the legislative reforms have not yet been enacted, OIL is unable to shoulder the entire immigration workload on its own.

176. There have been other reports of political favoritism within the Civil Rights Division.

a) Please provide the date of hire and resume for each attorney promoted to the position of "Special Litigation Counsel" in each of the litigating sections since January of 2002.

ANSWER: The Civil Rights Division has hired or promoted twenty-three attorneys into the position of Special Litigation Counsel since January 1, 2002. Almost all of these individuals were promoted from the position of Trial Attorney in the Division to the position of Special Litigation Counsel. Of the twenty-three individuals chosen for the position of Special Litigation Counsel, eleven were hired into the Division during years 2001-2006, eight were hired into the Division during the years 1995 to 2000, two were hired during the years 1989 to 1994, one was hired into the Division during the years 1977 to 1982, and one was hired into the Division during the years 1971 to 1976. With regard to the request for these individuals' resumes, the Civil Rights Division is currently gathering that information and will provide a supplement to this response.

b) Please provide the name of each attorney (including managers) who has been reassigned from one section to another and please also indicate the attorney's date of hire into the Division and the reason for the reassignment.

ANSWER: The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

c) **Please indicate the name of every attorney who has received a cash merit or service award since January of 2002 and indicate the amount of the award and the date the attorney was hired into the Division.**

ANSWER: The Civil Rights Division is in the process of gathering responsive information, and will supplement this response.

177. **The House and Senate have recently voted overwhelming to reauthorize the Voting Rights Act for another 25 years. Both you and the White House have stated the Administration's support for this legislation, including two provisions to restore Congress's original intent with respect to Section 5, which requires federal oversight of certain, covered jurisdictions with a history of race discrimination. On the date of passage, your office issued a press release in which you stated that "[t]he Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections." Yet, the Division's record of vigorous enforcement on behalf of African-American voters is abysmal. I am aware of only one Section 2 case brought on behalf of African-American voters by the current Administration. Interestingly, this case was filed just one week before your oversight hearing. Moreover, last year, the *Washington Post* reported that the recommendation of experienced career staff to deny Section 5 preclearance to Georgia's photo identification law because of its discriminatory impact on African-American voters was overruled. Unsurprisingly, the law was soon struck down by a federal judge who compared it to an unconstitutional Jim Crow Era poll tax. After this story appeared in the *Washington Post*, career attorneys were prohibited from making future recommendations in Section 5 proceedings. Finally, while ignoring discrimination against African Americans, the Division has filed an unprecedented reverse discrimination case on behalf of White voters in Noxubee County, Mississippi, a covered jurisdiction under the Voting Rights Act because of its egregious history of discriminating against African Americans.**

a) **What will you do to ensure that Congress's intent in reauthorizing the Voting Rights Act will be carried out?**
b) **What steps will the Department take to ensure that pervasive discrimination against African Americans, found to exist by both the House and Senate Judiciary Committees during the reauthorization process, will be addressed?**
c) **Will you insist that career attorneys again be allowed to make recommendations in Section 5 proceedings? If not, why not?**

ANSWER: As described in our answer to question 90, above, the Administration strongly supported reauthorization of the Voting Rights Act, and is currently vigorously defending the Act's constitutionality in court. When Congress enacted the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, the Attorney General stated that: "The Department of Justice is proud to have supported the passage of this historic legislation...The Department of Justice stands ready and looks forward to continuing, vigorous enforcement of its protections." The Department will continue to enforce Section 5 in a non-partisan and vigorous manner.

As noted in our answer to question 85, above, in this Administration, the Voting Section of the Civil Rights Division has filed cases on behalf of African American voters in many jurisdictions, including: *United States* v. *Crockett County* (W.D. Tenn.); *United States* v. *Euclid* (N.D. Ohio); *United States* v. *Miami-Dade County* (S.D. Fla.); and *United States* v. *North Harris Montgomery Community College District* (S.D. Tex), which also involved protecting the rights of Hispanic citizens. We also successfully litigated *United States* v. *Charleston County, South Carolina* (D.S.C.) and successfully defended that victory before the Fourth Circuit. The Department continues to seek out and prosecute cases on behalf of African American citizens. The Voting Section continues to actively identify at-large and other election systems that violate the Voting Rights Act. Where we find such systems and where the facts support a claim, we do not hesitate to bring lawsuits. We welcome allegations of possible Voting Rights violations from all sources, and have solicited such information widely.

The Department, of course, vigorously enforces all of the provisions of the Voting Rights Act. During fiscal year 2006, the Voting Section filed 17 new lawsuits, which is double the average number of lawsuits filed in the preceding 30 years. During this Administration, moreover, we have filed approximately 60 percent of all cases ever filed under the minority language provisions of the Voting Rights Act, as well as approximately 75 percent of all cases ever filed under Section 208. We also have used Section 2 of the Voting Rights Act to challenge barriers to participation, as in *United States* v. *Long County* (S.D. Ga.) and *United States* v. *City of Boston* (D.Mass.). We have filed the first voting rights case in the Division's history on behalf of Haitian-Americans; the first voting rights case in the Division's history on behalf of Filipino Americans; and the first voting rights cases in the Division's history on behalf of Vietnamese Americans. We will continue vigorously to protect all Americans from unlawful discrimination in voting.

The Georgia voter identification law, which amended an existing voter identification statute that had been precleared by the prior Administration, was precleared under Section 5 of the Voting Rights Act after a careful analysis that lasted several months. The decision took into account all of the relevant factors, including the most recent data available from the State of Georgia on the issuance of State photo identification and driver's license cards. The data showed, among other things, that the number of people in Georgia who already possess a valid photo identification greatly

exceeds the total number of registered voters. In fact, the number of individuals with a valid photo identification is slightly more than the entire eligible voting age population of the State. The data also showed that there is no racial disparity in access to the identification cards. The State subsequently adopted, and the Department precleared, a new form of voter identification that will be available to voters for free at one or more locations in each of the 159 Georgia counties.

In *Common Cause/Georgia v. Billups*, the district court did *not* conclude that the identification requirement violated the Voting Rights Act. To the contrary, the court refused to issue a preliminary injunction on that ground. The court instead issued a preliminary injunction on constitutional grounds that the Department cannot lawfully consider in conducting a preclearance review under Section 5 of the Voting Rights Act. Accordingly, the court's preliminary ruling, in a matter that is still being actively litigated, does not call into question the Department's preclearance decision.

Career attorneys do make recommendations in Section 5 proceedings. Indeed, the Chief of the Voting Section is a career Division attorney for more than 30 years.

178. You testified that you are Co-Chair of the President's Task Force on Identity Theft, created by Executive Order on May 10, 2006. A couple of weeks after the Task Force was created, the public learned for the first time that a laptop containing the personal information of more than 25 million veterans, and more than one million active military personnel had been stolen. Since then, there have been at least 10 reported major security breaches involving federal government databases containing personal, sensitive data of Americans, including the publication on a public website of the names, birth dates, and social security numbers of 100,000 members of the Navy, and the hacking of a Department of Agriculture computer system containing the names, social security numbers, and photographs of 26,000 former and current employees. What steps are you and the Task Force taking to prevent, track, and assist persons affected by these breaches in the federal government?

ANSWER: All members of the President's Identity Theft Task Force share the concern about data security breaches. In the Executive Order that he issued to establish the Task Force, the President made clear that he expects the Task Force to develop and pursue an aggressive response to all forms of identity theft through law enforcement actions, public outreach and education measures, and improved safeguards for data security. The Department anticipates that the Task Force's final strategic plan, which will be submitted to the President in early 2007, will address all of these issues.

In particular, both the Attorney General and the co-chair of the Task Force, Federal Trade Commission Chairman Deborah Platt Majoras, take very seriously the need for a swift response by law enforcement and prompt assistance to consumers when a major data breach results in the illegal accessing or disclosure of consumers' personal

information. As you may know, the Task Force, in September 2006, issued Interim Recommendations to the President on steps that could be taken immediately to begin to address the problem of identity theft. One of the Task Force's recommendations was that the Office of Management and Budget distribute to all federal agencies a guidance memorandum, written by the Task Force, which sets forth the steps that an agency should take if it suffers a data breach. We are pleased to say that the OMB distributed the Task Force's data breach guidance to all agencies and departments within a few days of the Task Force issuing its Interim Recommendations. We are confident that, with that guidance, agencies will be better equipped to effectively and quickly respond to data breaches and to mitigate any harms that may arise as a result of a data breach.

In its Interim Recommendations, the Task Force also recommended that in order to more effectively and quickly respond to data breaches, agencies should publish a "routine use" under the Privacy Act that would allow any agency that suffers a data breach to disclose information to those persons and entities in a position to cooperate (either by assisting in informing affected individuals or by actively preventing or minimizing harms from the breach), thereby helping to mitigate consequences of a breach. The Department of Justice took the lead in publishing such a routine use.

One of the first steps in response to a reported data breach is to determine whether any data has actually been improperly accessed or disclosed. In the cases of the Veterans Administration laptop that was stolen and the Department of Agriculture computer that was reportedly hacked, we understand that forensic review of computer data showed that no personal identifying information was downloaded or transferred from those computers. In situations involving actual misappropriation of databreaches, the Department of Justice works closely with investigative agencies such as the FBI and the Secret Service, as well as state and local law enforcement authorities in appropriate cases, to pursue the investigation expeditiously.

With respect to remediation and assistance to victims of data breaches, the Department understands that the FTC worked closely with the Veterans Administration in the laptop case to provide veterans with information on obtaining their credit reports and dealing with potential identity theft. The FTC has excellent information resources for consumers on identity theft, as well as a toll-free number and a website that identity-theft victims can use to report the crime and to obtain information on mitigating the harm caused by the identity theft. The Identity Theft Task Force has been considering many other steps that can be taken to assist victims of identity theft. Among other things, in its Interim Recommendations, the Task Force recommended that Congress amend the criminal restitution statutes to allow victims of identity theft to recover for the time spent attempting to remediate the harms that they suffer. The Department of Justice transmitted that proposed amendment to Congress in the autumn. The Task Force as a whole is now working on a series of comprehensive recommendations that will address criminal law enforcement, data security, and education and outreach in improving the federal government's response to identity theft.

Attachment for Question 175 (b): Amicus Briefs Filed Since November 2004 in the Courts of Appeals (as of December 28, 2006)

A. *Barnes-Wallace* v. *Boy Scouts of America* (9th Cir.)

The issue in this case was whether the City's two leases of public land to the Boy Scouts, under which the Boy Scouts agreed to build and maintain two parks and keep them open to the general public in exchange for limited control over the parks, violate the Establishment Clause. The Division argued that the district court was incorrect as a threshold matter in finding that the Boy Scouts was a religious organization such that the Establishment Clause applied to the City's leases with the Boy Scouts. The Division also argued that even if the Boy Scouts is a religious organization, the leases do not violate the Establishment Clause because they are not properly considered aid to a religious organization, or, if they are, such aid does not violate the Establishment Clause because it is made available to nonprofit organizations in a neutral manner, serves a secular purpose, and does not advance religion. On December 18, 2006 the Ninth Circuit certified a question in the case to the California Supreme Court. On December 26, 2006, the Ninth Circuit asked the California Supreme Court to delay ruling on the Ninth Circuit's certification order until the Ninth Circuit resolves whether it will consider an issue in the case en banc.

B. *Hayden* v. *Pataki* and *Muntaqim* v. *Coombe* (2d Cir.)

The issue in this case was whether Section 2 of the Voting Rights Act of 1965 applies to New York Election Law § 5-106(2), which prohibits presently incarcerated felons from voting. The Division argued that plaintiffs could not state a claim for vote dilution or denial because Section 2 does not apply to felon disenfranchisement laws. In *Hayden,* the Second Circuit agreed with the Division's position. In *Muntaqin*, the Second Circuit dismissed the case for lack of standing.

C. *Atkinson* v. *Lafayette College* (3d Cir.)

The issue in this case was whether Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C.1681(a), and thus the implied private right of action for violations of Section 901, encompasses a prohibition on retaliation for complaining about sex discrimination. The Division argued that Title IX's implied private right of action encompasses retaliation claims against an individual because he or she has complained about sex discrimination. The Third Circuit agreed with the Division's position.

D. *Baker* v. *Home Depot, Inc.* (2d Cir.)

The issue in this case was whether Home Depot offered plaintiff a reasonable accommodation in offering to excuse him from working Sunday mornings so that he could observe his religious beliefs. The Division argued that this was not a reasonable accommodation because in order to observe his religious beliefs plaintiff must refrain

from working at all on Sunday, not merely Sunday morning. The Second Circuit agreed with the Division's position.

E. *Fitzgerald* v. *Camdenton R III School District* (8th Cir.)

The issue in this case was whether the "child find" provision of the Individuals with Disabilities Education Act (IDEA) requires a school district to evaluate a child the school district suspects of having a disability if the child's parents refuse consent, remove the child from public school, and waive any claim to public educational benefits under the IDEA. The Division argued that if parents are privately funding their child's education and waive all benefits under the IDEA, the "child find" provision does not require the child be tested. The Eighth Circuit agreed with the Division's position.

F. *Faith Center* v. *Glover* (9th Cir.)

The issue in this case was whether Contra Costa County engaged in unconstitutional viewpoint discrimination when it barred a religious organization from using library meeting rooms to conduct meetings that included worship. The Division argued that the County's denial of access to Faith Center amounts to impermissible viewpoint discrimination under the standards set out in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001). The Division also argued the County would not violate the Establishment Clause by allowing Faith Center to use meeting rooms on equal terms with other community groups. The Ninth Circuit reversed the District Court's holding for the plaintiff. A petition for rehearing is pending.

G. *Wisconsin Community Services* v. *City of Milwaukee* (7th Cir.) (en banc)

On rehearing en banc, the court invited the United States to address four issues: (1) whether 28 C.F.R. 35.130(b)(7) and 28 C.F.R. 41.53 apply to disputes about zoning in suits under the Rehabilitation Act and Title II of the Americans With Disabilities Act (ADA); (2) if so, whether either regulation creates an entitlement to accommodation in the absence of intentional discrimination or disparate impact; (3) if the answer to Questions 1 and 2 is yes, are the regulations valid; and (4) if neither the Rehabilitation Act nor Title II of the ADA establishes an accommodation requirement for zoning disputes independent of intentional discrimination and disparate impact, does the approach of the Fair Housing Amendments Act apply to disputes about zoning.

The Division argued that Section 35.130(b)(7) applies to zoning, but that Section 41.53 does not. In addition, the Division argued that Section 35.130(b)(7) requires a plaintiff to show that, due to his disability, a challenged rule or practice has a greater adverse effect on him than on other individuals who do not have that disability. The Division also argued that the failure to make reasonable accommodations is a theory of liability distinct from either intentional or disparate-impact discrimination under Section 35.130(b)(7). In addition, the Division argued that the regulation, as interpreted, is valid under Title II. The en banc Seventh Circuit agreed with the Division's position.

H. *Living Waters Church of God* v. *Meridian Charter Township* (6th Cir.)

The issue in this case was whether the defendant violated plaintiff's rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by denying it a special use permit to construct a building in excess of 25,000 square feet. The Division argued that denial of the permit operates as a substantial burden on plaintiff's exercise of religion in violation of RLUIPA because the church cannot carry out all its ministries in a smaller building. The decision in this case is pending.

I. *Faith Temple Church* v. *Town of Brighton* (2d Cir.)

The issue in this case was whether the Town's use of its eminent domain power qualifies as the imposition or implementation of a "land use regulation" under RLUIPA. The Division argued that the Town's attempted use of eminent domain satisfies the "land use regulation" provision of RLUIPA. The parties subsequently settled the case.

J. *Jones* v. *Gale*, No. 06-1308 (8th Cir.)

The issue in this case was whether private plaintiffs can enforce the requirements of Title II of the ADA through *Ex parte Young* suits. The Division argued that, as the Eighth Circuit has already held, plaintiffs are permitted to enforce Title II through *Ex parte Young* suits. The Eighth Circuit declined to reach the ADA question, instead affirming the district court's conclusion that the challenged state constitutional provisions violate the dormant Commerce Clause.

K. *Lighthouse Institute for Evangelism* v. *City of Long Branch* (3d Cir.)

The issue in this case was whether a claim brought under RLUIPA's equal terms provision requires proof of a substantial burden on the plaintiff's religious exercise, as is required for a claim brought under RLUIPA's substantial burden provision. The Division argued that the plaintiff is not required to prove that the land use regulation at issue substantially burdened its religious exercise in order to prove a violation of RLUIPA's "equal terms" provision. The decision in this case is pending.

L. *Bronx Household of Faith* v. *Board of Education of the City of New York* (2d Cir.)

The issue in this case was whether the school board engaged in unconstitutional viewpoint discrimination by refusing to allow a religious organization to rent public school facilities for worship during non-school hours on an equal basis with other community organizations renting these facilities for expressive activities. The Division argued that the school board engaged in impermissible viewpoint discrimination by denying Bronx Household access to school property, that "worship" is protected speech,

and that permitting Bronx Household to use the school property would not endorse religion in violation of the Establishment Clause. The decision in this case is pending.

M. *Westchester Day School* v. *Village of Mamaroneck* (2d Cir.)

The issue in this case was whether a village violated a Jewish school's rights under RLUIPA when it denied the school permission to expand its dilapidated and overcrowded facilities. The Division argued that, as the district court held, the village violated the school's rights under RLUIPA. The decision in this case is pending.

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Hearing vowed on Bush's powers

The Boston Globe

Senator questions bypassing of laws

By Charlie Savage, Globe Staff | May 3, 2006

(Correction: Because of an editing error, a Page One story yesterday on a possible Senate hearing on President Bush's claims that he can bypass certain laws incorrectly attributed the quote, "How can we know whether the government will comply with the new laws that we passed?" to FBI director Robert Mueller. The quote was from Senator Russ Feingold, Democrat of Wisconsin. Also, because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.)

WASHINGTON -- The chairman of the Senate Judiciary Committee, accusing the White House of a "very blatant encroachment" on congressional authority, said yesterday he will hold an oversight hearing into President Bush's assertion that he has the power to bypass more than 750 laws enacted over the past five years.

"There is some need for some oversight by Congress to assert its authority here," Arlen Specter, Republican of Pennsylvania, said in an interview. "What's the point of having a statute if . . . the president can cherry-pick what he likes and what he doesn't like?"

Specter said he plans to hold the hearing in June. He said he intends to call administration officials to explain and defend the president's claims of authority, as well to invite constitutional scholars to testify on whether Bush has overstepped the boundaries of his power.

The senator emphasized that his goal is "to bring some light on the subject." Legal scholars say that, when confronted by a president encroaching on their power, Congress's options are limited. Lawmakers can call for hearings or cut the funds of a targeted program to apply political pressure, or take the more politically charged steps of censure or impeachment.

Specter's announcement followed a report in the Sunday Globe that Bush has quietly challenged provisions in about 1 in 10 of the bills that he has signed, asserting the authority to ignore more than 750 statutes.

Over the past five years, Bush has stated that he can defy any statute that conflicts with his interpretation of the Constitution. In many instances, Bush cited his role as head of the executive branch or as commander in chief to justify the exemption.

The statutes that Bush has asserted the right to override include numerous rules and regulations for the military, job protections for whistle-blowers who tell Congress about possible government wrongdoing, affirmative action requirements, and safeguards against political interference in federally funded

research.

Bush made the claims in "signing statements," official documents in which a president lays out his interpretation of a bill for the executive branch, creating guidelines to follow when it implements the law. The statements are filed without fanfare in the federal record, often following ceremonies in which the president made no mention of the objections he was about to raise in the bill, even as he signed it into law.

Dana Perino, a White House spokeswoman, said via e-mail that if Specter calls a hearing, "by all means we will ensure he has the information he needs." She pointed out that other presidents dating to the 19th century have "on occasion" issued statements that raise constitutional concerns about provisions in new laws.

But while previous presidents did occasionally challenge provisions in laws while signing them, legal scholars say, the frequency and breadth of Bush's use of that power are unprecedented.

Bush is also the first president in modern history who has never vetoed a bill, an act that gives public notice that he is rejecting a law and can be overridden by Congress. Instead, Bush has used signing statements to declare that he can bypass numerous provisions in new laws.

The statements attracted little attention in Congress or the media until recently, when Bush used them to reserve a right to bypass a new torture ban and new oversight provisions in the Patriot Act.

"The problem is that you have a statute, which Congress has passed, and then the signing statements negate that statute," Specter said. "And there are more and more of them coming. If the president doesn't like something, he puts a signing statement on it."

