AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–462

DEPARTMENT OF JUSTICE OVERSIGHT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

APRIL 19 AND JULY 24, 2007

Serial No. J–110–28

Printed for the use of the Committee on the Judiciary

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00001 Fmt 6011 Sfmt 6011 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

DEPARTMENT OF JUSTICE OVERSIGHT

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00002 Fmt 6019 Sfmt 6019 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

S. HRG. 110–462

DEPARTMENT OF JUSTICE OVERSIGHT

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

APRIL 19 AND JULY 24, 2007

Serial No. J–110–28

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

38–236 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00003 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

COMMITTEE ON THE JUDICIARY

PATRICK J. LEAHY, Vermont, *Chairman*

EDWARD M. KENNEDY, Massachusetts	ARLEN SPECTER, Pennsylvania
JOSEPH R. BIDEN, JR., Delaware	ORRIN G. HATCH, Utah
HERB KOHL, Wisconsin	CHARLES E. GRASSLEY, Iowa
DIANNE FEINSTEIN, California	JON KYL, Arizona
RUSSELL D. FEINGOLD, Wisconsin	JEFF SESSIONS, Alabama
CHARLES E. SCHUMER, New York	LINDSEY O. GRAHAM, South Carolina
RICHARD J. DURBIN, Illinois	JOHN CORNYN, Texas
BENJAMIN L. CARDIN, Maryland	SAM BROWNBACK, Kansas
SHELDON WHITEHOUSE, Rhode Island	TOM COBURN, Oklahoma

BRUCE A. COHEN, *Chief Counsel and Staff Director*
MICHAEL O'NEILL, *Republican Chief Counsel and Staff Director*

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00004 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

CONTENTS

APRIL 19, 2007

STATEMENTS OF COMMITTEE MEMBERS

	Page
Biden, Hon. Joseph R., a U.S. Senator from the State of Delaware, prepared statement	188
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	1
prepared statement	210
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement	190
Schumer, Hon. Charles E., a U.S. Senator from the State of New York	6
Sessions, Hon. Jeff, a U.S. Senator from the State of Alabama	7
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	4

WITNESS

Gonzales, Alberto R., Attorney General of the United States, Department of Justice	7

QUESTIONS AND ANSWERS

Responses of Alberto R. Gonzales to questions submitted by Senators Leahy, Specter, Kennedy, Durbin, and Schumer	96

SUBMISSION FOR THE RECORD

Gonzales, Alberto R., Attorney General of the United States, Department of Justice, statement and attachment	192
Hertling, Richard A., Acting Assistant Attorney General, Department of Justice, Washington, D.C., letter	213

JULY 24, 2007

STATEMENTS OF COMMITTEE MEMBERS

	Page
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	219
prepared statement	580
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	222

WITNESS

Gonzales, Alberto R., Attorney General of the United States, Department of Justice	224

QUESTIONS AND ANSWERS

Responses of Alberto R. Gonzales to questions submitted by Senators Leahy, Specter, Kennedy, Biden, Feinstein, Feingold, Schumer, Durbin and Grassley	287

SUBMISSION FOR THE RECORD

Gonzales, Alberto R., Attorney General of the United States, Department of Justice	554

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00005 Fmt 5904 Sfmt 5904 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

DEPARTMENT OF JUSTICE OVERSIGHT

THURSDAY, APRIL 19, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 9:33 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, Kyl, Sessions, Graham, Cornyn, Brownback, and Coburn.

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

Chairman LEAHY. Good morning. This week, like all Americans, we join in mourning the tragic killings at Virginia Tech on Monday. The innocent lives of students and—before we start, I notice some people holding up signs. A lot of people have stood in line a long time to be here. This is an important hearing. I would ask that people be polite enough not to hold up something and block those who have waited in line, waited to be at this hearing. Certainly anybody can be here, but I will not allow anyone, no matter what positions they may be taking, to block the view of others who have a legitimate right to be here.

As I said, we join in mourning the tragic killings at Virginia Tech. The innocent lives of students and professors are a terrible loss to their families, their friends, and their community. It affects us all. We honor them and mourn their loss. My family and I hold them in our prayers and our thoughts.

I expect in the days ahead, as we learn more about what happened, how it happened, and perhaps why it happened, we will have debate and discussion and perhaps proposals to consider. I look forward to working with the Department of Justice, with Regina Schofield, the Assistant Attorney General for the Office of Justice Programs, the Attorney General, who has offered briefings, and others to make improvements that can increase the safety and security of our children and grandchildren in schools and colleges.

Today the Department of Justice is experiencing a crisis of leadership perhaps unrivaled during its 137-year history. There is a growing scandal swirling around the dismissal and replacement of several prosecutors, and persistent efforts to undermine and marginalize career lawyers in the Civil Rights Division and elsewhere in the Department.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00007 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

We hear disturbing reports that politics played a role in a growing number of cases, and I have warned for years against the lack of prosecutorial experience and judgment throughout the leadership ranks of the Department. We are seeing the results amid rising crime and rampant war profiteering, abandonment of civil rights and voting rights enforcement efforts, and lack of accountability. I fear the Justice Department may be losing its way.

The Department of Justice should never be reduced to another political arm of the White House, this White House or any White House. The Department of Justice must be worthy of its name. The trust and confidence of the American people in Federal law enforcement must be restored.

Now, since Attorney General Gonzales last appeared before this Committee on January 18th, we have heard sworn testimony from the former U.S. Attorneys forced from office and from his former Chief of Staff. Their testimony sharply contradicts the accounts of the plan to replace U.S. Attorneys that the Attorney General provided to this Committee under oath—under oath—in January and to the American people during his March 13th press conference.