Specter added: "He put a signing statement on the Patriot Act. He put a signing statement on the torture issue. It's a very blatant encroachment on [Congress's constitutional] powers. If he doesn't like the bill, let him veto it."

It was during a Judiciary Committee oversight hearing on the FBI that Specter yesterday announced his intent to hold a hearing on Bush's legal authority. Another committee member, Senator Russ Feingold, Democrat of Wisconsin, also questioned Bush's assertions that he has the authority to give himself an exemption from certain laws.

"Unfortunately, the president's signing statement on the Patriot Act is hardly the first time that he has shown a disrespect for the rule of law," Feingold said. "The Boston Globe reported on Sunday that the president has used signing statements to reserve the right to break the law more than 750 times."

Feingold is an outspoken critic of Bush's assertion that his wartime powers give him the authority to set aside laws. The senator has proposed censuring Bush over his domestic spying program, in which the president secretly authorized the military to wiretap Americans' phones without a warrant, bypassing a 1978 surveillance law.

At the hearing yesterday, Feingold pressed FBI director Robert Mueller to give assurances that the bureau would comply with provisions in the Patriot Act and to tell Congress how agents are using the law to search homes and secretly seize papers.

Mueller said he saw no reason that the bureau couldn't share that information with Congress. But he also said that he was bound to obey the administration, and declined to promise that he would "go out there and fight" on behalf of Congress if Bush decided to override the Patriot Act's oversight provision and ordered the FBI not to brief Congress.

Feingold also said Bush's legal claims have cast a cloud over a host of rules and restrictions that Congress has passed, using its constitutional authority to regulate the executive branch of government.

"How can we know whether the government will comply with the new laws that we passed?" Feingold said. "I'm not placing the blame on you, obviously, or your agents who work to protect this country every day, but how can we have any assurance that you or your agents have not received a secret directive from above requiring you to violate laws that we all think apply today?"

Mueller replied: "I can assure with you with regard to the FBI that our actions would be taken according to appropriate legal authorities."

Specter said that challenging Bush's contention that he can ignore laws written by Congress should be a matter of institutional pride for lawmakers. He also connected Bush's defiance of laws to several Supreme Court decisions in which the justices ruled that Congress had not done enough research to justify a law.

"We're undergoing a tsunami here with the flood coming from the executive branch on one side and the judicial branch on the other," Specter said. "There may as well soon not be a Congress. . . . And I think that most members don't understand what's happening." ■

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Memorandum June 13, 2006

TO: Honorable Charles Grassley, Chairman,
Senate Committee on Finance

FROM: Morton Rosenberg
Specialist in American Public Law
American Law Division

SUBJECT: Substantiality of An Agency's Legal and Policy Objections In Refusing to Comply with Subpoenas for Documents and the Testimony of Agency Personnel

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Pursuant to your Committee's authority under the Standing Rules of the Senate, Rule XXV, 1.(i), and its rules of procedure, 151 Cong. Rec. S425 (daily ed. Jan. 25, 2005), you initiated an investigation of the Food and Drug Administration's (FDA) approval and post-market surveillance of Ketek, an antibiotic manufactured by Aventis Pharmaceuticals (Aventis) for the treatment of community-acquired pneumonia, sinusitis, and acute exacerbation of chronic bronchitis. Your inquiry was spurred by substantial allegations that the FDA approved Ketek despite problems about the drug's safety and efficacy, and, the allegations continue, with full knowledge that some of the clinical data contained in a safety study conducted by Aventis (Study 3014) supporting its approval, was fraudulent, in whole or part, and that this information was withheld at the direction of FDA officials from an FDA advisory committee tasked with recommending the drug's approval or disapproval. Since April, 2006 you have been seeking pertinent documents and interviews with agency personnel with direct knowledge of who knew what and when. You advise that your staff's efforts to obtain documents critical to the inquiry have been stymied and that line employees they sought for interviews have been directed not to speak to anyone on the Committee. On May 19, 2006, the Committee issued two subpoenas, one to Health and Human Services (HHS) Department Secretary Michael O. Leavitt for documents related to Ketek; and a second to compel the personal appearance of Special Agent Robert West, one of the employees prevented from being interviewed by Committee staff. The document subpoena was specifically directed at relevant Ketek materials in FDA's office of Criminal Investigation, the Division of Scientific Investigations, the Office of the Commissioner of FDA, and the Office of Regulatory Affairs.

On May 30, 2006, the HHS Assistant Secretary for Legislation informed you that the Secretary would not comply with two broad categories of materials covered by the document

subpoena, and would not allow Special Agent West to testify. More particularly, the Assistant Secretary stated that all documents "that reflect the Agency's ongoing deliberations about pending matters," would be withheld because "the Department has a confidentiality interest in materials that reflect its ongoing deliberative process," citing a Department of Justice Office of Legal Counsel (OLC) opinion, which, in turn cites other OLC opinions but no pertinent judicial rulings. The HHS letter and the OLC opinions rest on the notion that revelations of such internal deliberations would have a "chilling effect" on employees and their "free and candid flow of ideas and recommendations would be jeopardized."

Also to be withheld are documents from components of the FDA responsible for conducting investigations regarding compliance with FDA statutes and regulations, including the Office of Criminal Investigation (OCI), the Division of Scientific Investigations (DSI) and the Office of Regulatory Affairs (ORA). Here it is claimed that any disclosure of information in open, ongoing investigations (as opposed to a closed matters, which may be disclosed) "poses an inherent threat to the Executive Branch's enforcement and litigation functions," relying again on OLC opinions that assert that such disclosures to Congress would be perceived by the public and the courts as an exercise of "undue political and congressional influence over enforcement decisions" as well providing a "road map" of ongoing work that could undermine and prejudice such investigations. The OLC opinions cite other OLC and Attorney General opinions and their "consistent" assertion of this position as authority.

Finally, the agency's direction to the Special Agent not to comply with the testimonial subpoena is supported on the ground that it would undermine its ability "to ensure that its agents can exercise the independent judgment essential to the integrity of law enforcement and prosecution functions and to public confidence in their decisions." Rather, it is suggested that it is more appropriate that the Committee question supervisors selected by the agency which will satisfy the Committee's oversight responsibilities "without undermining the independence of line agents, without raising the appearance of political interference in investigational and prosecutorial decisions, and without compromising potentially successful prosecutions." The HHS letter concludes with statement that it has "consulted with the Department of Justice and understands this statement to be consistent with longstanding Executive Branch assertions of interest."

Conducted at your request, our review of the historical experience and legal rulings pertinent to access to information regarding the law enforcement activities of executive agencies indicates that claims exactly like those asserted here–prosecutorial deliberative process, confidential communications, and an agency's prerogative to determine who will be interviewed or testify before a jurisdictional committee, have been consistently rejected and compliance has been forthcoming. Such assertions have predominately emanated from the Department of Justice, the principal executive law enforcement agency, but have been raised by other departments and agencies in the past, including HHS. In the last 80 years Congress has consistently sought and obtained deliberative prosecutorial memoranda, and the testimony of line attorneys, FBI field agents and other subordinate agency employees regarding the conduct of open and closed cases in the course of innumerable investigations of Department of Justice (DOJ) activities. It appears that the fact that an agency, such as the Justice Department or any other agency exercising law enforcement authority, has determined for its own internal purposes that a particular item should not be disclosed, or that the information

sought should come from one agency source rather than another, does not prevent either House of Congress, or its committees or subcommittees, from obtaining and publishing information it considers essential for the proper performance of its constitutional functions. We are aware of no court precedent that imposes a threshold burden on committees to demonstrate, for example, a "substantial reason to believe wrongdoing occurred" before they may seek disclosure with respect to the conduct of specific open and closed criminal and civil cases. Indeed, the case law is quite to the contrary. An inquiring committee need only show that the information sought is within the broad subject matter of its authorized jurisdiction, is in aid of a legitimate legislative function, and is pertinent to the area of concern. There has been no claim by HHS of a lack of jurisdiction of your committee, or that your inquiry is for an improper legislative purpose, or that testimony of the subpoenaed agent is not pertinent to the investigation.

Our discussion will proceed as follows. We will briefly review the legal basis for investigative oversight and then describe several prominent illustrative instances of congressional oversight, principally using examples involving DOJ, that reflect the milestones in the establishment of oversight prerogatives vis- a- vis all executive departments and agencies. In light of this history, and the case law developed in conjunction with these proceedings, we assess the efficacy of the HHS claims.

The Legal Basis for Congressional Oversight

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon their authority, Congress and its committees have virtually plenary power to compel information needed to discharge their legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

Although there is no express provision of the Constitution that specifically authorizes Congress to conduct investigations and take testimony for the purposes of performing its legitimate function, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.[1] Thus, in *Eastland v. United States Servicemen's Fund*, the Court explained that "[t]he scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[2] In *Watkins v. United States*, the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the

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[1] *E.g., McGrain v. Daugherty,* 273 U.S. 135 (1927); *Watkins v. United States,* 354 U.S. 178 (1957); *Barenblatt v. United States,* 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); see also, *United States v. A.T.T.,* 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[2] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

administration of existing laws as well as proposed or possibly needed statues."[3] The Court did not limit the power of congressional inquiry to cases of "wrongdoing." It emphasized, however, that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[4] "[T]he first Congresses," it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[5] and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."[6] Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[7]

The breadth of a jurisdictional committee's investigative authority may be seen in the two seminal Supreme Court decisions emanating from the Teapot Dome inquiries of the mid-1920's. As part of its investigation, the Senate select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Daugherty failed to respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, in a landmark decision, *McGrain v. Daugherty,*[8] the Court upheld the Senate's authority to investigate these charges concerning the Department:

> [T]he subject to be investigated was the administration of the Department of Justice - whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers - specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.[9]

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[3] 354 U.S. at 187.

[4] *Id.*

[5] *Id.* at 182.

[6] *Id.* at 194-95

[7] *Id.* at 200 n. 33.

[8] 273 U.S. 135 (1927).

[9] 273 U.S. at 177-78.

The Court thus underlined that the Department of Justice, like all other executive departments and agencies, is a creature of the Congress and subject to its plenary legislative and oversight authority.

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[10] a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts... and shall respectfully decline to answer any questions propounded by your committee."[11] The Supreme Court upheld the witness' conviction for contempt of Congress. The Court considered and rejected in unequivocal terms the witness' contention that the pendency of lawsuits provided an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[12] The Court further explained: "It may be conceded that Congress is without authority to compel disclosure for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[13]

Illustrative Instances of Congressional Committees Obtaining Prosecutorial Deliberative Materials and the Testimony of Line Personnel

The Teapot Dome scandal in the mid-1920's provided not only the model and indisputable authority for wideranging congressional inquiries. While the Senate Committee on Public Lands and Surveys focused on the actions of the Department of the Interior in leasing naval oil reserves, a Senate select committee was constituted to investigate "charges of misfeasance and nonfeasance in the Department of Justice"[14] in failing to

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[10] 279 U.S. 263 (1929).

[11] *Id.* at 290.

[12] *Id.* at 295.

[13] *Id.*.

[14] *McGrain v. Daugherty,* 273 U.S. 135, 151 (1927).

prosecute the malefactors in the Department of the Interior, as well as other cases.[15] The select committee heard from scores of present and former attorneys and agents of the Department and its Bureau of Investigation, who offered detailed testimony about specific instances of the Department's failure to prosecute alleged meritorious cases. Not all of the cases upon which testimony was offered were closed, as one of the committee's goals in its questioning was to identify cases in which the statute of limitations had not run out and prosecution was still possible.[16]

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[15] Investigation of Hon. Harry M. Daugherty, Formerly Attorney General of the United States: Hearings Before the Senate Select Committee on Investigation of the Attorney General, vols. 1-3, 68th Congress, 1st Session (1924).

[16] *See, e.g., id.* at 1495-1503, 1529-30,2295-96.

The committee also obtained access to Department documentation, including prosecutorial memoranda on a wide range of matters. However, given the charges of widespread corruption in the Department and the imminent resignation of Attorney General Daugherty, it would appear that some of the documents furnished the committee early in the hearings may have been volunteered by the witnesses and not officially provided by the Department. Although Attorney General Daugherty had promised cooperation with the committee, and had agreed to provide access to at least the files of closed cases,[17] such cooperation apparently had not been forthcoming.[18]

In two instances immediately following Daugherty's resignation, the committee was refused access to confidential Bureau of Investigation investigative reports pending the appointment of a new Attorney General who could advise the President about such production,[19] though witnesses from the Department were permitted to testify about the investigations that were the subject of the investigative reports and even to read at the hearings from the investigative reports. With the appointment of the new Attorney General, Harlan F. Stone, the committee was granted broad access to Department files. Committee Chairman Smith Brookhard remarked that "[Stone] is furnishing us with all the files we want, whereas the former Attorney General, Mr. Daugherty, refused nearly all that we asked."[20] For example, with the authorization of the new Attorney General, an accountant with the Department who had led an investigation of fraudulent sales of property by the Alien Property Custodian's office appeared and produced his confidential reports to the Bureau of Investigation. The reports described the factual findings from his investigation and his recommendations for further action, and included the names of companies and individuals suspected of making false claims. The Department had not acted on those recommendations, though the cases had not been closed.[21] A similar investigative report, concerning an inquiry into the disappearance of large quantities of liquor under the control of the Department during the prior administration of President Harding, was also produced.[22]

As part of its investigation, the select committee issued a subpoena for the testimony of Mally S. Daugherty, the brother of the Attorney General. After Mally Daugherty failed to

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[17] *Id.* at 1120.

[18] *Id.* at 1078- 79.

[19] *Id.* at 1015-16 and 1159-60.

[20] *Id.* at 2389.

[21] *Id.* at 1495-1547.

[22] *Id.* at 1790.

respond to the subpoena, the Senate sent its Deputy Sergeant at Arms to take him into custody and bring him before the Senate. Daugherty petitioned in federal court for a writ of *habeas corpus* arguing that the Senate in its investigation had exceeded its constitutional powers. The case ultimately reached the Supreme Court, where, as noted above, in a landmark decision, *McGrain v. Daugherty,*[23] the Court upheld the Senate's authority to investigate these charges concerning the Department.

One of the most prominent congressional investigations of the Department of Justice grew out of the highly charged confrontation at the end of the 97th Congress concerning the refusal of Environmental Protection Agency Administrator Ann Gorsuch Burford, under orders from the President, to comply with a House subcommittee subpoena requiring the production of documentation about EPA's enforcement of the hazardous waste cleanup legislation. This dispute culminated in the House of Representative's citation of Burford for contempt of Congress, the first head of an Executive Branch agency ever to have been so cited by a House of Congress. It also resulted in the filing of an unprecedented legal action by the Department, in the name of the United States, against the House of Representatives and a number of its officials to obtain a judicial declaration that Burford had acted lawfully in refusing to comply with the subpoena.

[23] 273 U.S. 135 (1927).

Ultimately, the lawsuit was dismissed,[24] the documents were provided to Congress, and the contempt citation was dropped. However, a number of questions about the role of the Department during the controversy remained: whether the Department, not EPA, had made the decision to persuade the President to assert executive privilege; whether the Department had directed the United States Attorney for the District of Columbia not to present the contempt certification of Burford to the grand jury for prosecution and had made the decision to sue the House; and, generally, whether there was a conflict of interest in the Department's simultaneously advising the President, representing Burford, investigating alleged Executive branch wrongdoing, and enforcing the congressional criminal contempt statute. These and related questions raised by the Department's actions were the subject of an investigation by the House Judiciary Committee beginning in early 1983. The committee issued a final report on its investigation in December 1985.[25]

Although the Judiciary Committee ultimately was able to obtain access to virtually all of the documentation and other information it sought from the Department, in many respects this investigation proved as contentious as the earlier EPA controversy from which it arose. In its final report, the committee concluded that:

> [T]he Department of Justice, through many of the same senior officials who were most involved in the EPA controversy, consciously prevented the Judiciary Committee from obtaining information in the Department's possession that was essential to the Committee's inquiry into the Department's role in that controversy. Most notably, the Department deliberately, and without advising the Committee, withheld a massive volume of vital handwritten notes and chronologies for over one year. These materials, which the Department knew came within the Committee's February 1983 document request, contained the bulk of the relevant documentary information about the Department's activities outlined in this report and provided a basis for many of the Committee's findings.[26]

Among the other abuses cited by the committee were the withholding of a number of other relevant documents until the committee had independently learned of their existence,[27] as

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[24] *U.S. v. House of Representatives,* 557 F. Supp. 150 (D.D.C. 1983).

[25] See, Report of the House Comm. on the Judiciary on Investigation of the Role of the Department of Justice in the Withholding of Environmental Protection Agency Documents from Congress in 1982-1983, H.R. Rep. No.99-435, 99th Cong., 1st Sess (1985) ("EPA Withholding Report").

[26] EPA Withholding Report at 1163; *see* also 1234-38.

[27] *Id.* at 1164.

well as materially "false and misleading" testimony before the committee by the head of the Department's Office of Legal Counsel.[28]

[28] *Id.* at 1164- 65 & 1191-1231.

The committee's initial request for documentation was contained in a February 1983 letter from its chairman, Peter Rodino, to Attorney General William French Smith. The committee requested the Department to "supply all documents prepared by or in the possession of the Department in any way relating to the withholding of documents that Congressional committees have subpoenaed from the EPA."[29] The letter also specifically requested, among other things, a narrative description of the activities of each division or other unit of the Department relating to the withholding of the EPA materials, information about the Department's apparent conflict of interest in simultaneously advising the Executive Branch while being responsible for prosecuting the Burford contempt citation, and any instructions given by the Department to the United States Attorney for the District of Columbia not to present the Burford contempt to the grand jury.

At first the Department provided only publicly available documents in response to this and other document requests of the committee.[30] However, after a series of meetings between committee staff and senior Department officials, an agreement was reached whereby committee staff were permitted to review the materials responsive to these requests at the Department to determine which documents the committee would need for its inquiry.[31] Committee staff reviewed thousands of documents from the Land and Natural Resources Division, the Civil Division, the Office of Legal Counsel, the Office of Legislative Affairs, the Office of Public Affairs, and the offices of the Attorney General, the Deputy Attorney General, and the Solicitor General.[32]

In July 1983, the committee chairman wrote to the Attorney General requesting copies of 105 documents that committee staff had identified in its review as particularly important to the committee's inquiry.[33] By May 1984, only a few of those documents had been provided to the committee, and the chairman again wrote to the Attorney General requesting the Department's cooperation in the investigation. In that letter, the chairman advised the Attorney General that the committee's preliminary investigation had raised serious questions of misconduct, including potential criminal misconduct, in the actions of the Department in the withholding of the EPA documents.[34] The committee finally received all of the 105

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[29] *Id.* at 1167 & 1182-83.

[30] *Id.* at 1184.

[31] *Id.* at 1168 & 1233.

[32] *Id.* at 1168.

[33] *Id.* at 1169.

[34] *Id.* at 1172.

documents in July 1984, a full year after it had initially requested access. The committee at that time also obtained the written notes and a number of other documents that had been earlier withheld.[35]

[35] *Id.* at 1173.

There was also disagreement about the access that would be provided to Department employees for interviews with committee staff. The Department demanded that it be permitted to have one or more Department attorneys present at each interview. The committee feared that the presence of Department representatives might intimidate the Department employees in their interviews and stated that it was willing to permit a Department representative to be present only if the representative was "walled-off' from Department officials involved with the controversy, if the substance of interviews was not revealed to subsequent interviewees, and if employees could be interviewed without a Department representative present if so requested. The Department ultimately agreed to permit the interviews to go forward without its attorneys present. If a Department employee requested representation, the Department employed private counsel for that purpose. In all, committee staff interviewed twenty-six current and former Department employees, including four Assistant Attorney Generals, under this agreement.[36]

Partly as a result of these interviews, as well as from information in the handwritten notes that had been initially withheld, the committee concluded that it also required access to Criminal Division documents concerning the origins of the criminal investigation of former EPA Assistant Administrator Rita Lavelle in order to determine if the Department had considered instituting the investigation to obstruct the committee's inquiry. The committee also requested information about the Department's earlier withholding of the handwritten notes and other documents to determine whether Department officials had deliberately withheld the documents in an attempt to obstruct the committee's Investigation.[37] The Department at first refused to provide the committee with documents relating to its Lavelle investigation "[c]onsistent with the longstanding practice of the Department not to provide access to active criminal files."[38] The Department also refused to provide the committee with access to documentation related to the Department's handling of the committee's inquiry, objecting to the committee's "ever- broadening scope of ...inquiry."[39]

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[36] *Id.* at 1174-76.

[37] *Id.* at 1176- 77 & 1263-64.

[38] *Id.* at 1265.

[39] *Id.* at 1265.

The committee chairman wrote the Attorney General and objected that the Department was denying the committee access even though no claim of executive privilege had been asserted.[40] The chairman also maintained that "[i]n this case, of course, no claim of executive privilege could lie because of the interest of the committee in determining whether the documents contain evidence of misconduct by executive branch officials."[41] With respect to the documents relating to the Department's handling of the committee inquiry, the chairman demanded that the Department prepare a detailed index of the withheld documents, including the title, date, and length of each document, its author and all who had seen it, a summary of its contents, an explanation of why it was being withheld, and a certification that the Department intended to recommend to the President the assertion of executive privilege as to each withheld document and that each document contained no evidence of misconduct.[42] With respect to the Lavelle documents, the chairman narrowed the committee's request to "predicate" documents relating to the opening of the investigation and prosecution of Lavelle, as opposed to FBI and other investigative reports reflecting actual investigative work conducted after the opening of the investigation.[43] In response, after a period of more than three months from the committee's initial request, the Department produced those two categories of materials.[44]

But this was not the last chapter of this affair. As has been the case in the present inquiry, in the past the Department has frequently made the broad claim that prosecution is an inherently executive function and that congressional access to information related to the exercise of that function is thereby limited. Prosecutorial discretion is said to be off limits to congressional inquiry and access demands are viewed as interfering with the discretion traditionally enjoyed by the prosecutor with respect to pursuing criminal cases. That argument was raised to a constitutional level in litigation that ensued after the Judiciary Committee filed its report and asked the Attorney General to appoint an independent counsel to pursue a criminal investigation of Department officials based on the Committee's findings. The appointment was made and during the course of the investigation one of the subjects, Theodore Olson, who at the time of the Burford affair was the Assistant Attorney General for the Office of Legal Counsel, was served with a subpoena and refused to comply, claiming that the independent counsel statute was unconstitutional on a variety of constitutional grounds.

When the case reached the Supreme Court it rejected the notion that prosecutorial discretion in criminal matters is an inherent or core executive function. Rather, the Court noted in *Morrison v. Olson,*[45] sustaining the validity of the appointment and removal conditions for independent counsels under the Ethics in Government Act, that the independent counsel's prosecutorial powers are executive in that they have "typically" been performed by Executive Branch officials, but held that the exercise of prosecutorial discretion is in no way "central" to the functioning of the Executive

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[40] *Id.* at 1266.

[41] *Id.*

[42] *Id.* at 1268-69.

[43] *Id.* at 1269-70.

[44] *Id.* at 1270.

[45] 487 U.S. 654 (1988).

Branch.[46] The Court therefore rejected a claim that insulating the independent counsel from at-will presidential removal interfered with the President's duty to "take care" that the laws be faithfully executed. Interestingly, the *Morrison* Court took the occasion to reiterate the fundamental nature of Congress' oversight function (" . . . receiving reports or other information and oversight of the independent counsel's activities . . . [are] functions that we have recognized as generally incidental to the legislative function of Congress," citing *McGrain v. Daugherty*.)[47]

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[46] *Id.* at 691-92.

[47] *Id.* at 694.

A subsequent relevant case study involved a 1992 inquiry of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology commenced a review of the plea bargain settlement by the Department of Justice of the government's investigation and prosecution of environmental crimes committed by Rockwell International Corporation in its capacity as manager and operating contractor at the Department of Energy's (DOE) Rocky Flats nuclear weapons facility.[48] The settlement was a culmination of a five-year investigation of environmental crimes at the facility, conducted by a joint government task force involving the FBI, the Department of Justice, the Environmental Protection Agency (EPA), EPA's National Enforcement Investigation Centers, and the DOE Inspector General. The subcommittee was concerned with the size of the fine agreed to relative to the profits made by the contractor and the damage caused by inappropriate activities; the lack of personal indictments of either Rockwell or DOE personnel despite a DOJ finding that the crimes were "institutional crimes" that "were the result of a culture, substantially encouraged and nurtured by DOE, where environmental compliance was a much lower priority than the production and recovery of plutonium and the manufacture of nuclear "triggers"; and that reimbursements provided by the government to Rockwell for expenses in the cases and the contractual arrangements between Rockwell and DOE may have created disincentives for environmental compliance and aggressive prosecution of the case.

The subcommittee held ten days of hearings, seven in executive session, in which it took testimony from the United States Attorney for the District of Colorado; an assistant U.S. Attorney for the District of Colorado; a DOJ line attorney from Main Justice; and an FBI field agent; and received voluminous FBI field investigative reports and interview summaries, and documents submitted to the grand jury not subject to Rule 6(e).[49]

At one point in the proceedings all the witnesses who were under subpoena, upon written instructions from the Acting Assistant Attorney General, Criminal Division, refused to answer questions concerning internal deliberations in which decisions were made about the investigation and prosecution of Rockwell, the DOE and their employees. Two of the witnesses advised that they had information and, but for the DOJ directive, would have

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[48] See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Committee on Science, Space and Technology, 102d Cong., 2d Sess., Vols. I and II (1992) ("Rocky Flats Hearings"); Meetings: To Subpoena Appearance by Employees of the Department of Justice and the FBI and To Subpoena Production of Documents From Rockwell International Corporation, Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, 102d Congress, 2d Sess., (1992)("Subpoena Meetings").

[49] Rocky Flats Hearing, Vol. I, at 389-1009, 1111-1251; Vol. II.

answered the subcommittee's inquiries. The subcommittee members unanimously authorized the chairman to send a letter to President Bush requesting that he either personally assert executive privilege as the basis for directing the witnesses to withhold the information or direct DOJ to retract its instructions to the witnesses. The President took neither course and the DOJ subsequently reiterated its position that the matter sought would chill Department personnel. The subcommittee then moved to hold the U .S. Attorney in contempt of Congress.

A last minute agreement forestalled the contempt citation. Under the agreement (1) DOJ issued a new instruction to all personnel under subpoena to answer all questions put to them by the subcommittee, including those which related to internal deliberations with respect to the plea bargain. Those instructions were to apply as well to all Department witnesses, including FBI personnel, who might be called in the future. Those witnesses were to be advised to answer all questions fully and truthfully and specifically instructed that they were allowed to disclose internal advice, opinions, or recommendations connected to the matter. (2) Transcripts were to be made of all interviews and provided to the witnesses. They were not to be made public except to the extent they needed to be used to refresh the recollection or impeach the testimony of other witnesses called before the subcommittee in a public hearing. (3) Witnesses were to be interviewed by staff under oath. (4) The subcommittee reserved the right to hold further hearings in the future at which time it could call other Department witnesses who would be instructed by the Department not to invoke the deliberative process privilege as a reason for not answering subcommittee questions.[50]

The most recent and definitive exploration and resolution of the question of the nature and breadth of Congress' oversight prerogative with respect to DOJ operations occurred as a consequence of the President's December 2001 claim of executive privilege in response to a subpoena by the House Government Reform Committee. That subpoena sought, among other material, Justice Department documents relating to alleged law enforcement corruption in the Federal Bureau of Investigation's Boston office that occurred over a period of almost 30 years. During that time, FBI officials allegedly knowingly allowed innocent persons to be convicted of murder on the false testimony of two informants in order to protect the undercover activities of those informants, then knowingly permitted the two informants to commit some 21 additional murders during the period they acted as informants, and, finally, gave the informants warning of an impending grand jury indictment and allowed them to flee. The President directed the Attorney General not to release the documents because disclosure "would inhibit the candor necessary to the effectiveness of the deliberative processes by which the Department makes prosecutorial decisions," and that committee access to the documents "threatens to politicize the criminal justice process" and to undermine the fundamental purpose of the separation of power doctrine, "which was to protect individual liberty." In defending the assertion of the privilege the Justice Department

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[50] Rocky Flats Hearings, Vol. I at 9-10,25-31,1673-1737; Subpoena Hearings, at 1-3,82-86, 143-51.

claimed a historical policy of withholding deliberative prosecutorial documents from Congress in both open and closed civil and criminal cases.[51]

[51] Louis Fisher, "The Politics of Executive Privilege," Carolina Academic Press, 108 (2004)(Fisher).

Initial congressional hearings after the claim was made demonstrated the rigidity of the Department's position. The Department later agreed there might be some area for compromise, and on January 10, 2002, White House Counsel Gonzales wrote to Chairman Burton conceding that it was a "misimpression" that congressional committees could never have access to deliberative documents from a criminal investigation or prosecution. "There is no such bright-line policy, nor did we intend to articulate any such policy." But, he continued, since the documents "sought a very narrow and particularly sensitive category of deliberative matters" and "absent unusual circumstances, the Executive Branch has traditionally protected these highly sensitive deliberatiive documents against public or congressional disclosure" unless a committee showed a "compelling or specific need" for the documents.[52] The documents continued to be withheld until a further hearing, held on February 6, 2002, when the committee heard expert testimony describing over 30 specific instances since 1920 of the Department of Justice giving access to prosecutorial memoranda for both open and closed cases and providing testimony of subordinate Department employees, such as line attorneys, FBI field agents and U.S. attorneys, and included detailed testimony about specific instances of DOJ's failure to prosecute meritorious cases. In all instances, investigating committees were provided with documents respecting open and closed cases that often included prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda and correspondence prepared during undercover operations, and documents presented to grand juries not protected by Rule 6(e), among other similar "sensitive materials." Six days after the hearing the Committee was given access to the disputed documents.[53]

The instances of successful committee access to DOJ documents and witnesses cataloged in the above referenced hearing encompassed a wide number of divisions, bureaus, and offices at Main Justice and U.S. Attorneys offices in the field, and involved the Department's "sensitive" Public Integrity Section,[54] and provide a substantial basis for arguing that no element of the DOJ is exempt from oversight by a jurisdictional committee of the Congress. Indeed, other congressional investigations not cataloged have reached still other DOJ elements, including the DOJ Office of Professional Responsibility. That occurred during the 1995 investigation by the Senate Judiciary Committee's Subcommittee on Terrorism, Technology and Government Information of allegations that several branches of the Department of Justice and the Department of the Treasury had engaged in serious criminal and professional misconduct in the investigation, apprehension and prosecution of Randall Weaver and Kevin Harris at Ruby Ridge, Idaho. The Subcommittee held 14 days of hearings in which it heard testimony from 62 witnesses, including Justice, Federal Bureau of

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[52] Fisher, *Id.*

[53] "Everything Secret Degenerates: The FBI's Use of Murderers As Informants," House Report No. 108-414, 108th Cong., 2d Sess. 121-134 (2004); Hearings, " Investigation Into Allegations of Justice Department Misconduct In New England-Volume I", House Comm. on Government Reform, 107th Cong., 1st and 2d Sess's. 520-556, 562-604 (May 3, December 13, 2001; February 6, 2002) (Hearings); *McIntyre v. United States*, 367 F.3d 38, 42-51 (1st Cir. 2004)(recounting background of FBI corrupt activities); *United States v. Salemme*, 91 Fed. Supp. 2d 141, 148-63, 208-15, 322 (D.Mass. 1993) (same); *United States v. Flemmi,* 195 F. Supp 243, 249-50 (D. Mass. 200); (same) Charles Trefer, "President Bush's First Executive Privilege Claim: The FBI/Boston Investigation", 33 Pres. Stud. Q. 201(2003).

[54] See Hearings, *supra*, at 549-50, 555.

Investigation, and Treasury officials, line attorneys and agents, and obtained various Justice, FBI and Treasury internal reports,[55] and issued a final report.[56]

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[55] Hearings, "The Federal Raid on Ruby Ridge, Idaho," before the Senate Subcomm. On Terrorism, Technology, Government Information, Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (Ruby Ridge Hearings).

[56] Ruby Ridge: Report of the Subcommittee on Terrorism, Technology and Government Information of the Senate Committee on the Judiciary (Ruby Ridge Report). The 154-page document appears not to have been officially reported by the full Committee. A bound copy may be found in the United States Senate Library, catalogue number HV 8141.U56 1995.

The Subcommittee's hearings revealed that the involved federal agencies conducted at least eight internal investigations into charges of misconduct at Ruby Ridge, none of which has ever been publically released.[57] DOJ expressed reluctance to allow the Subcommittee to see the documents out of a concern they would interfere with the ongoing investigation but ultimately provided some of them under conditions with respect to their public release. The most important of those documents was the Report of the Ruby Ridge Task Force.[58] The Task Force was established by the DOJ after the acquittals of Randy Weaver and Kevin Harris of all charges in the killing of a Deputy United States Marshal[59] to investigate charges that federal law enforcement agents and federal prosecutors involved in the investigation, apprehension and prosecution of Weaver and Harris may have engaged in professional misconduct and criminal wrongdoing. The allegations were referred to DOJ's Office of Professional Responsibility (OPR). The Task Force was headed by an Assistant Counsel from OPR and consisted of four career attorneys from DOJ's Criminal Division and a number of FBI inspectors and investigative agents. The Task Force submitted a 542 page report to OPR on June 10, 1994, which found numerous problems with the conduct of the FBI, the U.S. Marshals Service, and the U.S. Attorneys office in Idaho, and made recommendations for institutional changes to address the problems it found. It also concluded that portions of the rules of engagement issued by the FBI during the incident were unconstitutional under the circumstances, and that the second of two shots taken by a member of the FBI's Hostage Rescue Team (HRT), which resulted in the death of Vicki Weaver, was not reasonable. The Task Force recommended that the matter of the shooting be referred to a prosecutorial component of the Department for a determination as to whether a criminal investigation was appropriate. OPR reviewed the Task Force Report and transmitted the Report to the Deputy Attorney General with a memorandum that dissented from the recommendation that the shooting of Vicki Weaver by the HRT member be reviewed for prosecutorial merit based on the view that given the totality of circumstances, the agent's actions were not unreasonable. The Deputy Attorney referred the Task Force recommendation for prosecutorial review to the Criminal Section of the Civil Rights Division which concluded that there was no basis for criminal prosecution. The Task Force Report was the critical basis for the Subcommittee's inquiries during the hearings and its discussion and conclusions in its final report.[60]

Claims of Deliberative Process Privilege

Assertions of deliberative process privilege by agencies have not been uncommon in the past. In essence it is argued that congressional demands for information as to what occurred

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[57] Ruby Ridge Report at 1; Ruby Ridge Hearings at 722, 954, 961.

[58] The Task Force Report was never publically released or printed in the Subcommittee's hearing record. A bound copy of the Report provided the Subcommittee may be found in the United States Senate Library, catalogue number HV814.U55 1995.

[59] Weaver was convicted for failure to appear for a trial and for commission of an offense while on release.

[60] See, *e.g.*, Ruby Ridge Hearings at 719-737, 941-985; Ruby Ridge Report at 10-11 ("With the exceptions of the [Ruby Ridge] Task Force Report, which was partially disavowed by the Department, and the April 5, 1995 memorandum of Deputy Attorney General Jamie Gorelick, it appeared to the Subcommittee that the authors of every report we read were looking more to justify agency conduct than to follow the facts wherever they lead."), 61-69, 115, 122-23, 134-35, 139, 145-49.

during the policy development process of an agency would unduly interfere, and perhaps "chill," the frank and open internal communications necessary to the quality and integrity of the decisional process. It may also be grounded on the contentions that it protects against premature disclosure of proposed policies before they are fully considered or actually adopted by the agency, and to prevent the public from confusing matters merely considered or discussed during the deliberative process with those on which the decision was based. However, as with claims of attorney-client privilege and work product immunity, congressional practice has been to treat their acceptance as discretionary with the committee. Moreover, a 1997 appellate court decision underlines the understanding that the deliberative process privilege is a common law privilege of agencies that is easily overcome by a showing of need by an investigatory body, and other court rulings and congressional practice have recognized the overriding necessity of an effective legislative oversight process.

The appeals court ruling in *In re sealed Case (Espy)*[61] is of special note. The case involved, *inter alia*, White House claims of executive and deliberate process privileges for documents subpoenaed by an independent counsel. At the outset of the appeals court's unanimous ruling it carefully distinguished between the "presidential communications privilege" and the "deliberative process privilege." Both, the court observed, are executive privileges designed to protect the confidentiality of executive branch decisionmaking. But the deliberative process privilege applies to executive branch officials generally, is a common law privilege which requires a lower threshold of need to be overcome, and "disappears altogether when there is any reason to believe government misconduct has occurred.[62] The court's recognition of the deliberative process privilege as a common law privilege which, when claimed by executive department and agency officials, is easily overcome, and which "disappears" upon the reasonable belief by an investigating body that government misconduct has occurred, may severely limit the common law claims of agencies against congressional investigative demands. A demonstration of need of a jurisdictional committee would appear to be sufficient, and a plausible showing of fraud waste, abuse or maladministration would be conclusive.

Even before *Espy,* courts and committees have consistently countered such claims of agencies as attempts to establish a species of agency privilege designed to thwart congressional oversight efforts. Thus it has been pointed out that the claim that such internal communications need to be "frank" and "open" does not lend it any special support and that coupling that characterization with the notion that those communications were part of a "deliberative process" will not add any weight to the argument. In effect, such arguments have been seen as attempting to justify a withholding from Congress on the same grounds that an agency would use to withhold such documents from a citizen requester under Exemption 5 of the Freedom of Information Act (FOIA).[63]

Such a line of argument is likely to be found to be without substantial basis. As has been indicated above, Congress has vastly greater powers of investigation than that of citizen

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[61] 121 F. 3d 729 (D.C. Cir. 1997).

[62] 121 F. 3d at 745, 746; see also *id.* at 737-738("[W]here there is reason to believe the documents sought may shed light on government misconduct, the [deliberative process] privilege is routinely denied on the grounds that shielding internal government deliberations in this context does not serve 'the public interest in honest, effective government'").

[63] 5 U.S.C. 553 (b)(5)(1994).

FOIA requesters. Moreover, in the FOIA itself, Congress carefully provided that the exemption section "is not authority to withhold information from Congress."[64] The D.C. Circuit in *Murphy v. Department of the Army*,[65] explained that FOIA exemptions were no basis for withholding from Congress because of:

[64] 5 U.S. C. 552 (d).

[65] 613 F. 2d 1151 (D.C. Cir. 1979).

> the obvious purpose of the Congress to carve out for itself a special right of access to privileged information not shared by others . . . . Congress, whether as a body, through committees, or otherwise, must have the widest possible access to executive branch information if it is to perform its manifold responsibilities effectively. If one consequence of the facilitation of such access is that some information will be disclosed to congressional authorities but not to private persons, that is but an incidental consequence of the need for informed and effective lawmakers.[66]

Further, it may be contended that the ability of an agency to assert the need for candor to ensure the efficacy of internal deliberations as a means of avoiding information demands would severely undermine the oversight process. If that were sufficient, an agency would be encouraged to disclose only that which supports its positions, and withhold those with flaws, limitations, unwanted implications, or other embarrassments. Oversight would cease to become an investigative exercise of gathering the whole evidence, and become little more than a set-piece of entertainment in which an agency decides what to present in a controlled "show and tell" performance.

Moreover, every federal official, including attorneys, could assert the imperative of timidity--that congressional oversight, by holding up to scrutiny the advice he gives, will frighten him away from giving frank opinions, or discourage others from asking him for them. This argument, not surprisingly, has failed over the years to persuade legislative bodies to cease oversight. Indeed, when the Supreme Court discussed the "secret law" doctrine in *NLRB v. Sears, Roebuck & Co.*[67] it addressed why federal officials--including those giving legal opinions--need not hide behind such fears:

> The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if *adopted*, will become public is slight. First, when adopted, the reasoning becomes that of agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the

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[66] *Id.* at 1155-56, 1158.

[67] 421 U.S. 132 (1975).

reasons for a policy actually adopted by an agency supports . . .[disclosure].[68]

[68] *Id.* at 161 (emphasis in original).