The Committee is still seeking documents and information and testimony so that we may know all the facts, the whole truth, surrounding the replacement of these prosecutors who had been appointed by President Bush.

One thing abundantly clear is that if the phrase "performance related" is to retain any meaning, that rationale should be withdrawn as the justification for the firing of David Iglesias, John McKay, Daniel Bogden, Paul Charlton, Carol Lam, and perhaps others. Indeed, the apparent reason for these terminations has a lot more to do with politics than performance.

In his written testimony for this hearing and his newspaper columns, the Attorney General makes the conclusory statement that nothing improper occurred.

The truth is that these firings have not been explained, and there is mounting evidence of improper considerations and actions resulting in the dismissals.

The dismissed U.S. Attorneys have testified under oath they believe political influence resulted in their being replaced. If they are right, the mixing of partisan political goals into Federal law enforcement is highly improper. The Attorney General's own former Chief of Staff testified under oath that Karl Rove complained to Attorney General Gonzales about David Iglesias not being aggressive enough against so-called voter fraud, which explains his being added to the list.

With respect to Mr. Iglesias, the former U.S. Attorney in New Mexico, the evidence shows that he is held in high regard, considered for promotion to the highest levels of the Department, and chosen by the Department to train other U.S. Attorneys in the investigation and prosecution of voter fraud.

Then as the election approached in 2006, administration officials received calls from New Mexico Republicans complaining that Mr. Iglesias would not rush an investigation and indictments before the November election.

True accountability means being forthcoming. True accountability requires consequences for bad actions. So this hearing is such an opportunity.

Last November, the American people rejected this administration's unilateral approach to Government and to the President acting without constitutional checks and balances. Rather than heed that call, within days of that election senior White House and Justice Department staff finalized plans to proceed with the simultaneous mass firings of a large number of top Federal prosecutors.

By so doing, they sent the unmistakable message—not only to those forced out but to those who remain—that the traditional, independent law enforcement by U.S. Attorneys would not be tolerated by this administration. Instead, partisan loyalty had become the yardstick by which all would be judged.

So I do not excuse the Attorney General's actions and his failures from the outset to be forthright with us, with these prosecutors, but especially with the American people.

The White House political operatives who helped spearhead this plan did not have effective and objective law enforcement as their principal goal. They would be happy to reduce United States Attorney's Offices to just another political arm of the administration.

If nothing improper was done, people need to stop hiding the facts and tell the truth and the whole truth. If the White House did nothing wrong, then show us. Show us the documents and provide us with the sworn testimony—the sworn testimony—of what was done and why and by whom. If there is nothing to hide, then the White House should stop hiding it.

Quit claiming the e-mails cannot be produced. Quit contending that the American people and their duly elected representatives cannot see and know the truth. And I trust that after the weeks of preparation for this hearing, the Attorney General's past failures to give a complete and accurate explanation of these firings will not be repeated today.

There has always been a tacit and carefully balanced intersection between politics and our law enforcement system, but it has been limited to the entrance ramp—the entrance ramp of the nomination and confirmation process. And instead of an entrance ramp, this administration seems to have envisioned a political toll road.

Real oversight has returned to Capitol Hill, and the investigation of this affair already pulled back the curtain to reveal unbridled political meddling, Katrina-style cronyism, and unfettered White House unilateralism that has been directed at one of our most precious national assets—our law enforcement and our legal system.

Earlier in this process, it seemed the administration was concluding that any answer would do, whether it was rooted in the facts or not. Those days are behind us. Just any answer won't do anymore. We need the facts, and we will pursue the facts until we get the truth.

Just as respect for the United States as a leader in human rights has been diminished during the last 6 years, the current actions have served to undercut confidence in our United States Attorneys.

And just as Mr. Gonzales cannot claim immunity from the policies and practices regarding torture that were developed under his watch while White House Counsel, he cannot escape accountability

for starting off on this plan to undercut effective Federal prosecutors and to infect Federal law enforcement with narrow political goals. His actions have served to undermine public confidence in Federal law enforcement and the rule of law. By getting to the truth, we can take a step toward restoring that trust.

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

Senator Specter.

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

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

The purpose of this Senate oversight hearing is to determine this Committee's judgment as to whether Attorney General Alberto Gonzales should continue in that capacity. We are mindful of the difficulties and the achievements that Attorney General Gonzales had to surmount to become a Harvard Law graduate, become a Texas State Supreme Court Justice, White House Counsel, and now the chief law enforcement officer of the United States—a very distinguished record indeed. And we further appreciate your status as a role model as the first Hispanic Attorney General and well recall the historic occasion, January 4, 2005, when you appeared at that table at your confirmation hearing.

As I see it, you come to this hearing with a heavy burden of proof to do three things: first, to re-establish your credibility; second, to justify the replacement of these United States Attorneys; and, third, to demonstrate that you can provide the leadership to the United States Department of Justice, which has such a vital role in protecting our national interests in so many lines.

Notwithstanding demands for your resignation by Democrats and Republicans in the U.S. Senate and elsewhere, I have insisted both publicly and privately that you be given your so-called day in court to give your responses. You do so in the context of testimony from a number of people in the Department of Justice who have contradicted certain of your public statements.

You earlier said that you were not involved in any discussions, and then your subordinates testified to the contrary, that you were at meetings where discussions were undertaken about the replacement of these U.S. Attorneys.