The deliberative process objection is often raised by an agency to forestall congressional inquiries while it is engaged in the process of promulgating substantive rules. But it is difficult to persuasively contend that disclosure to Congress will do injury to the quality and integrity of the ongoing rulemaking proceeding. Rather, a rulemaking exercise would appear to be a quintessential object of legislative scrutiny. An agency may engage in substantive rulemaking only with an express grant of legislative authority. Often such delegations vest broad discretionary power in an agency. Congress has made agency lawmaking subject to the procedural requirements of the Administrative Procedure Act,[69] which has fostered widespread public participation in the process, and which the courts have attempted to ensure is meaningful. It has not, however, abdicated control over this vital function. Thus Congress may intervene in an agency rulemaking proceeding at any point. It is not limited simply to withdrawing an agency's authority or to negating a particular rule by law after the fact. The courts have recognized that where the nature of a rulemaking is general policymaking it is akin to the legislative process[70] and that "[u]nder our system of government the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility, and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives and upon whom their commands must fall."[71] It is therefore "entirely proper for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policymaking . . . Administrative agencies are expected to balance congressional pressure with the pressures emanating from all other sources."[72]

Arguably, then, the integrity, even the legitimacy, of an agency rulemaking is more damaged by the attempted avoidance of oversight inquiries directed at the basis for proposed agency policy actions of general concerns than it would be by the temporary distress of officials and employees over revelation of positions taken during the policy development process. A commentator has succinctly made this point:

> The legitimacy and acceptability of the administrative process depends on the perception of the public that the legislature has some sort of ultimate control over the agencies. It is through the Congress that the administrative system is accountable to the public. If members of Congress "be corrupt, others may be chosen." The public may not, however, directly remove agency officials. The public looks to its power to elect representatives as its input into the administrative process. The public will perceive restrictions on reducing the accountability of agency officials. This will negatively affect the legitimacy of agency actions, as well as seriously erode notions of popular sovereignty. Even administrators, who may not perceive legislative intrusions

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[69] See 5 U.S.C. 553 (1994).

[70] *Assoc. Of National Advertisers, Inc., v. FTC,* 627 F. 2d 1151(D.C. Cir. 1979), *cert. denied.* 447 U.S. 921 (1980).

[71] *Sierra Club v. Costle*, 657 F. 2d 298, 400-401 (D.C. Cir. 1981).

[72] *Id.* at 409-410.

> into the administrative process as being particularly desirable, recognize congressional supervision as a necessary function in a democratic society. The nature of the government requires that the legislature maintain a careful supervision over agency action.[73]

[73] Comment, Judicial Limitation of Congressional Influence on Administrative Agencies, 73 Northwestern L. Rev. 931, 941 (1971) (footnotes omitted).

Some heed also may be paid to the salutary admonition of the Third Circuit Court of Appeals for a court to be "sensitive to the legislative importance of Congressional committees of oversight and investigation and recognize their interest in the objective and efficient operation of regulatory agencies serves a legitimate and wholesome functions with which we should not interfere."[74]

Conclusion

Past congressional history and practice, as well as pertinent judicial precedent, appear to support the Committee's demands for the documents and testimony called for in its subpoenas. That history also contains instances demonstrating a sensitivity to the law enforcement concerns and duties of the Justice Department and other departments and agencies with law enforcement functions where there has been an absence of a reasonable belief of a jurisdictional committee that government misconduct has occurred. But where such a reasonable belief of maladministration, malfeasance or fraud exists, the observation by Iran-Contra Independent Counsel Lawrence E. Walsh is pertinent: "The legislative branch has the power to decide whether it is more important perhaps to even to destroy a prosecution that to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."[75]

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[74] *Gulf Oil Corp.* v. FPC, 563 F. 2d 588, 611 (3d Cir. 1977).

[75] Lawrence E. Walsh, " The Independent Counsel and the Separation of Powers," 25 Hous. L. Rev. 1, 9 (1988).

STATEMENT

OF

ATTORNEY GENERAL

ALBERTO R. GONZALES

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

PRESENTED ON

JULY 18, 2006

Written Statement
of

ATTORNEY GENERAL

ALBERTO R. GONZALES

Before the
Committee on the Judiciary
United States Senate

July 18, 2006

Good morning. Thank you, Chairman Specter and Ranking Member Leahy, and Members of the Committee for having me here today at this oversight hearing.

As a country we are approaching a very painful anniversary. We are less than two months shy of the five-year anniversary of September 11. On the anniversary, we will be reminded of the horror of that day — of the profound loss of life. We will recall how we felt to see thousands of innocent Americans, our beloved brothers, sisters, friends, and colleagues, murdered on a day when evil seemed to rain down from a clear-blue sky. It is true that we will never forget how we felt on September 11 and on the days that followed. But I must be straightforward with members of this Committee: I think that sometimes we are forgetful of the threat that has persisted every day since.

On the five-year anniversary, we will once again be reminded of those haunting images: mighty towers plummeting into deadly rubble. Desperate souls jumping from the inferno. And of course we will never forget the victims at the Pentagon or the heroes who perished in Flight 93. We will remember the dead and we will mourn. But will we remember to renew our resolve?

I assure you that our enemy will not need to renew theirs. While we look back on September 11, the terrorists will be looking forward to something even more unthinkable. The human body and soul have great capabilities to heal themselves. The passage of time has a healing effect, and this is good. But while September 11, for us, is a wound from which to heal, for terrorists it was a victory upon which to build. So the fact remains: Our efforts as a government to protect our citizens from any terrorist attacks, as well as our efforts to bring terrorists to justice for their heinous acts, are far from over.

I am extremely proud of the employees of the Department of Justice. They come to work each day with a level of dedication, resolve, and love of country that is deeply moving. We at the Department are inspired by our troops abroad who put their lives in harm's way to defend us from this brutal enemy. On a personal note, my nephew will soon go to Iraq with the United States Army, and I know that his desire to prevent another September 11, and to protect this great nation while helping another country achieve freedom, is foremost in his mind.

Since the War on Terror is our Number One priority at Justice, I'd like to make that the initial focus of my testimony, but I will also discuss in some detail the significant progress that the Department is making in five other priority areas this year: Violent crime, drug trafficking, cyber crime, civil rights, and public and corporate corruption.

The most telling measure of the Department's performance since September 11, 2001, is this: In the nearly five years since, there has not been a single terrorist attack on U.S. soil.

To be sure, the Department of Justice is just one of the many contributors to this singular success — much credit must go to the Congress, for providing the tools to combat terrorist threats; to the President, for his unfailing leadership in this fight; to other Federal agencies, for the creativity and dedication in combating terrorism; our State and local law enforcement partners for their teamwork; and to the American people for their constant vigilance, support and resolve.

But we at the Department of Justice are proud of our accomplishments in fighting the War on Terrorism. Congress gave us important tools to fight the War on Terror in the USA PATRIOT Act and in its reauthorization, and we have used those tools wisely and effectively.

Over the past five years, we have expanded our efforts to combat terrorism. To support these expanded efforts, we have reorganized the components that are focused on national security; recruited essential personnel, such as intelligence analysts, investigators, and linguists; leveraged new technologies; and developed and implemented comprehensive training programs.

The Federal Bureau of Investigation (FBI) has fundamentally rethought its approach to national security matters. To better integrate its intelligence and investigative capabilities, the FBI established a National Security Branch (NSB) in September 2005. The NSB combines the resources, missions, and capabilities of the counterterrorism, counterintelligence, and intelligence elements of the FBI.

The FBI has also added Field Intelligence Groups, in which agents, analysts, linguists, and surveillance specialists work as teams in each of the Bureau's 56 field offices. Working together, they serve as the backbone of our intelligence efforts across the country. We have also greatly increased the number of Joint Terrorism Task Forces around the country and established at FBI headquarters the National Joint Terrorism Task Force to coordinate interagency investigative efforts. And a senior prosecutor has been designated as the Anti Terrorism Advisory Council Coordinator to spearhead local counterterrorism efforts in each of the 94 United States Attorney's Offices.

In February of 2006, together with the Office of the Director of National Intelligence, we commissioned the Drug Enforcement Agency's (DEA) Office of National Security to be the 16th member of the Intelligence Community (IC). Formalizing the relationship between the DEA and the IC will provide both parties with increased access to vital national intelligence information and provide DEA and other IC members with the ability to collaborate and work national security interests together at the same table

Congress also created a National Security Division (NSD) to centralize Main Justice's core national security functions. The NSD's creation fulfills a recommendation of the Weapons of Mass Destruction (WMD) Commission, and the Administration regards the establishment of this entity as the logical next step in the Department's continuing efforts to protect national security. But 15 months after the WMD Commission recommended that the NSD be created, we are still unable to make the NSD operational because of delays in confirming the nominee to serve as its head. Because it is the business of this Committee and central to the goal of protecting the American people from terror, I would be remiss today if I did not call, once again, for the swift confirmation of Ken Wainstein as the Assistant Attorney General for National Security. We hope that it will not be long before we finally can institute this important advance in the way the Department handles its vital national security responsibilities.

Similarly, I must also call for the swift confirmation of Alice Fisher to be the head of the Department's Criminal Division. Alice is leading our efforts to combat corporate and public corruption, gang violence, and the sexual exploitation of children, and must be confirmed during this current Congressional session so she can continue this critical work. And one more request, Mr. Chairman: I ask that the Committee move promptly to approve Steve Bradbury's nomination to be Assistant Attorney General for the Office of Legal Counsel, so that he too will be confirmed during the current Congress. Mr. Bradbury plays a vital role in the war against al Qaeda and has ably assisted the Administration and Congress of our

understanding of national security law.

As I mentioned earlier, employees of the Department of Justice come to work every day with the dedication and resolve to disrupt and prevent terrorist acts against our fellow citizens. To be any less vigilant would be an insult to those who have been lost to the heinous acts of a deadly enemy. In terms of operational successes in the War on Terror, there is much to be proud of within the Department of Justice. Though the highly classified nature of the Department's national security and foreign intelligence surveillance work means that its successes are rarely publicized, I can assure the American people that these efforts have helped disrupt terrorist enterprises and saved American lives.

The results of the Department's counterterrorism prosecutions are more public but no less impressive. To thwart terrorist enterprises, we use terrorism charges where they are available — but we do not, and should not, hesitate to use other, non-terrorism charges where those charges are the most effective way to secure convictions that protect the Nation. Criticism of our willingness to use non-terrorism charges in terrorism-related cases is misplaced: Our strategy is one of prevention. We cannot wait for terrorists to strike. We must utilize the full range of our authorities to minimize the possibility that the awful events of September 11 ever occur again.

The successes of this approach have been detailed in a Department White Paper that was released last month. It highlights our reliance upon both traditional and innovative criminal investigative tools and approaches in order to successfully prosecute terrorism cases. These include reliance upon our foreign partners, and the document fraud and material support statutes. Some of these prosecutions have been highly publicized, such as the conviction and life sentence of Zacarias Moussaoui; others have garnered less attention. But they are all part and parcel of the Department's aggressive pursuit of terrorists, would-be terrorists, and supporters of terrorists.[1]

And we have not forgotten about the needs of Americans who are the

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1 That these trials have taken place without incident – that is, without harm coming to either the judges trying the case, the attorneys prosecuting the cases, the jurors considering the evidence, the witnesses testifying in the cases, or the general public attending the proceedings – is a tribute to the success that the Department has had in the area of judicial security and witness security. In fiscal year 2006 alone, the United States Marshals Service funded and supported 127 high-threat trials, including the Moussaoui sentencing proceeding.

victims of terrorism at home and abroad. In 2005, pursuant to the leadership of Congress and the Chairman, the Department established an Office of Justice for Victims of Overseas Terrorism. In addition, the FBI's Terrorism Victim Assistance Program is ensuring that victims receive immediate and ongoing assistance.

Notwithstanding these successes, there is no room for complacency in fighting the War on Terror. As the President has often stated, we are safer today, but we are not yet safe. The United States has not been attacked at home since September 11, 2001, but other nations have. One need only look at events in England, Spain, Indonesia, Jordan, Iraq, or, most recently, India, to see that the threat of horrific terrorist attacks is very real and ever present. We must continue to stand guard against the evils of international terrorism, and we must strive to identify, disrupt and prevent another terrorist attack on U.S. soil. I can assure you the Department of Justice will continue to do so.

At the same time, we welcome Congress's attention to this issue and we appreciate your efforts, Mr. Chairman, to update old statutes in this area to reflect the novel nature of the terror threat we face. I want to thank the Chairman, Senator DeWine, and other Members of the Committee and of the Intelligence Committees for their diligent work on the vital issues relating to the Terrorist Surveillance Program. It is all to the good when the elected branches of government can work cooperatively to protect the American people and I am pleased to lend support to S. 2453, the "National Security Surveillance Act of 2006," which represents an excellent, collaborative and, we hope, bipartisan resolution to this issue. In addition, S. 2455, Senator DeWine's legislation on this issue, contains many positive concepts that we can work with.

Another very important, related issue remains our ability to capture terrorists, remove them from the battlefield, interrogate them for vital intelligence, and when appropriate, prosecute those who violate the laws of war by slaughtering innocent people around the world. On June 29th, the Supreme Court in *Hamdan v. Rumsfeld* held that the procedures of the military commissions the President established for this purpose were inconsistent with the Uniform Code of Military Justice and the Geneva Conventions.

The Administration will, of course, as the President has said, abide by the decision of the Court. The *Hamdan* decision now gives Congress and the Administration a clear opportunity to work together to reestablish the legitimate authority of the United States to rely on military commissions as one tool to bring the terrorists to justice. Taking this cooperative approach will allow us to structure

an effective system the world will look to with both appreciation and admiration.

In the wake of the *Hamdan* decision, we all have a common goal: to provide flexible but fair procedures that will enable us to try al Qaeda terrorists for their war crimes, without compromising our Nation's values or the safety of the American people. It is imperative that we move quickly, and the Administration stands prepared to provide assistance in this effort.

Gang Crime

Just as the Department has played a key role in the War on Terror, we are working to protect Americans from those who would threaten the safety and security of our nation's citizens within their own communities. After becoming Attorney General, I made combating gangs one of my first priorities. Among my earliest actions, I directed the Department to take several important steps to address gang violence. First, I established an Anti-Gang Coordination Committee to organize the Department's wide-ranging efforts to combat the scourge of gangs. Second, I directed each United States Attorney to appoint an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. And third, I directed the Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, to develop a comprehensive district-wide strategy to address the gang problem in their districts.

On February 15, 2006, I unveiled the Department's comprehensive plan to combat gangs across America. The strategy is twofold: First, prioritize prevention programs to provide America's youth, as well as offenders returning to the community, with opportunities that help them resist gang involvement. Second, ensure robust enforcement policies when gang-related violence does occur. The plan incorporates these two elements and provides necessary resources to local task forces on the front lines in the war against gang violence.

The President's 2007 Budget expanded the focus of Project Safe Neighborhood to encompass gang crime. In line with this refocusing, the Department has expanded the PSN initiative to include new and enhanced anti-gang efforts. In March, I announced the Comprehensive Anti-Gang Initiative, which focuses anti-gang resources on prevention, enforcement, and offender reentry efforts in six sites throughout the country: Los Angeles, Tampa, Cleveland, Dallas/Ft. Worth, Milwaukee, and the "222 Corridor," which stretches from Easton to Lancaster in Pennsylvania.

And it is worth highlighting the significant contributions ATF is making in

the effort to combat gangs. ATF has dedicated hundreds of special agents to leading the Department's efforts to coordinate the PSN task forces across the nation. Due to ATF's comprehensive efforts to identify and investigate illegal firearms traffickers, career criminals, armed narcotics traffickers, and other violent offenders who use firearms to further their criminal endeavors, ATF has for years been at the forefront of the Federal government's efforts to combat violent crime involving gangs. ATF also has significant involvement in the Federal government's efforts to combat violent crime involving gangs through its Violent Crime Impact Teams (VCITs). Presently, VCIT, a successful partnership between ATF and other Federal, State, and local law enforcement authorities, addresses violent firearms-related crimes in 23 cities, providing additional support to Project Safe Neighborhoods through focused operations aimed at the "worst of the worst" offenders in targeted hot spots.

I have also directed each U.S. Attorney to convene a Gang Prevention Summit in his or her district to explore additional opportunities in the area of gang prevention. At the national level, the Department is hosting two gang prevention webcasts that are accessible to the public, which will share best practices on gang prevention, identify resources, and support and complement the Department's anti-gang initiative. The Department, in partnership with the Ad Council, has also created two new public service announcements (PSAs) titled "Sounds of Gun Crime" and "Time Served." These PSAs are intended to educate youth about the perils of gun crime, and the consequences of joining gangs.

Finally, as you know, the Department has worked with this Congress to develop legislation to enhance the tools available to Federal law enforcement in its ongoing efforts to disrupt and dismantle gangs. We look forward to continuing this vitally important work. While bringing new intensity to the gang problem, we also continue our efforts to fight crime by arresting those individuals who are the most likely to commit gun crimes and wreak havoc on our communities — the violent fugitive offenders. In fiscal year 2005, the United States Marshals Service apprehended more than 81,000 felony fugitives, many of whom were wanted on weapons and drug charges.

Drug Trafficking

Just as the Department has tackled the scourge of gangs in our communities, we are working aggressively to prevent and to minimize the pernicious effects of drug trafficking and abuse. Indeed, today drug cases represent the single largest share of Federal prosecutions. In 2005, 34.2% of all defendants sentenced in Federal district court were convicted of drug-related offenses.

Many of these prosecutions are coordinated and investigated by the Department's Organized Crime Drug Enforcement Task Forces (OCDETF). In view of the recent FY 2007 Senate Appropriations mark, I want to take this opportunity to emphasize the critical role that the OCDETF program fulfills as the centerpiece of the Justice Department's drug enforcement strategy. The OCDETF Program, through its Federal, State and local partnerships, disrupts and dismantles the most significant drug trafficking organizations, and their supporting financial infrastructure. The OCDETF program oversees the Attorney General's Consolidated Priority Organization Target (CPOT) strategy and CPOT List, which identifies the most significant, sophisticated drug organizations impacting the U.S. drug supply.

Time and time again, the success of OCDETF's multi-agency, multi-faceted approach — which is the hallmark of the OCDETF Program — in dismantling these organizations and their financial infrastructure, has been proven. One recent example is the July 11th guilty plea of CPOT Haji Baz-Mohammad, a Taliban-linked narco-terrorist who was charged, extradited and convicted pursuant to an OCDETF investigation. Another example of OCDETF's continued success is Operation Panama Express, an OCDETF operation that has combined the expertise of the FBI, DEA, Immigration and Customs Enforcement, the United States Coast Guard and the United States Attorney's Offices to interdict more than 400,000 kilograms of cocaine destined for the United States, and to indict over 700 defendants, including CPOT Joaquin Mario Valencia-Trujillo. In fact, Valencia-Trujillo is on trial in a Federal courthouse in Tampa as we speak. These are but two of OCDETF's many success stories in which we have not only disrupted the most sophisticated drug organizations, but perhaps more importantly, their financial sources.

The OCDETF program is so critical to our national drug enforcement efforts that it resides in the Deputy Attorney General's Office to ensure it receives maximum exposure and access to DOJ leadership and the 93 United States Attorneys. The success of the program depends upon the coordinated leadership and efforts of all of the United States Attorneys and the Deputy Attorney General. Transferring this multi-agency program to an investigative agency would be extremely detrimental to our national interest in multi-agency drug investigations, the success of which is dependent upon bringing to bear the talents and statutory expertise of all the OCDETF partners against these sophisticated criminal organizations. Now is not the time to discourage multi-agency coordination and information sharing. Rather, we should encourage OCDETF's leadership in implementing an intelligence driven strategic approach to drug law enforcement

which maximizes the use of existing resources and eliminates duplication of effort. Accordingly, I urge this Committee to oppose the proposed transfer of OCDETF to the Drug Enforcement Administration and to fully fund the work of this essential Program.

Addressing the problem of drug trafficking continues to be one of the top priorities of the Department of Justice. To this end, our efforts to reduce the demand for, and supply of, methamphetamine and controlled substance prescription drugs have special priority.

On June 1, 2006, the Administration released the National Synthetic Drug Control Strategy. Among other things, the Synthetics Strategy outlines a three-tiered approach to the United States' international efforts: (1) improving intelligence and information sharing on the global market for precursor chemicals; (2) effective implementation of the Combat Meth Act; and (3) strengthening law enforcement and border control activities, particularly with Mexico.

To carry out the Department's part of the Synthetics Strategy, I have established the Anti-Methamphetamine Coordination Committee. This will harmonize the many ongoing efforts of the Department of Justice in combating methamphetamine. The Committee is simultaneously pursuing initiatives to reduce supply through coordinated interdiction efforts, and to reduce demand by supporting effective prevention and treatment programs.

The Department has principally focused on combating meth through six methods: (1) increasing law enforcement operations and arrests; (2) making meth prosecutions a priority for U.S. Attorneys; (3) working closely with State and local law enforcement to ensure that the meth problem is brought to an end; (4) providing information and creating awareness within communities about the irreversible harm that meth leaves in its wake; (5) strengthening international partnerships to combat meth; and (6) using additional tools to target meth traffickers, including the "Combat Methamphetamine Act," which Congress passed as part of the reauthorization of the USA Patriot Act.