You then said that you did not see memoranda, and again your subordinates have testified under oath that you were at meetings where documents, memoranda, were distributed. And then you modified your statement about discussions to say that you were not involved in deliberations. And, again, the testimony of three of your key subordinates—your former Chief of Staff, Kyle Sampson; the Acting Associate Attorney General, Bill Mercer; and the former Director of the Executive Office of U.S. Attorneys, Michael Battle—who said that you were involved in deliberations and had done so with some particularity. So that this is your opportunity, Mr. Attorney General, to tackle that burden of proof, the heavy burden of proof, to re-establish your credibility here.

With respect to the removal of United States Attorneys, there is no doubt that the President can remove U.S. Attorneys for no reason at all. And President Clinton did just that in 1993 when, in one

fell swoop, he removed 93 United States Attorneys. But there cannot be a removal for a bad reason; that is, if, as suggestions have been made, U.S. Attorney Lam in San Diego was replaced because she was hot on the trail of confederates of former Congressman Duke Cunningham, who is now serving 8 years in jail. Or a U.S. Attorney may not be replaced if, as the allegations are made—and until we hear from you, Mr. Attorney General, I am going to regard them as allegations, until we hear from you, until we give you an opportunity to respond. But the allegations were made that U.S. Attorney Iglesias in New Mexico was removed because he would not initiate prosecutions which, in his discretion, he felt were unwarranted.

Now, as you and I know, I have been candid with you in suggestions as to what you should do. I think that is the role of a Senator, to be open to discuss the issues candidly, and you called me on a Saturday, and I wrote to you some time ago outlining what I thought you had to address. As far as I am concerned, this is not a game of "gotcha." This is a matter where we want the facts. We want the hard facts so we can make an evaluation. And I suggested to you that you make a case-by-case analysis as to all of the U.S. Attorneys who were asked to resign; and if you concluded on reexamination that some were asked to resign improperly, that you ought to say so and even ought to consider reinstatement. If someone is improperly removed, there are judicial remedies—not in this case but in other analogous situations where courts will order reinstatement. Well, it's pretty hard to unscramble the eggs, but that is a possibility.

With respect to leadership, no one, short of the Secretary of Defense, has a more important role in our Government in the administration of civil and criminal justice than does the Attorney General of the United States heading the Department of Justice. In your effort to remove yourself or distance yourself, as you appear to have done, denying discussions, denying deliberations, denying memoranda, you face really the horns of a dilemma, and that is, if you were removed and actions were taken which were inappropriate, that you were not really part of, although you have articulated your overall responsibility as CEO, but not responsible on the judgments, from the other horn of the dilemma of how you can provide the leadership if you are detached on such really important matters. It is a very tough dilemma, I think, that you face. And I believe you have come a good distance from the day you said that this is an "overblown personnel matter" in the USA Today article.

So this is as important a hearing as I can recall, short of the confirmation of Supreme Court Justices, more important than your confirmation hearing. In a sense, it is a reconfirmation hearing. And I await your testimony.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter.

What I am going to do, the Chairman and Ranking Member of the appropriate Subcommittee, even though we are holding this in the full Committee, the Chairman and Ranking Member, Senator Schumer and Senator Sessions, we are going to grant 2 minutes each to them, first Senator Schumer and then Senator Sessions, and then we will go, Attorney General, to your testimony.

Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman. I join you in mourning the losses at Virginia Tech.

It cannot make anyone happy to have to question the credibility and competence of the Nation's chief law enforcement officer. This is, however, a predicament strictly of the Attorney General's own making, so I would like to make three points.

First, we must get sincere and direct answers from the Attorney General. We need clear responses, not careful evasions. The Attorney General, as we have all read, has been preparing long and hard for this hearing, so I hope and expect we will be treated to a minimum of "I don't recall." I hope we will not get meandering answers that take up time but do not answer the question. After all this time, if the Attorney General cannot answer a straightforward, factual question from a Senator about recent events, how can he possibly run the Department?

Second, the burden of proof has clearly shifted. Of course, we are not going to find an e-mail that says, "Fire Carol Lam because she is prosecuting Duke Cunningham." But when there is no cogent explanation for most of the firings, when there is virtually no documentation to support those decisions, when there are mounting contradictions, when there are constant coincidences, when those firings occur against a backdrop of mishaps, missteps, and misstatements by the highest officials at the Justice Department, what are we to think?

Every lawyer knows that cases are often made without finding the so-called murder weapon, but are often made on circumstantial evidence. Here, the circumstantial evidence is substantial and growing, and the burden is on the Attorney General to refute it. If the Attorney General cannot give clear and consistent reasons for each firing, then that burden will not have been met.

And, third, and finally, I hope we will not hear the Attorney General continually repeat like a mantra, as if it is some sort of defense against all inquiry, that the President can dismiss a U.S. Attorney for almost any reason. If the President suddenly ordered the firing of every U.S. Attorney with an IQ over 120 because he did not want smart people in the job, he is certainly legally permitted to do so. But a Congress that did not challenge such a silly plan would not be doing its job, and an Attorney General who would unquestioningly executed it should not keep his job. The issue is not whether the administration has the legal power to fire U.S. Attorneys. It is about how that power has been exercised. Was it used for proper, prudent reasons or improper political ones? Was it used wisely or crassly? Was it used with the best of intentions or the worst?

We do not know all the facts yet. I hope we learn more today.

Chairman LEAHY. Thank you.

Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. This is an important hearing, and there is politics here, but there are some very serious problems, Mr. Attorney General. Having served as United States Attorney for 12 years myself and knowing so many of those people that have served, they are out there by themselves having to make tough decisions, and it is important that they feel like the Department of Justice will back them up when they are right.

But they are accountable. They are appointed by the President and can be removed by the President. And there are a lot of important issues that United States Attorneys must be engaged in, such as illegal gun use, corruption, terrorism, immigration. They have to be held to account for the performance of those duties.

It is a tough job for United States Attorneys, and I would say for the Attorney General, it is a very tough job. Ask John Ashcroft. Ask Janet Reno. It is not easy, the job that you have. It is a great challenge and a very great responsibility. The integrity of the office you hold must be above reproach. I know you feel that way. You have said that to me more than once and said so publicly. But we have got some questions, and those questions have to be answered.

It does appear that your statements given at the Department of Justice at a press conference incorrectly minimized your involvement in this matter. I believe that you should have been more involved in the entire process. I believe, frankly, you should have said no. I do not believe this was a necessary process, particularly the way it was conducted.

I do remember your Chief of Staff toward the end of the hearing said this: "In hindsight, I wish that the Department had not gone down this road, and I regret my role in it."

I think it has hurt the Department. It has raised questions that I wish had not been raised, because when United States Attorneys go into court, they have to appear before juries, and those juries have to believe that they are there because of merit of the case and that they have personal integrity.

So this matter has taken on a bit of a life of its own, it seems. Your ability to lead the Department of Justice is in question. I wish that were not so, but I think it certainly is. So be alert and honest and direct with this Committee. Give it your best shot. You are a good person, and I think that will show through.

Thank you, Mr. Chairman.

Chairman LEAHY. Mr. Attorney General, please stand and raise your right hand. Do you solemnly swear that the testimony you will give before this Committee will be the whole truth, so help you God?

Attorney General GONZALES. I do.

Chairman LEAHY. Your full statement will be made part of the record, and I understand that you have a shortened version you wish to give, so please go ahead.

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

Attorney General GONZALES. Good morning. Chairman Leahy, Ranking Member Specter, members of the Committee, I, too, want

to begin by recognizing those who died and were injured on Monday. The tragic events in Blacksburg have shocked and saddened Americans who have come together this week to grieve, to remember, and to try to make sense out of this senseless act of violence. I offer my prayers and condolences to the victims, their families, and friends.

I also want to recognize the law enforcement personnel who bravely responded to the scene. As I watched Monday's events unfold, I was filled with pride watching men and women risk their lives and care for victims in the line of duty. Moments like these underscore my commitment to the mission of law enforcement and the honor that I have to serve as the Nation's chief law enforcement officer.

I have provided the Committee with a lengthy written statement detailing some of the Department's work under my leadership to protect our Nation, our children, and our civil rights. I am proud of our past accomplishments in these and other areas, and I do look forward to future achievements.

I am here, however, to answer your questions, not to repeat what I have provided in writing. But before we begin, I want to make three brief points about the resignations of the eight United States Attorneys, a topic that I know is foremost on your minds.

First, those eight attorneys deserve better. They deserve better from me and from the Department of Justice, which they served selflessly for many years. Each is a fine lawyer and dedicated professional. I regret how they were treated, and I apologize to them and to their families for allowing this matter to become an unfortunate and undignified public spectacle. I accept full responsibility for this.

Second, I want to address allegations that I failed to tell the truth about my involvement in these resignations. These attacks on my integrity have been very painful to me. Now, to be sure, I have been—I should have been more precise when discussing this matter. I understand why some of my statements generated confusion, and I have subsequently tried to clarify my words. My misstatements were my mistakes, no one else's, and I accept complete and full responsibility here as well.

That said, I have always sought the truth in every aspect of my professional and personal life. This matter has been no exception. I never sought to mislead or deceive the Congress or the American people. To the contrary, I have been extremely forthcoming with information. As a result, this Committee has thousands of pages of internal Justice Department communications and hours of interviews with Department officials, and I am here today to do my part to ensure that all facts about this matter are brought to light. These are not the actions of someone with something to hide.

Finally, let me be clear about this: While the process that led to resignations was flawed, I firmly believe that nothing improper occurred. U.S. Attorneys serve at the pleasure of the President. There is nothing improper in making a change for poor management, policy differences or questionable judgment, or simply to have another qualified individual serve. I think we agree on that. I think we also agree on what would be improper. It would be improper to remove a U.S. Attorney to interfere with or influence a particular prosecu-

tion for partisan political gain. I did not do that. I would never do that. Nor do I believe that anyone else in the Department advocated the removal of a U.S. Attorney for such a purpose.

Recognizing my limited involvement in the process, a mistake I freely acknowledge, I have soberly questioned my prior decisions. I have reviewed the documents available to the Congress, and I have asked the Deputy Attorney General and others in the Department if I should reconsider.

What I have concluded is that although the process was nowhere near as rigorous or structured as it should have been, and while reasonable people might decide things differently, my decision to ask for the resignations of these U.S. Attorneys is justified and should stand. I have learned important lessons from this experience which will guide me in my important responsibilities. I believe that Americans focus less on whether someone makes a mistake than on what he or she does to set things right.

In recent weeks I have met or spoken with all of our U.S. Attorneys to hear their concerns. These discussions have been open and frank. Good ideas were generated and are being implemented. I look forward to working with these men and women to pursue the great goals of our Department. I also look forward to continuing to work with the Department's career professionals, investigators, analysts, prosecutors, lawyers, and administrative staff, who perform nearly all of the Department's work and deserve the credit for its accomplishments.