The use of meth and other similar drugs is not the only problem the nation faces with respect to controlled substances. Indeed, the only category of drugs in which abuse has increased for youths in recent years is the non-medical use of prescription drugs. We are working hard to reverse this trend. The 2006 Synthetic Drug Control Strategy sets the ambitious goal of reducing the abuse of controlled pharmaceuticals by 15 percent over three years. Our approach to this problem combines education, prevention, and enforcement, while avoiding unduly

hampering the lawful purchase of such prescription drugs.

The purchase of these controlled pharmaceuticals on the Internet is of great concern. The Internet is widely accessible and provides anonymity, both to those seeking prescription drugs and to those dispensing them. Internet sites (either through the websites themselves or through Internet facilitation sites) give drug abusers the ability to circumvent the law, as well as sound medical practice, and they dispense potentially dangerous controlled pharmaceuticals. Because there is often no identifying or false information on these websites, it is very difficult for law enforcement to track any of the individuals behind them.

The Department is using all available tools to shut down these sites. We are conducting investigations of rogue online pharmacies and working to intercept prescription drugs illegally sent into the United States through the mail system. For example, the DEA's Internet investigations unit within the Special Operations Division continues to coordinate Internet cases, and the DEA has issued a number of suspensions of the DEA registrations of doctors and pharmacies operating illegally over the Internet. The Department has prosecuted doctors, pharmacists, pharmacy owners and website owners, and pharmaceutical wholesalers who enable and assist in illegal trafficking in prescription drugs via the Internet.

Cyber Crime

As these efforts to combat gangs and drugs are making headway, we are also using the successful model of Project Safe Neighborhoods to protect our children and communities in other areas, such as the Internet, where the twin threats of sexual predators and child pornography have become all too real and commonplace. Project Safe Childhood, which I announced in February of this year, is aimed at preventing the exploitation of our children on the Internet. Just like Project Safe Neighborhoods, this new program will bring together the resources of Federal, State, and local law enforcement.

I cannot overemphasize the importance of this effort. Oftentimes in the public arena, the true nature and scope of this type of criminal activity is not fully aired. It has been estimated that at any given time there are 50,000 sexual predators on the Internet prowling for children. I have personally seen the efforts we make to capture these individuals, and I am astonished by how many predators there are, and how aggressively they act.

With respect to child pornography — a closely related problem — let me be very clear. This is not a victimless crime. Most images of child pornography

depict actual sexual abuse of real children. Each image literally documents a crime scene. Working with the Child Exploitation and Obscenity Section of the Department's Criminal Division, I've seen some of the shocking and vulgar images we've uncovered. We're talking about a young toddler, tied up with towels, desperately crying in pain while she is being brutally raped and sodomized by an adult man. This is the reality of child pornography and sexual exploitation on the Internet today.

I cannot emphasize strongly enough the pernicious nature of these offenses, the harm they do to our society, and the need to ensure that those who commit these crimes are kept away from our children. Experts agree that the Internet is responsible for a significant increase in both the proliferation and severity of child pornography and sexual exploitation. The Internet provides child pornographers with an easily accessible and relatively anonymous means for collecting and distributing these images, and the vast community of fellow pedophiles on the Internet serves to validate and encourage their behavior. Eventually, as offenders collect more and more child porn images, many turn to abusing children and producing their own pictures or images. The result is that images of child sexual abuse today are more disturbing, more graphic, and more sadistic than ever before, and they involve younger and younger children — in some cases, as I just mentioned, involving the brutal rape of mere infants.

We have made progress in this area: For example, between 1996 and 2005, the number of cases investigated by the FBI rose by more than 2000 percent, as did the number of arrests for child pornography and child enticement offenses; in total, since 1996, the FBI has opened more than 15,000 cases, leading to more than 6,000 arrests and nearly 5,000 convictions. Moreover, annual Federal prosecutions of child pornography and child abuse cases have increased by more than 350% in the past decade, from 344 cases in fiscal year 1995 to 1,576 cases in fiscal year 2005. I have also asked the FBI to hire a Victim Specialist to work exclusively with victims of child pornography.

We also have made significant progress in our efforts to apprehend violent sexual offenders who carry out their Internet fantasies and prey upon the nation's children by working with the National Center for Missing and Exploited Children, as well as through targeted initiatives such as Operation FALCON II, which resulted in the arrests of more than 1,100 fugitives wanted for sexual felonies, violent sexual offenses, and failure to register as sex offenders. I commend the U.S. Marshals Service for their superb work on this effort.

But there is more to be done because there is, in short, an epidemic involving

child pornography and sexual exploitation in America today. It is our collective responsibility to curtail this epidemic, and I look forward to working with this Committee and others to address this critical problem. The Department strongly supports legislation pending in the House and Senate to strengthen both the national system for registering sex offenders and the recordkeeping regime that prevents minors from being used in sexually explicit materials. The National Public Sex Offender Registry that the Department currently administers, and that is prominently displayed on the Department's website, is an enormously valuable mechanism for alerting parents and others in the community of the presence of potentially dangerous sexual predators among them. The bills that the House and Senate have passed would both enhance that system and give the Department additional important tools for protecting children from sexual exploitation.

Of particular importance is the legislation that Senator Hatch and Congressman Pence have championed that would make key improvements to the criminal statute that requires producers of sexually explicit materials to keep records of the names, ages, and proof of identification of the individuals depicted in those materials, and permits the Department to inspect those records at all reasonable times. Senator Hatch's bill, S. 2140, is cosponsored by 30 Senators, including many members of this Committee, and deserves prompt passage by the Senate. Both Majority Leader Frist and Minority Leader Reid have called on the House and Senate to resolve expeditiously the remaining differences. I wholeheartedly agree and urge Congress to send this legislation to the President soon.

In addition to combating violent crime and keeping the Internet safe for our children, we at the Department of Justice take extremely seriously the protection of intellectual property. With an estimated two hundred and fifty billion dollars in losses to American corporations every year and 750,000 American jobs lost to intellectual property theft, the impact this crime has on our economic well-being is simply too great not to take action. To that end, early last year, I appointed new members to the Task Force on Intellectual Property that was established by my predecessor, John Ashcroft. In the 2006 Progress Report issued last month, we proudly announced that the Department has implemented all thirty-one recommendations made by the Task Force in 2004. In fact, recognizing the threat that intellectual property theft poses not only to our economy but also to the health and safety of consumers, the Department has gone well beyond these recommendations, taking additional steps to protect and enforce intellectual property rights.

I would like to take a moment to detail a few of our efforts in this regard.

First, we have increased the number of prosecutors in the field by nearly doubling, in the past two years, the number of Computer Hacking and Intellectual Property (CHIP) Units to focus on fighting intellectual property and cyber offenses. The Department has prosecuted a number of significant cases, ranging from individuals selling counterfeit cholesterol medication to an individual who illegally accessed and stole more than one billion records containing personal information from a commercial data broker, to a racketeering enterprise that supported the terrorist organization Hezbollah. In addition, we have dispatched a Federal prosecutor to serve as an Intellectual Property Law Enforcement Coordinator in Southeast Asia. Finally, in recognition of the key role of education in stemming the tide of intellectual property theft, we have partnered with the U.S. Patent and Trademark Office to dedicate $900,000 over three years to a program with three national nonprofit educational organizations. By increasing public awareness of individual responsibility in this area, we believe we can prevent a sizeable portion of the intellectual property theft occurring today.

We have also been working hard to support the Senate's giving its advice and consent to ratification of the Convention on Cybercrime. The Convention on Cybercrime is extremely important to our ability to obtain critical computer evidence from overseas that could allow us to prevent a new terrorist attack, break up an international pedophile ring, or prosecute those who defraud our fellow citizens from locations abroad. I call on Congress to ratify this important treaty.

I am also proud that the Department of Justice is taking a lead role in the President's Task Force on Identity Theft. The President established the Task Force with the goal of strengthening Federal efforts to protect against identity theft, and he directed that I serve as a Co-Chair along with the Chairman of the Federal Trade Commission. The work of the Task Force is well underway. We are on track to present the President with a Strategic Plan to further improve the effectiveness and efficiency of the Federal government's activities in the areas of identity theft awareness, prevention, detection, and prosecution by November 6, 2006, as directed by Executive Order.

The substantial growth of identity theft in recent years has made it necessary for law enforcement agencies at all levels of government to devote increased resources to investigation of identity theft-related crimes. The FBI, for example, reports that identity theft impacts almost every financial crime it investigates, from health care fraud to securities fraud. The FBI currently has more than 1,550 pending identity theft-related cases. In 2005, the FBI opened more than 660 identity theft-related cases, and to date in 2006 has opened more than 270 such cases. The FBI also has a Financial Crimes Intelligence Unit at headquarters with

investigative analysts dedicated to identity theft matters.

The Department is also participating in successful collaborative efforts, including the Regional Identity Theft Working Group in the Eastern District of Pennsylvania, the Identity Theft Crimes Working Group in the District of New Hampshire, and the Los Angeles Identity Theft and Economic Crimes Task Force. In May 2002, the Department conducted an initiative focused on identity theft, involving 73 criminal prosecutions by United States Attorneys' Offices against 135 individuals in 24 districts.

I am proud of the Department's efforts to date and look forward to continuing our efforts and implementing the recommendations of the Identity Theft Task Force.

Civil Rights Enforcement

As we work to combat terrorism, violent crime, and economic crimes, we must not forget that a key part of the Department's law enforcement mission involves protecting critical rights of our citizens and ensuring that all Americans have the opportunity to participate in the American Dream.

To this end, I want to note today that the Civil Rights Division has achieved record levels of enforcement protecting the right to vote, ensuring the disabled can fully participate in their communities, and providing the highest standard of care for institutionalized persons. And we vigorously work to stop one of the most pernicious ills imaginable: human trafficking.

The Civil Rights Division recently brought more criminal civil rights cases in a single year than in any other year in the Division's history and the Department has obtained convictions against 30 percent more law enforcement officials for criminal civil rights violations than during the comparable period of the previous administration. The Division has also authorized over 30 percent more investigations under the Civil Rights of Institutionalized Persons Act (CRIPA) in the past five and one-half years than in the previous comparable time frame. And in matters involving children committed to juvenile justice facilities, this Administration has increased the number of settlement agreements by 50 percent and has more than doubled the number of investigations and findings letters issued.

Since January 2001, when President Bush signed the New Freedom Initiative, the Division has pursued over 2,000 ADA enforcement measures to

increase the ability of Americans with disabilities to integrate into the workforce and to have improved access. Moreover, the Division has brought lawsuits to create more than 12,000 housing opportunities for persons with disabilities in the past five and one-half years — a number that far outpaces previous figures. The Division has also nearly doubled the number of pattern or practice sexual harassment cases brought against landlords, one of which resulted in the highest jury verdict ever obtained under the Fair Housing Act. Finally, the Division has launched the most extensive election monitoring effort in history to protect the right to vote, while also filing more cases to protect the rights of voters under the minority language provisions of the Voting Rights Act than in the previous 26 year history of the Act.

The Administration's fight against human trafficking deserves special mention. Each year, thousands of the most vulnerable persons, primarily women and children, are trafficked into the United States. The President has declared this pernicious crime a moral and national security imperative requiring an effective strategy to combat it. This effort has been declared a civil rights priority for the Department because it strikes at one of our Nation's core values — the right to freedom as promised in the Declaration of Independence and guaranteed by the Thirteenth Amendment to the Constitution.

I am pleased to say that the Department's prosecutorial efforts have produced impressive results. In the last five fiscal years, the Civil Rights Division, in conjunction with United States Attorneys' Offices, has quadrupled the number of trafficking investigations, tripled the number of defendants charged, and doubled the number of defendants convicted. Between fiscal years 2001 and 2005, Federal prosecutors charged 189 defendants with sex trafficking, an increase of more than 450 percent over the previous five years. And, with three months remaining in the current fiscal year, the Department already has set a record by convicting more trafficking defendants than in any other single year on record.

The Department of Justice also combats child prostitution in the United States through the Innocence Lost initiative. The Innocence Lost initiative is conducted by the Department, together with the FBI and the National Center for Missing and Exploited Children, and has so far resulted in 188 open investigations, 547 arrests, 79 complaints, 105 indictments, and 80 convictions in both the Federal and State systems.

Another area of civil rights enforcement that merits special mention is fair housing. On February 15 of this year, I announced a major new civil rights initiative: Operation Home Sweet Home, which expands and strengthens the

Department's fair housing testing program. Under this program, persons pose as prospective renters or purchasers of a home for the purpose of gathering information regarding a housing provider's compliance with the Fair Housing Act, which prohibits discrimination in housing on the basis of race, color, religion, sex, national origin, familial status, or disability by housing providers. For example, a "test" may involve an African-American person and a Caucasian person each inquiring separately about the availability of the same apartment. We then compare their experiences to determine if the real estate agents or landlords misrepresented the availability of rental units or offered different terms and conditions to our testers to rent or buy the home. Such comparisons may reveal that the housing provider is illegally treating persons differently based on race, national origin, or familial status.

Through Operation Home Sweet Home, the Department will improve the effectiveness and reach of its testing program over the next two years. First, we will concentrate testing for housing discrimination in areas recovering from the effects of Hurricane Katrina and in areas where Katrina victims have been relocated. As you all know, Hurricane Katrina displaced a large number of persons, many of them minorities, who are seeking new housing. Our efforts seek to ensure that these displaced residents do not face discrimination in their search for housing. Second, we will concentrate testing in areas that, based on Federal data, have experienced a significant volume of bias-related crimes like cross burnings or assaults on minorities. We do this because in areas where there has been an up-tick of bias crimes, housing discrimination may also be occurring. Lastly, we will increase our outreach to State and local agencies and organizations to better target our testing to problematic areas. Through these and other measures, the Department will conduct an all-time high number of fair housing tests over the next two years in an effort to ensure the rights of all Americans to fair housing.

From fair housing opportunities, equal access to the ballot box, and criminal civil rights prosecutions to desegregation in America's schools and protection of the rights of the disabled, the noble mission of the Civil Rights Division continues forward.

Public and Corporate Corruption

We continue to strive to preserve the integrity of our public institutions and corporations. We recognize that one of the things that makes America the land of opportunity is our unique commitment to the rule of law that allows ordinary citizens to rely on and expect the honesty and integrity of government officials, corporate executives, and other holders of the public's trust. So at every level —

Federal, State, and local — the Department is enforcing the laws that protect the integrity of our government and corporate institutions.

In doing so, we have made significant progress. Since 2002, we have convicted more than 1000 corporate insiders who have engaged in illegal activities, including more than 160 chief executive officers and corporate presidents. The President's Corporate Fraud Task Force, chaired by my colleague Deputy Attorney General Paul McNulty, continues to ensure that our country's boardrooms are free from corrupt business practices.

In addition, the Department has successfully prosecuted a number of high-profile public figures, and continues to work on additional investigations and prosecutions involving illegal contributions, lobbying, and abuse of the public trust. Moreover, the Department's Hurricane Katrina Task Force — working with our local, State and Federal partners — continues to successfully detect, deter and prosecute fraudulent schemes, and associated crimes such as public corruption, arising from the tragedy of Hurricane Katrina.

Federal Sentencing

Advocating for a tough and fair sentencing system will give teeth to our enforcement objectives, improve our deterrence efforts, and ensure that every defendant is treated fairly. One of the most critical issues relates to the impact of the Supreme Court's decision in *United States v. Booker*. While much of the immediate impact of this decision has already been felt in America's courtrooms, there are important policy issues that must be addressed.

In the wake of *Booker*, the Department of Justice has engaged in a careful assessment of trends in Federal sentencing and an in-depth review of various sentencing reform proposals. The Department's key goal in this effort has been to find a way to preserve the principles and protections of the Sentencing Reform Act of 1984, which itself was a product of a bipartisan effort to focus our judicial system on punishment, incapacitation, and deterrence in sentencing.

Unfortunately, this review of recent trends in sentencing has yielded some troubling results. Over the past year, we have seen a decrease in within-guidelines sentences and an increase in inter-circuit and intra-district disparities in sentencing. Given the emergence and possible acceleration of such trends, the Department has recommended legislation to Congress implementing a Minimum Guideline System.

Under such a system, the lower range of a sentence prescribed by the guidelines would be mandatory, as it was prior to *Booker*, unless a departure is authorized by the guidelines. The top of the guideline range would remain advisory, as required by *Booker*, but in no instance, of course, could a sentence exceed the statutory maximum set by Congress. Such a system would vindicate Congress' intent in passing the Sentencing Reform Act, while remaining fully consistent with the Supreme Court's jurisprudence.

Conclusion

Now, this list of priorities is not exhaustive. We have other responsibilities that are no less important to the American dream. Comprehensive immigration reform will restore faith in the rule of law and prevent terrorists from crossing our borders, while at the same time honoring our tradition as a nation of immigrants. And this is the beauty of well-constructed laws — they protect what we value most while keeping pace with changing times, circumstances, and challenges.

Each of these priorities is important, and behind each one is a nationwide network of highly dedicated Department of Justice employees and law enforcement officials who work together to protect lives and freedoms. I am proud to work with these individuals every day and to be a part of the effort to protect our nation from those that would harm our citizens – both domestically and abroad.

Thank you, Mr. Chairman, members of the Committee. I would be glad to take your questions now.

The Attorney General
Washington, D.C.

January 17, 2007

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Minority Member
Committee of the Judiciary
United States Senate
Washington, D.C. 20510

Dear Chairman Leahy and Senator Specter:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

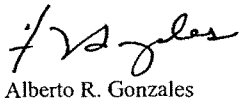
In the spring of 2005—well before the first press account disclosing the existence of the Terrorist Surveillance Program—the Administration began exploring options for seeking such FISA Court approval. Any court authorization had to ensure that the Intelligence Community would have the speed and agility necessary to protect the Nation from al Qaeda—the very speed and agility that was offered by the Terrorist Surveillance Program. These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

The President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of developments in the law. Although, as we have previously explained, the Terrorist Surveillance Program fully complies with the law, the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages. Accordingly, under these circumstances, the President has

determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires.

The Intelligence Committees have been briefed on the highly classified details of these orders. In addition, I have directed Steve Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, and Ken Wainstein, Assistant Attorney General for National Security, to provide a classified briefing to you on the details of these orders.

Sincerely,



Alberto R. Gonzales
Attorney General

cc: The Honorable John D. Rockefeller, IV
The Honorable Christopher Bond
The Honorable Sylvester Reyes
The Honorable Peter Hoekstra
The Honorable John Conyers, Jr.
The Honorable Lamar S. Smith

The Attorney General

Washington, D.C.

August 9, 2006

MEMORANDUM FOR IMMIGRATION JUDGES
MEMBERS OF THE BOARD OF IMMIGRATION APPEALS

FROM: THE ATTORNEY GENERAL ag

SUBJECT: Measures To Improve the Immigration Courts and the Board of Immigration Appeals

As you know, in January, I asked the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. I am pleased to inform you that their review is complete and that, based on their work, I am directing that twenty-two new measures be implemented. The attached document describes the measures in detail.

I want to thank you for your input during the review and look forward to your assistance in implementing these reforms.

Attachment

Department of Justice

MEASURES TO IMPROVE THE IMMIGRATION COURTS AND THE BOARD OF IMMIGRATION APPEALS

On January 9, 2006, the Attorney General directed the Deputy Attorney General and the Associate Attorney General to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. The review team they assembled traveled to nearly 20 Immigration Courts and the Board, conducted more than 200 interviews of stakeholders, administered an online survey to hundreds of participants, and analyzed thousands of pages of material in an effort to assess the strengths and weaknesses of the immigration court system. The Deputy Attorney General and the Associate Attorney General have now briefed the Attorney General on the review team's findings and have provided him with their recommendations for reform.

Based on that advice, the Attorney General is directing the implementation of the following measures.

1. *Performance Evaluations*

With the assistance of the Director of the Executive Office for Immigration Review (EOIR), the Deputy Attorney General will develop and implement a process to enable EOIR leadership to review periodically the work and performance of each immigration judge and member of the Board of Immigration Appeals. Just as performance appraisal records are used elsewhere in the Department to assess the work of personnel at all levels, EOIR performance evaluations will allow for identification of areas where an immigration judge or Board member may need improvement while fully respecting his or her role as an adjudicator. Given the size and structure of the immigration court system, a formal process to allow supervisors within EOIR to evaluate and improve the work of its adjudicators is appropriate at this time.

2. *Evaluation During Two-Year Trial Period*

Like many other Department employees, newly appointed immigration judges and Board members have a two-year trial period of employment. The Director of EOIR will use that period both to assess whether a new appointee possesses the appropriate judicial temperament and skills for the job and to take steps to improve that performance if needed. In addition, the Director of EOIR will provide a short report to the Deputy Attorney General on the temperament and skills of each newly appointed immigration judge or Board member roughly four months prior to the expiration of the two-year trial period. The assessment will be done in a way that fully respects the adjudicator's role.