I want to continue working with this Committee as well. We have made great strides in protecting our country from terrorism, defending our neighborhoods against a scourge of gangs and drugs, shielding our children from predators and preserving the integrity of our public institutions, and recent events must not deter us from our mission.

I am ready to answer your questions. I want you to be satisfied, to be fully reassured that nothing improper was done. More importantly, I want the American people to be reassured of the same.

Thank you.

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

Chairman LEAHY. Thank you, Attorney General. Your former Chief of Staff testified under oath about a conversation which Karl Rove told you about complaints of former New Mexico U.S. Attorney David Iglesias and two other U.S. Attorneys were not being aggressive enough against so-called voter fraud. When did such a conversation between you and Karl Rove take place?

Attorney General GONZALES. What I recall, Senator, is that there was a conversation where Mr. Rove mentioned to me concerns that he had heard about pursuing voter fraud, or election fraud, in three jurisdictions—New Mexico, Milwaukee, Wisconsin, and Philadelphia, Pennsylvania, as I recall.

Chairman LEAHY. Going back to New Mexico, how many conversations about New Mexico with Mr. Rove?

Attorney General GONZALES. Senator, I can only recall of that one conversation.

Chairman LEAHY. Do you recall when that was?

Attorney General GONZALES. Senator, my recollection was that it was in the fall of 2006.

Chairman LEAHY. Do you remember where?

Attorney General GONZALES. No, sir, I don't remember where that conversation took place. And, Senator, I don't recall either whether or not it was a phone conversation or it was an in-person conversation, but I do have a recollection of that conversation.

Chairman LEAHY. So when was David Iglesias added to the list of U.S. Attorneys to be replaced?

Attorney General GONZALES. Of course, Senator, when I accepted the recommendation, I did not know when Mr. Iglesias was, in fact, added to the recommended list. As I have gone back and reviewed the record, it appears that Mr. Iglesias was added sometime between, I believe, October 17th and December 15th, but I was not responsible for compiling that list.

Chairman LEAHY. He was added either before or after the elections, but you do not know when; is that what you are saying?

Attorney General GONZALES. Senator, I just responded as to when I believe—as I have gone back and looked at the documents, it appears he was added sometime between October 17th and November 15th.

Chairman LEAHY. I understand. But you do not know when?

Attorney General GONZALES. Senator, I have no recollection of knowing when that occurred.

Chairman LEAHY. Do you know why he was added?

Attorney General GONZALES. Again, Senator, I was not responsible for compiling that information. The recommendation was made to me. I was not surprised that Mr. Iglesias was recommended to me because I had heard about concerns about the performance of Mr. Iglesias.

Chairman LEAHY. From?

Attorney General GONZALES. Certainly, I had heard concerns from Senator Domenici.

Chairman LEAHY. And who else?

Attorney General GONZALES. Senator, certainly—

Chairman LEAHY. And Karl Rove?

Attorney General GONZALES. I heard concerns raised by Mr. Rove, and what I know today—while I don't recall the specific mention of this conversation, I recall the meeting—is that there was a meeting in October with the President in which the President, as I understand it, relayed to me similar concerns about pursuing election fraud in three jurisdictions.

Chairman LEAHY. When was that?

Attorney General GONZALES. Senator, I have gone back and looked at my schedule, and it appears that that meeting occurred on October 11th.

Chairman LEAHY. Mr. Iglesias has been described by your former Chief of Staff as a diverse up-and-comer. He was reportedly offered the job as the head of the Executive Office of the United States Attorneys for you here in Washington. He was selected by the Department of Justice to instruct other U.S. Attorneys on investigating and prosecuting voter fraud. This past weekend the Albuquerque Journal reported that when Senator Domenici told—this is a quote—"Senator Domenici told Gonzales he wanted Iglesias out

in the spring of 2006." You refused—I'm quoting now from the article—"and told Senator Domenici you would fire Iglesias only on orders from the President." In your testimony that you provided, you characterize Mr. Iglesias as a fine lawyer, a dedicated professional, gave many years of service to the Department.

In your March 7th column in USA Today you wrote that he was asked to leave because he simply lost your confidence. When and why did he lose your confidence?

Attorney General GONZALES. Senator, Mr. Iglesias, like these other United States Attorneys, I recognize their service, I recognize their courage to serve the American people. Mr. Iglesias lost the confidence of Senator Domenici, as I recall, in the fall of 2005, when he called me and said something to the effect that Mr. Iglesias was in over his head, and that he was concerned that Mr. Iglesias did not have the appropriate personnel focused on cases like public corruption cases. He didn't mention specific cases. He simply said public corruption cases.

I don't recall Senator Domenici ever requesting that Mr. Iglesias be removed. He simply complained about whether or not Mr. Iglesias was capable of continuing in that position.

Chairman LEAHY. With all due respect, Mr. Attorney General, my question was not when he may have lost the confidence of Senator Domenici, my question is when and why did he lose your confidence?

Attorney General GONZALES. Senator, what I instructed Mr. Sampson to do was consult with people in the Department.

Chairman LEAHY. When and why did he lose your confidence?

Attorney General GONZALES. Based upon the recommendation, what I understood to be the consensus recommendation of the senior leadership in the Department, that, in fact, there were issues and concerns about the performance of these individuals, that is when I made the decision to accept the recommendation, and in fact, it would be appropriate to make a change in this particular district.

Now, the fact that Mr. Iglesias appeared on the list again was not surprising to me because I had already heard concerns about Mr. Iglesias's performance.

Chairman LEAHY. In a March 21 op-ed in the New York Times, Mr. Iglesias addressed the reasons he believes he was fired, and let me just quote from it. These are his words. "As this story has unfolded these last few weeks, much has been made of my decision to not prosecute alleged voter fraud in New Mexico. Without the benefit of reviewing evidence gleaned from FBI investigative reports, party officials in my State have said that I should have begun a prosecution. What the critics, who don't have any experience as prosecutors, have asserted is reprehensible—namely that I should have proceeded without having proof beyond a reasonable doubt. The public has a right to believe that prosecution decisions are made on legal, not political, grounds."

Would you agree with that?

Attorney General GONZALES. I do agree with that.

Chairman LEAHY. Justice Department officials, including your principal associate deputy, Mr. Moschella, has said that one of the reasons Mr. Iglesias was replaced, was because in their words he

was an absentee landlord, but I understand he continues his service as an officer of the Naval Reserve, and in fulfilling his Naval Reserve responsibilities to take him out of the office approximately 40 days a year. You are aware, I assume, that the Uniformed Services Employment and Reemployment Rights Act and other laws prohibit employers from denying an individual employment benefits because of their military service?

Attorney General GONZALES. I am aware of that. I support it strongly, and we enforce that act.

Chairman LEAHY. When, how and by whom did this absentee landlord rationale for replacing Mr. Iglesias arise?

Attorney General GONZALES. Senator, that rationale was not in my mind, as I recall, when I accepted the recommendation. We have, of course, several other United States Attorneys who perform military service. I applaud it and I support it. It would not be a reason that I would ask a United States Attorney to leave.

Chairman LEAHY. Let me ask you about absentee landlords. You have a Mr. Mercer who is currently serving as your Acting Associate Attorney General, and who is U.S. Attorney of Montana. The Chief Judge out there has been very, very critical of the way that office is run, the fact that he is gone. How many days a year does Mr. Mercer stay here serving as your Acting Associate Attorney General, rather than the job he was confirmed for?

Attorney General GONZALES. Senator, that is an answer that I have to get back to you. But I think every United States Attorney—

Chairman LEAHY. Do you have any general idea? I mean is it like a week, a year, is it several months a year?

Attorney General GONZALES. Senator, let me get back with you with the most accurate information—

Chairman LEAHY. But he is your Associate Attorney General. I mean, you would certainly know whether it was a week a year or several months a year, would you not?

Attorney General GONZALES. Senator, I would like to give you that information, but the main point I want the American people to understand is that every case is different with respect to serving in dual-hat capacities. I have heard no one complain about the fact that Pat Fitzgerald was prosecuting—

Chairman LEAHY. I am not talking about Mr. Fitzgerald.

Attorney General GONZALES.—that case while he was still serving as United States Attorney.

Chairman LEAHY. I am talking about an office that the judge himself says is in disarray in Montana, and Mr. Mercer has testified that he is in Montana just 3 days a month, 3 days a month, while he is acting as your Associate Attorney General. I just mention that because if we are talking about absentee landlords, sometimes absentee landlords are created by your own office.

Attorney General GONZALES. Can I respond to that?

Chairman LEAHY. Certainly, and then it is Mr. Specter's time.

Attorney General GONZALES. In my travels talking to the United States Attorneys, I raise this issue whether or not dual-hatting continues to be a good idea to a person. I don't recall any dissent. They all thought it was good. It was good for the U.S. Attorney to get transparency into the Department of Justice. They also believed

it was important for them to be able to call someone they knew working the Department of Justice. Every case is different. It may depend upon how strong the first assistant is, it may depend upon the strength of the other chiefs in that office, so every case is going to be different, Senator. So the fact that someone can do it, like Mr. Fitzgerald, depends on a lot of different circumstances.

Chairman LEAHY. In my State I would be pretty upset if the U.S. Attorney was there only 3 days a month.

Senator Specter.

Attorney General GONZALES. And, Senator, your views would be very important. I would be interested in knowing what those views are.

Senator SPECTER. Mr. Attorney General, in my opening statement I raised the issue as to whether you had been candid, more bluntly truthful in your statements about not being involved in "discussions", not being involved in "deliberations", not seeing a memoranda. And in your opening statement you said two things which appear to me to be carrying forward this same pattern of being candid. You said that you were only involved to a limited extent in the process, and then you say you should have been more precise. It is not exactly a matter of precision to say that you discussed the issues or were involved in deliberations and decisions, that is just a very basic, fundamental fact.

Let me review some of the record with you, and we do not have much time, but it is necessary to go through it in a rather summary basis, but I know you are familiar with this record because I know you have been preparing for this hearing.

Attorney General GONZALES. I prepare for every hearing, Senator.

Senator SPECTER. Do you prepare for all your press conferences? Were you prepared for the press conference where you said there were not any discussions involving you?

Attorney General GONZALES. Senator, I have already said that I misspoke, it was my mistake.

Senator SPECTER. I am asking you were you prepared. You interjected that you were always prepared. Were you prepared for that press conference?

Attorney General GONZALES. Senator, I didn't say that I was always prepared. I said I prepared for every hearing.

Senator SPECTER. What I am asking you, do you prepare for your press conferences?

Attorney General GONZALES. Senator, we do take time to try to prepare for the press conference.

Senator SPECTER. Were you prepared when you said you were not involved in any deliberations?