3. *Examination on Immigration Law*

Immigration judges and Board members should be proficient in the principles of immigration law. To ensure that is true, all immigration judges and Board members appointed after December 31, 2006, will have to pass a written examination demonstrating familiarity with key principles of immigration law before they begin to adjudicate matters. The Director of EOIR will develop such an immigration law exam and submit it to the Deputy Attorney General. The Director may consider the appropriateness of a training course prior to the administration of the examination.

4. *Improved Training for Immigration Judges and Board Members*

It is important that training for immigration judges and Board members be comprehensive and up to date. The Director of EOIR will conduct a review of EOIR's current training programs for immigration judges and Board members, develop a plan based on that review to strengthen training, and submit the plan to the Deputy Attorney General. The plan will address, among other things, (i) whether expansion of the training program for new immigration judges and Board members is warranted, (ii) ways to ensure that immigration judges and Board members receive continuing education that is appropriate to their level of experience and instructive about current developments in the field of immigration law, and (iii) ways to ensure that immigration judges are trained on properly crafting and dictating oral decisions. The Director will consult the Director of the Federal Judicial Center with respect to this and other training-related measures.

5. *Improved Training and Guidance for EOIR Staff*

The Director of EOIR will conduct a review to assess how well Immigration Court and Board of Immigration Appeals staff are performing their functions and provide a plan for improvement, including any additional training the Director deems appropriate in areas such as case management. In particular, the Director's review will consider how well the Board's staff attorneys are performing their screening and drafting duties and develop a plan based on that review to strengthen these areas. The plan will address, among other things, ways to (i) improve the guidance and training provided to staff attorneys—especially on major recurring issues (*e.g.*, correct screening standards, proper standards of review, and how to craft effective draft opinions), and (ii) ensure that Board members provide staff attorneys with appropriate guidance in drafting decisions in individual cases, consistent with the policies and directives of the Director of EOIR and the Chairman of the Board of Immigration Appeals. The Director will submit the plan to the Deputy Attorney General.

6. *Improved On-Bench Reference Materials and Decision Templates*

Immigration judges should have available to them up-to-date reference materials and standard decision templates that conform to the law of the circuits in which they sit. The Director of EOIR is encouraged promptly to form a committee composed of immigration judges and other EOIR personnel to undertake the task of developing these materials.

7. *Mechanisms To Detect Poor Conduct and Quality*

While most immigration judges and Board members perform their difficult duties with skill and dedication, as in any large organization, instances of poor conduct and quality can occur from time to time. To ensure that those instances are promptly detected, the Director of EOIR will establish regular procedures (1) for Board members and the Civil Division's Office of Immigration Litigation (OIL) to report adjudications that reflect immigration judge temperament problems or poor Immigration Court or Board quality to him and to the Chief Immigration Judge and the Chairman of the Board of Immigration Appeals; and (2) for the Chief Immigration Judge and the Chairman of the Board to track and report to the Director statistics that may signal problems in temperament or quality (*e.g.*, unusually high reversal rates, unusually frequent or serious complaints, and unusually significant backlogs).

8. *Analysis and Recommendations Regarding Disparities in Asylum Grant Rates*

A recent study has highlighted apparent disparities among immigration judges in asylum grant rates. The Director of EOIR, in consultation with the Acting Chief Immigration Judge, will review this study and provide an analysis and, if appropriate, recommendations to the Deputy Attorney General with respect to this issue.

9. *Pilot Program To Deploy Supervisors to Regional Offices*

To test whether the Immigration Courts would benefit from having Assistant Chief Immigration Judges assigned regionally rather than at EOIR headquarters, the Acting Chief Immigration Judge will consider assigning one or more of the Assistant Chief Immigration Judges to serve regionally, near the Immigration Courts that he or she oversees, on a pilot basis. After the conclusion of this assignment, the Chief Immigration Judge will report to the Deputy Attorney General and the Director of EOIR on whether the assignment improved managerial contact and oversight in those courts. The Acting Chief Immigration Judge will also consider piloting other mechanisms for improving the management of the Immigration Courts.

10. *Code of Conduct*

The Director of EOIR will draft a Code of Conduct specifically applicable to immigration judges and Board members and, after consultation with the Counsel for Professional Responsibility and the Director of the Office of Attorney Recruitment and Management, submit it to the Deputy Attorney General. Thereafter, it will be available online to counsel and litigants who appear before the Immigration Courts and the Board.

11. *Complaint Procedures*

The Department takes seriously complaints of inappropriate conduct by its adjudicators. Procedures already exist within EOIR, the Office of Professional Responsibility (OPR), and the Office of the Inspector General (OIG) to address them. In

light of the serious and sometimes sensitive nature of these complaints, the following additional measures will be taken to improve the quality and speed of the Department's complaint-handling processes. The Director of EOIR, in consultation with the Counsel for Professional Responsibility and the Inspector General, will conduct a review of EOIR's current procedures for handling complaints against its adjudicators, and will develop a plan based on that review to (i) standardize complaint intake procedures; (ii) create a clearance process that will clearly define the roles of EOIR, OPR, and OIG in the handling of any particular complaint; and (iii) ensure a timely and proportionate response. The Director of EOIR will conduct the review and submit a plan to the Deputy Attorney General.

12. *Improvements to the Streamlining Reforms*

Much commentary has been directed at the reforms that the Department instituted in 1999 and then expanded in 2002 to streamline the Board of Immigration Appeals' procedures for hearing appeals. Critics believe that these reforms have led the Board of Immigration Appeals to dedicate insufficient review to some matters and to produce too few published precedential decisions. Proponents of these reforms, on the other hand, have observed that streamlining brought much-needed efficiency to the review process, enabling the Board to eliminate a large backlog and to provide respondents with a final, reviewable administrative action in a reasonable amount of time. Having carefully considered the existing and predicted caseload, the existing resources, the need to review respondents' claims adequately, and the need to provide respondents with a final decision in a timely fashion, the Department has concluded that it is neither necessary nor feasible to return to three-member review of all cases without recreating unacceptable backlogs. Some adjustments to streamlining, however, are appropriate to allow the Board to improve and better explain its reasoning in certain cases. Accordingly, the following adjustments will be made to the Board's rules.

- The Director of EOIR will draft a proposed rule that will adjust streamlining practices to (i) encourage the increased use of one-member written opinions to address poor or intemperate immigration judge decisions that reach the correct result but would benefit from discussion or clarification; and (ii) allow the limited use of three-member written opinions—as opposed to one-member written opinions—to provide greater legal analysis in a small class of particularly complex cases. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Director of EOIR will draft a proposed rule that will revise processes for publishing opinions of three-member panels as precedential to provide for publication if a majority of panel members or a majority of permanent Board members votes to publish the opinion, or if the Attorney General directs publication. The Director of EOIR will submit a draft of the proposed rule to the Assistant Attorney General for Legal Policy.

- The Assistant Attorney General for Legal Policy, in consultation with EOIR and the Civil Division, will draft a proposed rule that would return cases to the Board for

reconsideration when OIL identifies a case that has been filed in federal court and, in OIL's view, warrants reconsideration.

From time to time, the streamlining rules may need to be adjusted to meet the exigencies and needs of the Board and the parties who litigate before it. Accordingly, the Deputy Attorney General and the Director of EOIR will monitor the effect of these adjustments closely to ensure that they are appropriate in light of the Board's changing workload, and the Deputy Attorney General will reevaluate the effectiveness of these adjustments after they have been in effect for two years.

13. *Practice Manual*

The immigration judges, and the counsel and litigants who appear before them, would benefit from having a Practice Manual that describes a set of best practices for the Immigration Courts. Working with the immigration judges, the Director of EOIR will draft such a Manual and submit it to the Deputy Attorney General. It will be available online to counsel and litigants who appear before the Immigration Courts.

14. *Updated and Well-Supervised Sanction Authorities for Immigration Judges for Frivolous or False Submissions and Egregious Misconduct*

Immigration judges should have the tools necessary to control their courtrooms and to protect the adjudicatory system from fraud and abuse. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority for false statements, frivolous behavior, and other gross misconduct, *see* 8 C.F.R. 1003.101–109, and will draft a new proposed rule that creates a strictly defined and clearly delineated authority to sanction by civil money penalty an action (or inaction) in contempt of an immigration judge's proper exercise of authority. Because the authority to impose a civil monetary sanction exists only for conduct "in contempt of an immigration judge's proper exercise of authority" (8 U.S.C. 1229a(b)(1)), its use will require substantial oversight (*e.g.*, approval by the Director of EOIR or another overseeing body), and one would anticipate it would be used sparingly. The Director, after consultation with the Counsel for Professional Responsibility, will submit proposed rules to the Assistant Attorney General for Legal Policy.

15. *Updated Sanctions Power for the Board*

Likewise, the Board of Immigration Appeals should have the ability to sanction effectively litigants and counsel for strictly defined categories of gross misconduct. The Director of EOIR will consider, and where appropriate, draft proposed revisions to the existing rules that provide sanction authority to the Board. I ask the Director, after consultation with the Counsel for Professional Responsibility, to submit any proposed revisions to the Assistant Attorney General for Legal Policy.

16. *Seek Budget Increases*

With its workload having increased significantly in recent years and still further increases in caseload being anticipated, EOIR has demonstrated a need for additional resources. The Deputy Attorney General and the Director of EOIR will prepare a plan as soon as possible to seek budget increases, starting in FY 2008, for (i) the hiring of more immigration judges and judicial law clerks, focusing on those Immigration Courts where the need is greatest; and (ii) the hiring of more staff attorneys to support the Board of Immigration Appeals.

17. *Increase in Size of the Board*

The Director of EOIR will draft and submit to the Assistant Attorney General for Legal Policy a proposed rule to increase the size of the Board of Immigration Appeals from 11 to 15, by adding four permanent members. In addition, the Director is encouraged to continue the use of temporary Board members to fulfill the needs of the Board of Immigration Appeals.

18. *Updated Recording System and Other Technologies*

For some time, EOIR has been considering the need to replace the Immigration Courts' tape recording system with a digital recording system. The Director will provide the Deputy Attorney General with a plan and timeline for accomplishing this project. The plan and timeline will include the steps necessary to begin piloting a digital audio recording system during the next fiscal year, and to begin nationwide implementation of that system as soon as feasible.

In general, it is important to ensure that EOIR's use of technology—from the digital recording system to an electronic docket management system—is efficient, innovative, and compatible with the information management systems of users of EOIR's systems.

19. *Improved Transcription Services*

The Director of EOIR will conduct a review of EOIR's current transcription services and develop a plan based on that review to strengthen the transcription of oral decisions, including improving the timeliness of transcription to the extent feasible. The Director will submit the plan to the Deputy Attorney General.

20. *Improved Interpreter Selection*

Likewise, the Director of EOIR will conduct a review of its current interpreter selection process and develop a plan based on that review to strengthen interpreter selection. The plan will address, among other things, (i) ways to improve the screening, hiring, certification, and evaluation of staff interpreters, and (ii) ways to ensure that contract interpreters meet similar standards of quality. The Director will submit the plan to the Deputy Attorney General.

21. *Referral of Immigration Fraud and Abuse*

The Director of EOIR, in consultation with the Director of the Executive Office for United States Attorneys, will develop a procedure by which immigration judges and Board members may refer cases of immigration fraud and abuse to the appropriate investigative body for appropriate action, including possible future referral to and prosecution by the U.S. Attorney's Offices. The Director will notify the immigration judges and Board members of that procedure.

22. *Expanded and Improved EOIR-sponsored* Pro Bono *Programs*

The Director of EOIR will consider forming a committee to oversee the expansion and improvement of EOIR's *pro bono* programs. Such a committee will be composed of immigration judges, representatives of the Board, other EOIR personnel, representatives of the Department of Homeland Security and the private immigration bar, and any other participants whom the Director deems necessary.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In a letter dated January 13, 2006, we informed you of the Attorney General's call for the Department to undertake a comprehensive review of the Immigration Courts and the Board of Immigration Appeals. We are pleased to inform you that the review is complete.

Over the past six months, a review team convened by the Deputy Attorney General and the Associate Attorney General, comprised of approximately 15 attorneys and staff, traveled to nearly 20 Immigration Courts around the country. The team conducted more than 200 interviews of stakeholders from the Executive Office for Immigration Review, the American Immigration Lawyers Association, the Department of Homeland Security (DHS), pro bono programs, interest groups, and other relevant parties. The team also administered an anonymous online survey to hundreds of participants with whom they could not meet personally. In addition, the team analyzed thousands of pages of material in an attempt to assess the strengths and weaknesses of the current immigration court system.

The review assured us that, despite a staggering caseload that has grown exponentially, and staffing levels and technology that have not kept pace, the vast majority of immigration judges discharge their duties in a professional and effective manner. In addition, it highlighted the impressive accomplishment of the Board of Immigration Appeals in substantially reducing its pending caseload in the face of these same challenges. The review also showed, however, that on rare occasions, some immigration judges do behave inappropriately toward those appearing before them, whether aliens, their representatives, or DHS attorneys. It also indicated that, in some respects, the quality of work that the immigration judges and the Board produce could improve. In an effort to address these areas, the Department is implementing twenty-two measures to improve the Immigration Courts and the Board. Enclosed is a detailed description of these measures. We hope you will find it helpful.

We would welcome the opportunity for representatives from the Department to sit down with you or your staff to walk through the measures and to answer any questions you may have. Toward this end, please do not hesitate to contact me or Deputy Assistant Attorney General Rebecca Seidel at (202) 514-2141 to schedule this briefing.

As we begin the process to improve our immigration adjudications, we look forward to any additional input you may have. Thank you for your attention to this matter.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 26, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On May 8, 2006, the Department of Justice submitted a letter expressing its views on H.R. 5005, the "Firearms Corrections and Improvements Act." In that letter, the Department expressed its concerns over some aspects of the language of section 9 of the legislation, and proposed some revisions to that section. The Department now wishes to submit the following revised proposal, which we offer as a complete substitute for the text of section 9 as introduced.

"SEC. 9. TRACE DISCLOSURE.

Section 923(g) of title 18, United States Code, is amended by adding at the end the following:

'(8)(A) Notwithstanding any other provision of law, information required to be kept by licensees pursuant to this subsection, or required to be reported pursuant to paragraphs (3) and (7) of this subsection, and information in the firearms trace system database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, including (but not limited to) all information received or generated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with any request to trace a firearm ~~shall not be--~~

'(i) shall not be disclosed by the Attorney General to any entity, except:

(I) to an official of a Federal, State, local, or foreign law enforcement agency or a Federal, State, or local prosecutor who certifies that the information is sought solely in connection with

bona fide criminal investigative purposes or prosecutions, or to a Federal official for national security, intelligence, or counterterrorism purposes, and will not be used or disclosed for any other purpose~~, and only to the extent that the information pertains to the geographic jurisdiction of the law enforcement agency or prosecutor requesting the disclosure~~; or

(II) for use in an action or proceeding commenced by the Attorney General to enforce the provisions of this chapter, chapter 53 of title 26, or chapter 39 (subchapter III) of title 22, or a review of such an action or proceeding; or

(III) for use in an action or proceeding commenced by the Secretary of the Treasury to enforce the provisions of title 26, United States Code, chapter 32, sections 4181 and 4182, or a review of such an action or proceeding; and

(ii) shall not be disclosed to any Federal, State, local, or foreign law enforcement agency or a Federal, State, or local prosecutor receiving information except in connection with *bona fide* criminal investigative purposes or prosecutions.

~~'(ii) made available for use in any civil action or proceeding other than—~~

~~'(I) an action or proceeding commenced by the Attorney General to enforce this chapter; or~~

~~'(II) a review of such an action or proceeding.~~ Nothing in this paragraph shall be construed to prevent the sharing or exchange of such information among and between federal, state, local or foreign law enforcement agencies; federal, state, or local prosecutors; or, national security, intelligence, or counterterrorism officials, provided that such information, regardless of its source, is shared, exchanged, or used solely in connection with *bona fide* criminal investigative purposes or prosecutions or national security, intelligence, or counterterrorism purposes.

' (B) ~~The information described in subparagraph (A)~~ Information ~~required to be reported pursuant to paragraphs (3) and (7) of this subsection, and information~~ in the firearms trace system database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives including (but not limited to) all information received or generated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with any request to trace a firearm, shall be immune from legal process, shall not be subject to subpoena or other discovery, shall not be used, relied on, or disclosed in any manner, and shall not be admissible as evidence, nor shall testimony or other evidence based on such data be admissible as evidence, in any civil action pending on or filed after the effective date of this subparagraph in ~~a~~ any State or Federal court (including any court in the District of Columbia), or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce the provisions of this chapter, chapter 53 of title 26, or chapter 39 (subchapter III) of title 22, or a review of such an action or proceeding.

'(C) This paragraph shall not be construed to prevent the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer and licensed manufacturer.

'(b) Section 925(a) of such title is amended by adding at the end the following:

(6) Section 924(a)(1)(D) shall not apply to the violation of Section 923(g)(8) by an official of any Federal, state or local law enforcement agency."

The Department also believes that this legislative language ought to be accompanied by the following report language, which clarifies the legislative text:

"The Committee wishes to confirm that, for purposes of section 923(g)(8), the term '*bona-fide* criminal investigative purposes' includes analyses and reports prepared by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and used by law enforcement agencies solely for such uses as detecting firearms trafficking patterns and allocating resources. Such analyses and reports serve a valuable law enforcement investigative purpose and, subject to the restrictions set forth in section 923(g)(8), may continue to be disseminated by ATF and used by Federal, state, local, and international law enforcement agencies and prosecutors."

The proposed changes to the text of section 9 include five provisions, specifically endorsed by the Department, that will better serve the more than 17,000 Federal, State, local and international law enforcement agencies that request firearms traces from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The first change would clarify and confirm that ATF can trace firearms for Federal agencies for national security, intelligence, or counterterrorism purposes. Although these agencies, other than the FBI, do not perform traditional law enforcement functions, they are integrally involved in homeland security defense and, as such, should have access to firearms trace information in furtherance of their critical missions. Pursuant to the USA PATRIOT Act, which tore down the perceived "wall" between law enforcement and intelligence agencies, this information also can be made available to federal agencies and officials for national security, intelligence, or counterterrorism purposes.

The second change would clarify and confirm that law enforcement or prosecution agencies that receive trace information for *bona fide* criminal investigative purposes or prosecutions may share or exchange that information with other law enforcement or prosecution agencies in connection with such investigations or prosecutions. This clarification is important because firearms traffickers, terrorists, and other criminals often operate interstate and in multiple jurisdictions, so sharing of trace information between jurisdictions for law enforcement, intelligence, and prosecution purposes is of vital importance.

The third change would clarify and confirm that ATF may provide to law enforcement agencies firearms trace analyses for use in such law enforcement activities as identifying trafficking patterns and allocating resources. This clarification is important because these bona fide law enforcement functions are not necessarily performed in connection with a specific investigation.

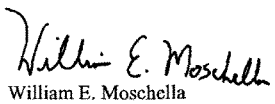
The fourth change add language in proposed section 923(g)(8)(III) to ensure that the Alcohol and Tobacco Trade and Tax Bureau will have access to information it needs in connection with its Firearms and Ammunition Excise Tax (FAET) enforcement actions under 26 U.S.C. chapter 32, sections 4181 and 4182.

The fifth and final change clarifies that those law enforcement officers who mistakenly share trace data with each other for a purpose not specifically authorized in the legislation will not be subject to criminal prosecution for such a mistake. This change is important in ensuring that law enforcement officers do not act with an excess of caution in providing information that may serve useful law enforcement purposes.

The Department believes that these changes to section 9, along with the additional clarifying report language, address in full the concerns expressed in its May 8 letter. The Department appreciates the Committee's consideration of these proposals and continues to stand willing to provide technical and other assistance to the Committee in its consideration of this legislation.

The Office of Management and Budget has advised the Department that from the perspective of the Administration's program, there is no objection to submission of this letter. Please do not hesitate to contact this Office if we may be of additional assistance.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 17, 2006

The Honorable Arlen Specter
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter, dated May 10, 2006, to the Attorney General last month, and is a follow-up to the conversation you had with him over lunch several weeks ago, regarding the determination of the Office of Professional Responsibility (OPR) to close its investigation into the involvement of Department of Justice attorneys in the President's Terrorist Surveillance Program (TSP). OPR investigates allegations that Department lawyers have engaged in professional misconduct; as you know, OPR closed its investigation into whether Department lawyers involved in TSP somehow engaged in professional misconduct because OPR was not granted access to classified information about the TSP.