Attorney General GONZALES. Senator, I have already conceded that I misspoke at that press conference. There was nothing intentional. And the truth of the matter is, Senator, I—

Senator SPECTER. Let us move on. I do not think you are going to win a debate about your preparation, frankly, but let us get to the facts. I would like you to win this debate, Attorney General Gonzales. I would like you to win this debate.

Attorney General GONZALES. I apologize, Senator.

Senator SPECTER. But you are going to have to win it. This is what some of the record shows, and this is according to sworn testimony from your former Chief of Staff, Kyle Sampson, from the Acting Associate Attorney General, Bill Mercer, and by the former Executive Director of the Office of U.S. Attorneys, Michael Battle.

You had a first conversation with Sampson in December of 2004 about replacing U.S. Attorneys. Then there were intervening events, but I will come to some of the highlights. On June 1st, 2006, in an e-mail, Sampson described your statements on a plan addressing U.S. Attorney Lam's problems with the option of removing her. Certainly, sounds like more than discussions, deliberations and judgments. I am going to go on because I want to give you the whole picture here.

Then on June 4th or 5th, according to sworn testimony, Associate Attorney General Mercer discussed with you Lam's performance. Then on June 13th of 2006, Sampson, in sworn testimony, said that you were "almost certainly consulted on the removal of Bud Cummins." Then in mid October—you have now identified a date of October 11th—you went to the White House to talk about your vote fraud concerns. Mr. Rove, with the President personally, came back, and according to Sampson's sworn testimony said: look into the vote prosecution issues, including those in New Mexico. That is what Sampson says under sworn testimony. Then on November 27th of 2006, you attended a meeting on the removal plans, attended by Sampson, Goodling, McNulty, Battle, a whole host of people.

I have just given you a part of the picture as to what these three deputies of yours, high-ranking deputies, have said that you did on talking about removal, talking about replacements. Do you think it is a fair, honest characterization to say that you had only a "limited involvement in the process?"

Attorney General GONZALES. Senator, I don't want to quarrel with you.

Senator SPECTER. I do not want you to either, I just want you to answer the question.

Attorney General GONZALES. Sir, I guess it's—I had knowledge that there was a process going on. I don't know all the—

Senator SPECTER. You did not understand there was a process going on?

Attorney General GONZALES. No, I had—sir, I had knowledge that there was a process going on.

Senator SPECTER. Well, were you involved in it?

Attorney General GONZALES. Senator, with respect to Carol Lam, for example—

Senator SPECTER. Were you involved in the process?

Attorney General GONZALES. I was involved in the process, yes, sir.

Senator SPECTER. Were you involved to a limited extent only?

Attorney General GONZALES. Yes, sir.

Senator SPECTER. How much more could you have been involved than to be concerned about the replacement of Cummins, and to evaluate Lam, and to be involved in Iglesias? We have not gone over the others, but is that limited in your professional judgment?

Attorney General GONZALES. Based on what I thought that I understood was going on, yes, Senator. I thought Mr. Sampson—I directed Mr. Sampson to consult with senior officials in the Department who had information about the performance of United States Attorneys. I believe that that was ongoing and that he would bring back to me a consensus recommendation. The discussion about Ms. Lam, never in my mind, was about this review process, and I indicated so in my conversation with Pete Williams, I believe on March 26th, is that we were doing this process. Of course, there were other discussions outside of the review process about the performance of U.S. Attorneys. I can't simply stop doing my supervisory responsibilities over U.S. Attorneys because this review process is going.

Senator SPECTER. Did you tell Mercer to take a look at Lam's record with a view to having her removed as a U.S. Attorney, or is he wrong?

Attorney General GONZALES. Senator, I don't recall—Senator, what I recall is, of course, we had received, the Department had received numerous complaints about Carol Lam's performance with respect to gun prosecutions and immigration prosecutions. I directed that we take a look at those numbers because I wanted to know, and I don't recall whether it was Mr. Mercer who presented me the numbers, but I recall being very concerned.

Senator SPECTER. But you were involved in evaluating U.S. Attorney Lam's record, were you not?

Attorney General GONZALES. Senator, I did not view that, I did not view that as part of Mr. Sampson's project of trying to analyze and understand the performance of United States Attorneys for possible removal.

Senator SPECTER. Never mind Mr. Sampson's project. Were you not involved in the evaluation of U.S. Attorney Lam?

Attorney General GONZALES. Senator, of course, I was involved in trying to understand—

Senator SPECTER. Were you not involved in the decision on the removal of Arkansas U.S. Attorney Bud Cummins, as Kyle Sampson testified?

Attorney General GONZALES. Senator, I have no recollection about that but I presume that that is true.

Senator SPECTER. Were you not involved with the decisions with respect to U.S. Attorney Iglesias in New Mexico, as you have already testified in response to the Chairman's questions?

Attorney General GONZALES. Senator, I do recall having the conversation with Mr. Rove. I now understand that there was a conversation between myself and the President, and at some point Mr. Sampson brought me what I understood to be the consensus recommendation of the senior leadership that we ought to make a change in that district.

Senator SPECTER. Okay. Now we have to evaluate—and this is a final statement before I yield—as to whether the limited number of circumstances that I have recited—and it is only a limited number, there are many, many more—whether you are being candid in saying that you were involved only to a limited—you only had a "limited involvement in the process," as to being candid and as to having sound judgment, if you consider that limited. And as we re-

cite these, we have to evaluate whether you are really being forthright in saying that you "should have been more precise" when the reality is that your characterization of your participation is just significantly, if not totally, at variance with the facts.