As the Attorney General advised you over lunch, decisions to provide access to classified information about the TSP for non-operational purposes are made by the President of the United States. With regard to TSP, the President decided that protecting the secrecy and security of the program requires that a strict limit be placed on the number of persons granted access to information about the program for non-operational reasons. Every additional security clearance that is granted for the TSP increases the risk that national security may be compromised.

Notwithstanding the sensitivity of the information involved, the Department of Justice has been extremely forthcoming in providing information about the well-established legal authorities that support the Program, which were set forth in detail in a 42-page paper released to the public on January 19, 2006. I would further note that the TSP has been, and continues to be, the subject of extensive oversight both by the Executive Branch and by the Congress:

- Congressional leaders, both Republican and Democrat, including the leaders of the Intelligence Committees, have been given regular, extensive briefings since the Program's inception. In addition, all of the members of the Senate Select Committee on Intelligence and all of the members of the House Permanent Select Committee on Intelligence have been briefed on the Program.

- This year, the Attorney General has appeared at three congressional hearings (and, as you know, will appear before your Committee again on July 18); senior Administration officials have participated in numerous congressional briefings and discussions; and Department of Justice officials have written over thirty letters to Congress and answered over 250 questions for the record about the Program.

- The Program is reviewed approximately every 45 days by officials at the highest levels of government, including the Office of the Director of National Intelligence, and the Department of Justice, as well as career lawyers and officials at the National Security Agency. That review includes scrutiny by the National Security Agency's Office of the General Counsel and by the agency's Inspector General, who is specifically charged with overseeing the lawfulness of employees' actions in implementing National Security Agency programs.

These steps, among others, have ensured strong and continuing Executive Branch and Congressional oversight of the TSP.

Finally, enclosed are documents responsive to your request regarding OPR's requests for clearance into the TSP, including OPR memoranda about the requests and a document that sets forth OPR's policies and procedures. The names of OPR employees have been redacted, in accordance with our usual practice. Also, and consistent with long-standing Executive Branch practice, documents that reflect internal deliberations about these matters have not been produced and there also is a redaction in one document for that reason. The Executive Branch has significant confidentiality interests in those materials but we believe that the enclosed documents, coupled with the above information regarding the President's decision, provide a comprehensive response to the Committee's interests in this matter.

We hope that this information is helpful. Please do not hesitate to contact this Office if we may be of assistance with other matters.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 8, 2006

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Department of Justice appreciates the opportunity to comment on H.R. 5005, the "Firearms Corrections and Improvements Act." The Department believes that enactment of the legislation, if amended as suggested below, would not have an adverse impact on the ability of the Department, including the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), to enforce existing federal firearms statutes. Our analysis of the bill, by section, with suggested amendments where appropriate, follows.

Section 2:

The Department has no objection to the revisions proposed by this provision to 18 U.S.C. §922(b)(1).

Section 3:

The Department supports the goal of this provision, which is to permit contractors providing national security services to the Defense Department and other federal agencies to procure machine guns in the United States for specified purposes. The provision would also permit the possession of machine guns by Federal firearms manufacturers and importers for testing and specified training purposes. This section also would amend import provisions accordingly. The Department does not object to the purposes of the provision, but does have serious reservations and cannot support the drafting of two of the section's provisions.

First, subsection (f) seeks to add to 18 U.S.C. § 921(a) a new subsection (36) defining the term "national security services." The proposed definition includes "...a contract <u>or subcontract</u> with a department or agency of the United States" (emphasis added). This revision would effectively exempt a subcontractor providing national security services from the ban on possession of machine guns. We object to the inclusion of "subcontractors," as we believe that this addition improperly expands the scope of the limited "national security" exemption and will make it difficult to enforce limitations on access to machine guns should Congress enact the

provision. Accordingly, the Department recommends the deletion of the words "or subcontractor" in this definition.

Second, subsection (c)(3) would prohibit a person from transferring a machine gun to a contractor providing national security services absent a check of the National Instant Background Check System (NICS). This provision as drafted is unclear, and we recommend that the proposal instead use the language Congress recently enacted in 42 U.S.C. § 2201a:

> "A person that receives, possesses, transports, imports, or uses a weapon, ammunition, or a device under subsection (b) of this section shall be subject to a background check every three years by the Attorney General, based on fingerprints and including a background check under section 103(b) of the Brady Handgun Violence Prevention Act (Public Law 103-159; 18 U.S.C. § 922 note) to determine whether the person is prohibited from possessing or receiving a firearm under Federal or State law. Any person who receives, possesses, transports, imports, or uses a weapon, ammunition, or a device under subsection (b) shall be subject to 18 U.S.C. §§ 922(g) and (n)."

Id.

Section 4:

The Department does not oppose this provision, but we would point out a minor drafting issue. The proposal would eliminate 18 U.S.C. § 922(s) as obsolete and redesignate 18 U.S.C. § 922(t). However, 18 U.S.C. §§ 922(y)(2) and 924(a)(5) both reference existing section 922(s), and both of these provisions should be amended to conform to the amendment proposed in section 4.

Section 5:

Section 5 of the bill would codify an annual prohibition imposed by Congress in previous appropriations bills prohibiting the Department from charging a fee or tax for a NICS check. The Department has no current intention of either seeking to impose a fee for conducting a NICS check or asking Congress not to include the annual prohibition in its appropriations legislation. Therefore, the Department has no objection to the provision.

Section 6:

The Department has no objection to section 6 of the bill.

Section 7:

Under section 7 of the bill, multiple sales report forms would continue to be filed with ATF, but would no longer have to be filed with the local law enforcement agency in the

jurisdiction in which the transaction occurred. Because ATF will continue to receive the reporting forms, the Department does not believe enactment of this provision will adversely affect ATF's ability to enforce federal firearms laws. The Department would point out, however, that the elimination of the requirement that the form be provided to local law enforcement agencies may have an impact on their ability to enforce relevant state or local firearms laws. The Department will defer to appropriate state and local law enforcement agencies to comment on those potential effects.

Section 8:

The Department has no objection to section 8 of the bill, which codifies restrictions imposed by Congress in previous appropriations bills.

Section 9:

Section 9 would place in Title 18 an existing provision of law (some version of the proposed statutory language has been included since 2003 in the Department's appropriations bill) that prohibits disclosure of information collected pursuant to 923(g) "to any entity, except to a Federal, State, local, or foreign law enforcement agency or a Federal, State, or local prosecutor solely in connection with and for use in a bona fide criminal investigation or prosecution, and only to the extent that the information pertains to the geographic jurisdiction of the law enforcement agency or prosecutor requesting the disclosure." Therefore, the Department supports the purpose underlying the provision. We do have, however, some technical concerns with the provision as drafted.

We are concerned that the amendment as written may impede the investigation and prosecution of individuals involved in criminal activity that crosses jurisdictional lines. Gangs, other criminal organizations, and individual criminals do not consider jurisdictional lines when engaging in their criminal activity. For example, guns are frequently purchased in one jurisdiction for use by gang members or others during their crimes in another jurisdiction, particularly where gun laws in one state are more cumbersome to the purchaser. Thus, the efficacy of the law enforcement exception provided in the amendment is severely undercut by the limitation that the disclosure be limited "to the extent that the information pertains to the geographic jurisdiction of the law enforcement agency or prosecutor requesting the disclosure." We recommend the deletion of that clause from the text. Absent information about trace data spanning jurisdictions, links and information about the criminal activity between the jurisdictions may be difficult to develop in many cases. We therefore also suggest changing "investigation" to "investigative purpose."

In addition, this version of the proposal does not comport with the language of the provision in the FY06 appropriations bill. It is important to recognize that, if the appropriation restriction regarding the disclosure of trace data were to become part of the Gun Control Act, it would effectively criminalize the sharing of trace data by law enforcement outside of the narrow constraints found in proposed section 9, *i.e.*, disclosure of the data can only be made "in

connection with and for use in a bona fide criminal investigation or prosecution, and only to the extent that the information pertains to the geographic jurisdiction of the law enforcement agency or prosecutor requesting the disclosure." Specifically, 18 U.S.C. § 924(a)(1)(D) provides, in pertinent part, that whoever "willfully violates any provision of this chapter [which would include proposed new section 923(g)(8)(A) relating to the disclosure of trace data], shall be fined under this title, imprisoned not more than five years, or both."

Currently, the appropriation restriction applies only to the disclosure of information by the Federal government, has no attached penalty clause for a violation, and does not extend to the 17,000 law enforcement agencies to which ATF provides trace data. In fact, under current policy, if ATF is asked by a State or local law enforcement agency whether it can disclose trace data further, it informs the agency that such disclosure is not prohibited by the appropriation restriction. Under H.R. 5005, the restriction would apply equally to the Federal government and our law enforcement partners with severe penalties attached.

The Department believes the provision as drafted may have a chilling effect on the use by law enforcement of the trace service ATF provides, as well as on the sharing of data among state and local law enforcement agencies for bona fide law enforcement purposes. Such a chilling effect could have adverse consequences for law enforcement operations and officer safety. In order to avoid the chilling effect, we would recommend that the provision in the Gun Control Act that exempts government agencies from the provisions of the Gun Control Act, 18 U.S.C. § 925(a)(1), be amended to exempt law enforcement officials and prosecutors from potential liability for a wrongful disclosure under the proposed trace data restriction. We would be pleased to work with the Committee on appropriate language to effect this change.

Accordingly, we propose the following revisions to the language of Section 9 of the bill with respect to Section 923(g) of Title 18. The Department also believes that these changes will meet the concerns that have resulted in the drafting of the provision (concerns we share), without hindering effective law enforcement and prosecution efforts.

SEC. 9. TRACE DISCLOSURE.

Section 923(g) of title 18, United States Code, is amended by adding at the end the following:

'(8)(A) **Notwithstanding any other provision of law**, information required to be kept by licensees pursuant to this subsection, or required to be reported pursuant to paragraphs (3) and (7) of this subsection, and information in the firearms trace system database maintained by the National Trace Center of the Bureau of Alcohol, Tobacco, Firearms, and Explosives, shall not be --

'(i) disclosed to any entity, except to a Federal, State, local, or foreign law enforcement agency or a Federal, State, or local prosecutor solely in connection with and for use in a bona fide criminal **investigative purpose** ~~investigation~~ or prosecution~~, and only to the extent that the information pertains to the geographic jurisdiction of the law enforcement agency or~~

~~prosecutor requesting the disclosure~~**, or to a Federal agency if the disclosure is for national security or intelligence purposes**; or

'(ii) made available for use in any civil action or proceeding other than--

'(I) an action or proceeding commenced by the Attorney General to enforce this chapter; or

'(II) a review of such an action or proceeding.

'(B) The information described in subparagraph (A) shall be immune from legal process and shall not be subject to subpoena or other discovery, and shall ~~not be admissible as~~ be inadmissible as evidence, ~~in any civil action in a State or Federal court,~~ **and shall not be used, relied on, or disclosed in any manner, nor shall testimony or other evidence be permitted based upon such data, in any civil action pending on or filed after the effective date of this Act in any State (including the District of Columbia)** or in any administrative proceeding other than a proceeding commenced by the Bureau of Alcohol, Tobacco, Firearms, and Explosives to enforce **the provisions** of this chapter, or a review of such an action or proceeding.

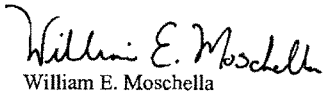
'(C) This subsection shall not be construed to prevent the disclosure of statistical information concerning total production, importation, and exportation by each licensed importer and licensed manufacturer **(as defined in section 921(a)(9) of such title).**

Section 10:

Section 10 of the bill would amend 18 U.S.C. § 925(e) to permit licensed firearms importers to import frames, receivers, and barrels for otherwise non-importable firearms, but only if they are for repair or replacement purposes. The provision would also allow the import of otherwise non-importable barrels for law enforcement purposes. The Department has no objection to this provision.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report. Please do not hesitate to contact this Office if we may be of additional assistance.

Sincerely,



William E. Moschella
Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member

The Honorable Howard Coble
Chairman
Subcommittee on Crime, Terrorism,
and Homeland Security

The Honorable Bobby Scott
Ranking Minority Member
Subcommittee on Crime, Terrorism,
and Homeland Security

U.S. Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530

JAN 20 2006

MEMORANDUM

TO: William W. Mercer
Principal Associate Deputy Attorney General

FROM: H. Marshall Jarrett
Counsel

SUBJECT: Investigation into the Role of Department Attorneys in the Authorization and Oversight of Warrantless Electronic Surveillance by the National Security Agency and in Compliance with the Foreign Intelligence Surveillance Act

This Office is investigating the role of Department attorneys in the authorization and oversight of warrantless electronic surveillance by the National Security Agency (the NSA program) and in compliance with the Foreign Intelligence Surveillance Act (FISA). As a preliminary matter, we have asked the Office of Legal Counsel to provide information and documents in its possession relating to the NSA program. We have also asked James Baker, Counsel of the Office of Intelligence Policy and Review, to submit to an interview concerning the NSA program and its relationship to the Department's dealings with the FISA court.

I am writing to request that the attorneys who are conducting and supervising this Office's investigation be authorized to receive the necessary security clearances for access to documents and information concerning the NSA program and its relationship to the Department's compliance with FISA. Those attorneys are Senior Assistant Counsel [redacted], Assistant Counsel [redacted], Associate Counsel [redacted], Deputy Counsel [redacted] and myself. In addition, I request that essential support employees assisting the attorneys in this investigation be authorized to receive the necessary security clearances. Those employees are Executive Officer [redacted] and Administrative Support Specialist [redacted].

Thank you for your assistance in this matter, and please do not hesitate to call me at (202) 514-3365 if you have any questions.

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, NW
Washington, D.C. 20530

FEB 16 2006

MEMORANDUM

TO: Paul J. McNulty
Acting Deputy Attorney General

FROM: H. Marshall Jarrett
Counsel

SUBJECT: Investigation into the Role of Department Attorneys in the Authorization and Oversight of Warrantless Electronic Surveillance by the National Security Agency and in Compliance with the Foreign Intelligence Surveillance Act

On January 11, 2006, in response to complaints from more than forty Members of Congress, the Office of Professional Responsibility (OPR) initiated an investigation into the Department's role in the authorization and oversight of a program of warrantless electronic surveillance by the National Security Agency (the NSA program) and in compliance with the Foreign Intelligence Surveillance Act. In a memorandum dated January 20, 2006 to Principal Associate Deputy Attorney General (PADAG) William W. Mercer (copy attached), we requested that certain OPR attorneys and support staff be authorized to receive security clearances for access to documents and information relating to the NSA program. PADAG Mercer has informed me in response to my inquiry that he forwarded our request to the authorizing agency, but that the request has not been approved and that he did not know when it would be considered.

As you know, the Criminal Division recently opened a criminal investigation into possible unauthorized disclosures to the news media regarding the NSA program. The Criminal Division's request for security clearances for a large team of attorneys and agents assigned to the case (the same clearances we have requested) was promptly granted, and that investigation is moving forward.

OPR cannot proceed with its investigation if the clearances we have requested are not approved. I therefore request that you take all appropriate action to expedite our request for security clearances so that OPR's investigation can move forward.

Thank you for your attention to this matter, and please do not hesitate to call me at (202) 514-3365 if you have any questions.

Attachment

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Room 3266

Washington, D.C. 20530

MAR 21 2006

MEMORANDUM

TO: Paul J. McNulty
Deputy Attorney General

FROM: H. Marshall Jarrett
Counsel

SUBJECT: Investigation into the Role of Department Attorneys in the Authorization and Oversight of Warrantless Electronic Surveillance by the National Security Agency and in Compliance with the Foreign Intelligence Surveillance Act

As you know, on January 11, 2006 the Office of Professional Responsibility (OPR) initiated an investigation into the Department's role in the authorization and oversight of a program of warrantless electronic surveillance by the National Security Agency (the NSA program) and in compliance with the Foreign Intelligence Surveillance Act. Attorney General Gonzales, in a February 17, 2006 letter, advised Senator Charles E. Schumer that OPR's investigation was in progress.

You should be aware that apart from gathering some very general background information, most of which has appeared in the press, OPR has in fact been unable to move forward with its investigation because we have not received authorization for the necessary security clearances. In my January 20, 2006 memorandum to Principal Associate Deputy Attorney General William W. Mercer and in my February 16, 2006 memorandum to you, I requested that certain OPR attorneys and support staff be authorized to receive security clearances for access to documents and information relating to the NSA program. On March 3, 2006, I made the same request to Courtney Elwood, Deputy Chief of Staff and Counselor to the Attorney General. To my knowledge, none of the requests has been acted upon. We note, however, that the Criminal Division's request for the same security clearances for a large team of attorneys and FBI agents was promptly granted, and that their investigation of certain news leaks about the NSA program is moving forward. We have also learned that individuals involved in the Civil Division's response to legal challenges to the NSA program and response to FOIA litigation have received the same clearances. And, according to recent press reports, the five private individuals who make up the Privacy and Civil Liberties Oversight Board have been briefed on the NSA program and have been granted authorization to receive the clearances in question.

In contrast, our repeated requests for access to classified information about the NSA program have not been granted. As a result, this Office, which is charged with monitoring the integrity of the Department's attorneys and with ensuring that the highest standards of professional ethics are

maintained, has been precluded from performing its duties. I therefore again request that you take all appropriate action to expedite our request for security clearances so that OPR's investigation can move forward. Thank you for your attention to this matter, and please do not hesitate to call me at (202) 514-3365 if you have any questions.

cc: Courtney Elwood
Deputy Chief of Staff and Counselor to the Attorney General

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Room 3266

Washington, D.C. 20530

April 21, 2006

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: Paul J. McNulty
Deputy Attorney General

FROM: H. Marshall Jarrett
Counsel

SUBJECT: Status of OPR Investigation into the Role of Department Attorneys in the Authorization and Oversight of Warrantless Electronic Surveillance by the National Security Agency and in Compliance with the Foreign Intelligence Surveillance Act

As you know, in response to letters we received in early January 2006 from more than 40 Members of Congress, we initiated an investigation into the Department's role in the authorization and oversight of a program of warrantless electronic surveillance by the National Security Agency (the NSA program) and in compliance with the Foreign Intelligence Surveillance Act. On February 2, 2006, we wrote to four of those Members and advised them that we had initiated an investigation. In addition, in a letter dated February 17, 2006, you informed Senator Charles E. Schumer that OPR's investigation was under way.

OPR first requested the security clearances necessary to conduct the investigation in a January 20, 2006 memorandum to Principal Associate Deputy Attorney General William W. Mercer. We reiterated that request in memoranda to Deputy Attorney General (DAG) Paul J. McNulty on February 16, 2006 and again on March 21, 2006. More recently, we discussed the issue with your Deputy Chief of Staff and your Chief of Staff.

We note that the Criminal Division's request for the same security clearances for a large team of attorneys and FBI agents investigating certain news leaks about the NSA program was granted several months ago. We have also learned that individuals involved in the Civil Division's responses to legal challenges to the NSA program and to FOIA litigation received the same clearances. According to press reports, the five private individuals who make up the Privacy and Civil Liberties Oversight Board have been briefed on the NSA program and have been granted authorization to receive the clearances. More recently, Inspector General (IG) Glenn Fine and two members of his

staff received the clearances we requested. As you know, and as IG Fine informed certain Members of Congress on January 4, 2006, the jurisdiction of the Office of Inspector General (OIG) is not coextensive with that of OPR, and that Office does not have the authority to investigate the role of Department attorneys in providing legal advice regarding the NSA program. Nor does the OIG have the authority to investigate whether Department attorneys appearing before the Foreign Intelligence Surveillance Court have complied with their legal and ethical obligations.

OPR was created in 1975 by order of the Attorney General to ensure that Department attorneys perform their duties in accord with the professional standards expected of the nation's principal law enforcement agency. Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels. In all those years, OPR has never been prevented from initiating or pursuing an investigation.

Because OPR cannot proceed with its investigation without the requested security clearances, and because those security clearances have not been granted, we intend to close our investigation. Consistent with our normal practice, we will notify the appropriate Members of Congress of our decision. Accordingly, on Wednesday, April 26, 2006, I will write to the following Members of Congress: Congressman Maurice Hinchey; Congressman John Lewis; Congresswoman Lynn Woolsey; Congressman Henry Waxman; and Congresswoman Zoe Lofgren. In my letters, I will state that we have closed our investigation because our request for security clearances for access to documents and information relating to the NSA program has not been granted.

[Redacted]

]

UNITED STATES SENATOR • IOWA
CHUCK GRASSLEY

http://grassley.senate.gov
grassley_press@grassley.senate.gov

Contact: Jill Kozeny, 202/224-1308
Beth Levine, 202/224-6197
Lucas Bolar, 202/224-0484

Prepared Statement of Senator Chuck Grassley of Iowa
Senate Committee on the Judiciary
Oversight of the Department of Justice
Tuesday, July 18, 2006

Thank you, Mr. Chairman, for holding this hearing on Justice Department oversight. I look forward to hearing the testimony of Attorney General Gonzales. While I share a number of concerns that have been identified by Chairman Specter, I also have several other areas of interest that I would like Attorney General Gonzales to address.

For example, I'm concerned about the tax deductibility of government settlements and the Justice Department's policy regarding these settlements. Recently, I was joined by Senators McCain and Warner in asking the Justice Department about whether The Boeing Company would be able to deduct any of its $615 million settlement with the government over hiring and contracting manipulation. I was extremely troubled with the inadequacy of the Justice Department's response to our concerns. It's plain to me that the Justice Department doesn't understand that there are serious tax implications to these settlements which undermine the mission of another agency – the IRS – and then end up being a burden to the American taxpayer. I plan on questioning Attorney General Gonzales more about the basis for the Department's policy.

I also have serious concerns about the way the Justice Department reacts and how it advises other departments to react to Congressional oversight. Our attempts to gather information from the Executive Branch when we investigate allegations of government misconduct are too often met with delays, excuses and arguments. We frequently hear the same objections time and time again, despite their lack of any basis in law, history or common sense. The Department's "line attorney" or "line agent" policy frequently is cited as a reason to allow only senior level policy makers to speak to Congress, preventing us from gathering information from frontline government employees who have in depth knowledge of the facts and problems we are trying to look into. This policy is selectively asserted as a way to deflect certain inquiries, but ignored whenever the Executive Branch decides that allowing such employees to speak to Congress appears to be in its best interests. We have been denied access to files from both the Justice Department's and FBI's Office of Professional Responsibility, purportedly to protect the privacy of government employees who have been investigated by those offices. However, Congress often needs the information in these OPR files to evaluate the credibility of whistleblowers who come to us with information about waste, fraud and abuse, as well as to assess whether they have been retaliated against for such disclosures. That is one of the reasons that there is an exemption in the Privacy Act for Congressional requests.

For instance, the Judiciary Committee was recently denied OPR documents related to allegations of misconduct in the investigation of the death of Jonathan Luna, an Assistant U.S. Attorney in Baltimore who was found dead under mysterious circumstances in the Chairman's home state of Pennsylvania. Three FBI employees were accused of turning the Luna investigation into a personal vendetta against a fellow FBI agent, who complained about an overly personal, aggressive and irrelevant interrogation as well as an unauthorized search of her computer. The FBI employees accused of misconduct were investigated by FBI/OPR, but only after intervention by the Inspector General prevented FBI management from sweeping the incident under the rug. One of the FBI employees accused of misconduct has since been promoted to a senior counterterrorism position. We requested documents regarding this matter from the FBI, but have been provided only a briefing. Even though the head of OPR indicated that she had no objection to providing the Committee a copy of her final report in this matter, neither that report, nor the other documents we requested have been turned over.

This resistance to Congressional oversight has spread to other agencies through the advice that the Justice Department provides to them. In my capacity as Chairman of the Finance Committee, I am frequently conducting inquiries at HHS and FDA that are stalled, delayed, or frustrated by these policies. I have some questions for the Attorney General about those today, and I look forward to hearing his responses.

On a brighter note, I am pleased that when it comes to the Justice Department's oversight of the FBI, there is some good news. Last February, the Judiciary Committee asked the Inspector General to investigate allegations that the FBI's highest-ranking Arab American agent, Bassem Youssef, had been denied a transfer to the International Terrorist Operations Section (ITOS) in retaliation for raising concerns to the Director that his expertise and talents were being underused by the FBI. The Inspector General referred the case to DOJ/OPR, which investigated and found that there was a reasonable basis to believe that Youssef had been the victim of whistleblower retaliation. Moreover, DOJ/OPR recommended that Youssef be transferred to ITOS, as the FBI had originally planned to do four years ago.

I'm glad to see the Department's internal process working to provide some vindication to an FBI whistleblower. This preliminary finding will now be reviewed by another DOJ office for final action. However, I am concerned that the process may still not be as effective as it should be. Specifically, even if Youssef is ultimately found to be a victim of retaliation and transferred to ITOS, the person responsible for keeping him out of that position for four years may escape accountability because of the way the Department's whistleblower regulations work. DOJ/OPR did not identify which FBI official made the retaliatory decision to stop Youssef's transfer, and without further fact-finding we may never know who did it. No matter how many senior officials claim that whistleblower retaliation won't be tolerated, there is no disincentive as long as retaliators are not identified and punished. I hope this Committee will schedule future hearings on DOJ and FBI whistleblower issues, and specifically the cases of Michael German and Bassem Youssef.

There are other issues that I'm interested in, such as drug patent settlements and interchange fees. I'm pleased that Chairman Specter will be conducting a hearing on interchange fees

tomorrow morning, but I'd also like to know whether the Justice Department sees any antitrust concerns with these financial practices. I also wanted to express my disappointment with the Justice Department's position in the recent Schering Plough case before the Supreme Court dealing with drug patent settlements. Sweetheart deals that delay the entry of low cost drugs in the marketplace not only hurt consumers, they also threaten the sustainability of federal health care programs, such as Medicare and Medicaid. The Federal Trade Commission is doing the right thing by going after these kinds of anti-consumer settlements. I hope that the Justice Department will take a hard look at its position and decide to assist the FTC in its effort to crack down on anticompetitive activity and to promote true competition in the prescription drug market.

In the meantime, I look forward to hearing the Attorney General's testimony today and having this opportunity to ask him about some instances where the Justice Department has stood in the way of Congress discharging its duty to conduct vigorous oversight of allegations of misconduct in the Executive Branch, as well as the Justice Department's position regarding the deductibility of government settlements.

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from the office of

Senator Edward M. Kennedy

of Massachusetts

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July 18, 2006 (202) 224-2633

STATEMENT BY SENATOR EDWARD M. KENNEDY AT OVERSIGHT HEARING WITH ATTORNEY GENERAL GONZALES (AS PREPARED FOR DELIVERY)

When it comes to national security, our country is far stronger when the government stands united. We all agree on the need for law enforcement and intelligence officers to have strong powers to investigate terrorism, to prevent future attacks, and improve information-sharing between federal, state and local law enforcement. This is not a question of party or politics. It is a question of national security, and we should all come together to meet our obligations and protect the safety and security of the United States.

Americans deserve national security laws that protect both our security and our constitutional rights, and we have not yet achieved the goal set by the 9/11 Commissioners: to adopt governmental powers that truly enhance our national security while ensuring adequate oversight over their use.

For the past five years, Congress has stood ready to work with the President to give him the necessary tools to protect America. In fact, the Congress has worked with the President on the PATRIOT Act and many other important measures to strengthen our national security laws. However, through a rampant series of leaks, we find out that this Administration has pursued many secret programs and pursued a solitary path that rides roughshod over the historic legal standards that have made this country great.

Other than President Bush and Vice President Cheney, no person has been more central to the policies of the Bush Administration—and their dubious legal justifications—than you, Mr. Attorney General. Your name has been linked with a litany of troubling acts: implementing warrantless surveillance outside the scope of the law, endorsing legal opinions stretching the limit for our country's treatment of detainees, and creating a legal limbo for detainees at Guantanamo Bay.

On issue after issue, you have endorsed expediency over the rule of law. You advocated a breathtakingly expansive view of Presidential power, purporting to put the Executive Branch above the law.

You've been at the center of a torture policy that has predictably run amok, contradicting the values and cherished principles that Americans hold so dear.

From the beginning, you adopted an absurdly narrow definition of torture in order to permit extreme interrogation practices. You signed off on interpretations of law that would allow any interrogation technique that stopped short of organ failure or death.

You ignored the plain language of the Geneva Conventions in an attempt to immunize those who may commit war crimes. The Supreme Court has rebuked the Administration's treatment of detainees. Yet, it still remains an open question whether the Administration will continue to push a discredited interpretation of our treaty obligations to permit the C.I.A. to commit cruel, inhuman and degrading acts outside the United States.

A very troubling characteristic of the way these policies have been formulated is that people who should have been involved in the process have been shut out. From Colin Powell, to career military lawyers and experts in the Departments of Justice or State, we have heard repeatedly that the normal process was not followed and voices that should have been heard during the internal debate were not consulted or – worse -- ignored. Similarly, the Administration has consistently sought to avoid congressional oversight of its policies. The result – quite predictably – has been bad law and bad policy.

In an interview last summer, you told the Academy of Achievement that the hardest part of his job is saying "no" to the President and others in the Administration. You said, "to be an effective lawyer...you have to say no...there are limits to what can be done, even for the Attorney General and even for a president." Given the Administration's policies, it is alarming to imagine which – if any -- policies you have said "no" to. We know now that you didn't say "no" when the President chose to ignore well-established laws for domestic surveillance.

Since 1978, Congress has never authorized nor approved domestic electronic surveillance of United States citizens without a warrant. The conference report makes clear that Congress was setting forth a standard for President Ford – and all future Presidents to follow. The law's purpose has always been clear – to put an end to any wiretapping under the blanket claim of "national security." Congress also made clear that the Foreign Intelligence Surveillance Act established the "exclusive means by which such surveillance may be conducted."

The Act was also intended to ensure that the Executive Branch – under <u>any</u> President – did not ignore basic civil liberties of the American people by utilizing an unchecked "inherent power" to eavesdrop on U.S. soil. After September 11th, the Authorization for Use of Military Force passed by Congress did <u>not</u> authorize domestic electronic surveillance, and certainly <u>not</u> domestic electronic surveillance of American citizens, without a judicially approved warrant.

At a minimum, the Committee should be able to know the details of the surveillance programs the President authorized -- more than 30 times -- since the September 11th attacks. On January 27th, every Democratic Senator on this Committee requested documents from the Attorney General to support the legal justifications for the program before he testified. We received no response.

The Administration refuses even to give us an inventory of all the relevant documents – much less a legitimate reason for rejecting our document request. There is no rational purpose in denying Congressional access to the legal thought and analysis relied on by the Administration to develop, create and maintain these surveillance activities.

The President does not have a blank check on matters of national security. Yet, over the past five years, the Administration has taken us down a dangerous path, violating the well-established checks and balances of the Constitution. In *Hamdan v. Rumsfeld*, the Supreme Court said the President had gone too far. As Justice Stevens noted, "the Executive is bound to comply with the Rule of Law."

If our current national security laws are not adequate, the Administration should work with both Republican and Democratic Members of Congress to update our laws with due regard for the Constitution, treaties, and the laws of war. Today, and going forward, we will see whether the Administration is ready to get back on track and work with Congress on the urgent priorities facing our country today.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

STATEMENT OF SENATOR PATRICK LEAHY,
RANKING MEMBER, JUDICIARY COMMITTEE
HEARING ON DEPARTMENT OF JUSTICE OVERSIGHT
WITNESS: ATTORNEY GENERAL GONZALES
JULY 18, 2006

Three weeks ago, in *Hamdan*, the Supreme Court held that the President is bound to comply with the rule of law. Three years ago, in *Hamdi*, the Supreme Court held that war is not a blank check for the President when it comes to the rights of the Nation's citizens. Those are two remarkable statements coming from the Nation's highest court. They are not remarkable for the propositions they state. The Rule of Law was the basic premise upon which this Republic was founded 230 years ago. They are remarkable, instead, for the fact that this Administration's unprecedented record of complete disregard for the rule of law -- coupled with its arrogance and secrecy -- made it necessary to say them at all.

Needed Doses Of Constitutional Tonic

The witness before us today has held two uniquely important roles with respect to the rule of law. As White House Counsel, it was his sworn duty to advise the President how to comply with the rule of law. As Attorney General, he has the further responsibility to lead the Nation's enforcement of the rule of law. On his watch, the Bush-Cheney Administration has repeatedly flouted the laws that limit the power of the Executive. During the past few years, the Supreme Court has rendered three landmark constitutional decisions regarding Executive power. In all three, it ruled against the President.

In *Hamdi*, the Court rejected the Administration's unprecedented claim that an American citizen can be stripped of the constitutional right to due process simply on the say-so of the President. The Court held that Mr. Hamdi was entitled to a fair hearing on the legality of his detention.

In *Rasul*, the Court rejected the legal premise upon which the Guantanamo detention center was built. The Bush-Cheney Administration chose to hold prisoners captured in Afghanistan on the island of Cuba as a means of avoiding the jurisdiction of United States courts. The Court held that the writ of habeas corpus cannot be suspended by housing prisoners off shore.

That brings us to last month's decision in *Hamdan*. The path to that latest setback to the Administration begins with a memorandum written by today's witness. In January 2002, then-White House Counsel Gonzales advised President Bush that he need not and should

not comply with the Geneva Conventions, contrary to the advice of Secretary of State Colin Powell. The President chose to take Mr. Gonzales' advice rather than listen to General Powell. In *Hamdan*, the Court held that the President is bound by the Geneva Conventions, and that the President's military commissions are illegal. In sum, the Administration is batting 0 for 3 in the Supreme Court.

But the result of this series of blunders is not merely a strike-out: With respect to Mr. Hamdi, after nearly three years of incarceration, during which the Administration insisted that American security would be seriously prejudiced by even affording him a lawyer, the Administration set him free in the Middle East.

Four years after the Administration began transporting prisoners to Guantanamo, that detention center has become an international embarrassment which everyone from Tony Blair to Colin Powell has said should be closed immediately.

And more than four years after initiating a military commissions program which Attorney General Gonzales told us was designed to ensure "swift justice" close to the battlefield, the Administration has charged a total of 10 people, convicted zero, and is now back at square one.

Perhaps the only lesson that this Administration learns from its mistakes is not to get caught next time. This Administration is allergic to accountability, whether in the form of judicial review or in the form of congressional oversight.

The attempt to evade habeas review by holding detainees at Guantanamo is just one of a series of measures the Administration has taken to shield its actions from the courts. The Hamdan case addresses another. In one of his notorious signing statements, issued after Congress passed the Detainee Treatment Act in 2005, the President asserted that the Act retroactively stripped the courts of jurisdiction over pending cases. The Court rejected this claim and instead followed the plain language of the Act, informed by the legislative history that was actually available to members of Congress before they voted on the Act.

The case of Jose Padilla presents another example. Three-and-a half years after detaining Padilla as an unlawful combatant, and on the eve of Supreme Court review, the Administration moved to have his case dismissed by transferring him from military to civilian custody. In a unanimous opinion, the conservative Fourth Circuit rejected the Administration's motion. Judge Luttig pointedly noted that the motion appeared to be an attempt to evade Supreme Court review and that it had damaged the government's credibility.

Warantless Wiretapping

Meanwhile, with respect to its secret domestic wiretapping program, the Administration has for nearly five years evaded even the limited judicial review afforded by the Foreign Intelligence Surveillance Act. In fact, in just the few months since the public and Congress first learned of the NSA's warrantless wiretapping program, the Justice

Department has asserted the state secrets privilege in at least 19 different court cases challenging that program. Last week we learned that in closed-door negotiations with Senator Specter, the Administration made a conditional offer to submit one of its domestic spying programs to secret review by a single FISA court judge. As I understand the Administration's offer, Congress must first agree to completely gut FISA and to deprive American citizens of the right to challenge domestic wiretapping in open court – nothing more than ratification of the Administration's actions after-the-fact.
So when the President tells the Chairman of this Committee that he is agreeable to judicial review of that program and his other actions, I hope that you understand why some of us are a bit wary.

We should reject the Administration's so-called "compromise" and instead demand that it submit to the judicial review that FISA already requires. But more than that, we in Congress have a responsibility not just to punt to the courts, but to do our job of holding the Administration accountable. Congressional oversight is the ultimate democratic antidote to Executive over-reaching. Oversight makes government more accountable and more effective.

Congress's Oversight Duty

It is time for Congress to fulfill its constitutional duty by acting as a real check on the Executive branch. A Congress that defers to the President and ratifies his continuing illegal actions is no better than a President who seeks to immunize or ignore illegal conduct of his subordinates. Congress needs to act and truly be an independent branch of the Government. A start is real oversight.

For too many months the Department of Justice has shown blatant disregard for this Committee and its oversight role by dispatching junior deputies, unauthorized or unable to answer our questions. Instead of providing us with information, these subordinates were sent to parrot the Administration's talking points. This is not an Administration that recognizes or learns from its mistakes. The Bush-Cheney Administration does not engage in soul-searching. Instead, it blithely maintains, as its witness told us last week, that "the President is always right."

Recently, the Republican chair of the House Intelligence Committee complained that the Administration has breached its responsibility to keep his Committee informed of ongoing intelligence operations. Just last week, the *New York Times* reported that the Republican chair of a House Financial services subcommittee on oversight accused the Administration of being too secretive and failing to adequately inform Congress about the Treasury Department's questionable bank records program. The Republican chair of the House Judiciary Committee described the Attorney General's testimony as "stonewalling." If only Congress had insisted all along on truly effective oversight, all Americans would be better off.

The cost to American liberty, our standing in the world, and to the security of our soldiers and citizens is staggering — even more than the half a trillion dollar cost of the war in

Iraq. Instead of coming to this Committee to get authority under the law to gather intelligence to advance the war on terror, the Administration chose to simply snub Congress. Instead of coming to Congress to create a credible and effective justice system for the war on terror, this Administration chose to disregard congressional power under the Constitution to "make Rules concerning Captures on Land and Water" and to cobble together an illegal system for military tribunals.

The result has been the dangerous specter of illegal Government surveillance at home and a military tribunal system which has undermined our standing in the world, jeopardized our troops abroad and compromised our moral values. The Supreme Court's repudiation of the President's military tribunals has given our system of checks and balances a constitutional tonic that was sorely needed.

Decline In Anti-Crime Support

Further, turning to our domestic situation, despite great gains in the war on crime during the 1990s, this President, Attorney General and the Republican-controlled Congress have cut more than $2 billion in funding for state and local law enforcement since 2001. It may not be coincidental that we are now witnesses a dramatic rise in violent crime. Last year alone, violent crime increased at the fastest rate in 15 years. Just as we see a world made less safe by a flawed foreign policy, when we look at our domestic situation we see a nation with rising crime, more at risk and more divided. Last week, for example, following a dramatic wave of homicides, D.C. Police Chief Charles Ramsey declared a crime emergency in the Nation's Capital. There have even been expressions of deep concern about crime on the National Mall – just a short walk from where we are today -- after serious crime incidents in recent weeks, directed at tourists. Many of us recall the Bush Administration's firing of former Park Service Chief of Police Teresa C. Chambers three years ago, when she dared to publicly warn Congress and the American people that, quote, "There's not enough of us to go around to protect those green spaces anymore" – a reference to the Bush Administration's cuts in the anti-crime budget for the Park Police. Her warnings seem particularly prescient today, and her firing by the White House seems all the shabbier.

Today's oversight hearing provides another new start for Congress to stop rubber-stamping the questionable policies of this Administration and to finally say 'enough is enough.' By acting unilaterally, in secret, and in violation of the laws passed by Congress, this Administration has acted as if it were above the law for far too long. I hope all Members of this Committee, Republican and Democrats alike, will join me to restore the constitutional checks and balances that have been systematically eroded by this Administration, and I hope that we can begin that process today.

At the beginning of my remarks, I quoted the words of President Reagan's first Supreme Court appointee, Justice Sandra Day O'Connor, who wrote in *Hamdi* that war is not a blank check for the executive. Last month in *Hamdan*, President Reagan's last Supreme Court appointee, Justice Anthony Kennedy, wrote that concentration of power in the Executive "puts personal liberty in peril of arbitrary action by officials, an incursion the

Constitution's three-part system is designed to avoid." Congressional oversight is essential to that three-part system. Its restoration is long overdue.

The People's Attorney, Not The President's

During the confirmation hearings on his nomination to be Attorney General, several members of the Committee emphasized that in his new position, Judge Gonzales would no longer be the President's attorney, but the people's attorney. The importance of the person who serves as our top law enforcement officer to be able to act and advise independently has come into even sharper relief over the last year, and especially with these Supreme Court decisions.

The last time the Attorney General appeared before this Committee, he was not very responsive. I hope he will not repeat that performance today. I hope that he will answer our questions. I hope he will admit mistakes and we can join together in meaningful oversight and genuine accountability. I hope today is the beginning of real oversight activity for this Committee and an open exchange of information from the Administration. The American people, expect -- and deserve -- no less.

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