Attorney General GONZALES. Senator, you are talking about a series of events that occurred over possibly 700 days. I probably had thousands of conversations during that time. So putting it in context, Senator, I would say that my involvement was limited. I think that is an accurate statement, that it was limited involvement.

And with respect to certain communications, such as the communication with the President, such as the discussions about Carol Lam, I did not view that at the time as part of this review process. I simply considered those as doing part of my job. We had heard complaints about the performance of Ms. Lam. I directed the Department to try to ascertain whether or not those complaints were legitimate, and if not, we ought to look at perhaps doing something about it.

Senator SPECTER. The Chairman says I can ask one more question. You are saying it is not part of the process, you thought it part of your job? Is that what you are saying? If you are, I do not understand it.

Attorney General GONZALES. Senator, I did not consider it as part of this project that Mr. Sampson was working on. Simply because we had this process ongoing with Mr. Sampson, doesn't mean that I quit doing my job as Attorney General and supervising the work of the United States Attorneys, and that's what I attempted to do.

Senator SPECTER. But it was intimately connected with her qualifications to stay on.

Attorney General GONZALES. Senator, of course, in hindsight, I look back now that, of course, that that may have affected the recommendations made to me, yes, but, Senator, when I focused on those complaints, I wasn't thinking about this process to remove U.S. Attorneys. I was focusing on a complaint that I had received about her performance. That's what I was focused on. I wasn't focused on the review process itself. I wasn't focused on whether or not her name would go on this list. I was focused on making sure that she was doing her job. That's what I was focused on.

Chairman LEAHY. So that Senators can focus on where they are going to be, the order on the Democratic side will be, going back and forth of course, will be Senators Kennedy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse and Biden. And the list I have from the Republican side, it would be Senators Grassley, Cornyn, Brownback, Hatch, Sessions, Graham, Coburn and Kyl. And on what I said I would do earlier, I take that list from Senator Specter.

Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

We appreciate, General, your sentiments about this horrific tragedy. I think all of us here on the Committee, all Americans, know that that is certainly something that is hanging over all of our hearts at this very important and sad time.

Just to come back to some themes that have been talked about a little bit here earlier during the course of this hearing, in your

opening statement you indicated, as Senator Specter mentioned, that you had a limited involvement and that the process was not vigorous. And then you say: my decision is justified and should stand.

Since you apparently knew very little about the performance of the replaced U.S. Attorneys, how can you testify that the judgment ought to stand? What is the basis for it?

Attorney General GONZALES. I think that is a fair question, Senator. Obviously, when this began I was not the person at the Department who had the most information about the performance and qualification of U.S. Attorneys. There were many other people, particularly the Deputy Attorney General. I challenged Mr. Sampson, then my Deputy Chief of Staff, to engage in a review. I think it was perfectly appropriate to see where we could make changes to benefit the performance of the Department of Justice. What I understood and what I expected is he would talk to people like the Deputy Attorney General to ascertain how U.S. Attorneys were performing.

And, of course, when the recommendation was presented to me, I understood it recommended the consensus view of the senior leadership of the Department.

Senator KENNEDY. I am going to ask you, how can you know that none of them were removed for improper reasons? How can you give us those assurances since you had a limited involvement, the process was not vigorous, and you left it basically to somebody else?

Attorney General GONZALES. Well, Senator, since then, of course, I have gone back to look at the documents made available to Congress. I also had a conversation with—

Senator KENNEDY. This is since then?

Attorney General GONZALES. Yes, sir.

Senator KENNEDY. But when you made the judgment and decision, you did not know, did you?

Attorney General GONZALES. On December 7th, I know the basis on which I made the decision, no reasons that would be characterized as improper. I think I was justified—

Senator KENNEDY. But you did not know whether those decisions were proper or improper since you have said you had limited involvement, the process was not vigorous, and you basically gave the assignment to Mr. Sampson, as he testified, and you approved?

Attorney General GONZALES. Senator, I think that I am justified in relying upon what I understood to be the recommendation, the consensus recommendation of the senior leadership. I think as we look through the documents, as you glean through the documents, there is nothing improper occurred here. You have more information about the testimony of witnesses than I do. I'm not aware that anyone based their recommendation on improper reasons, but just to be sure, I've asked the Office of Professional Responsibility to work with the Office of the Inspector General at the Department of Justice to ensure that nothing improper happened here.

Senator KENNEDY. Getting back to the time that you made the judgment and decision, you did not really know the actual reasons when you approved the removal, did you, at the time?

Attorney General GONZALES. Senator, I have in my mind a recollection as knowing as to some of these United States Attorneys. There are two that I do not recall knowing in my mind what I understood to be the reasons for the removal. But as to the others, I recall knowing the reasons why. Independently I was not surprised to see their names recommended to me because through my performance as Attorney General I have become aware of specific issues related to performance.

Senator KENNEDY. We are reminded that the documents do not show any clear rationale for the firings.

I want to come back to how you can say in your opening statement that the Department of Justice makes decisions based on evidence. That certainly was not the case with regard to your judgment and decisions with regard to these firings. As I understand, you said you had limited involvement, the process was not vigorous. In response to Senator Leahy, you said that you were not responsible for compiling information. How can you give a blanket statement that the Department of Justice makes decisions based on evidence when you did not have the rationale for the firings of these individuals at the time that they were fired?

Attorney General GONZALES. Senator, that statement related to our decision with respect to prosecutions, but with respect to what happened here, I believe that I had a good process when this began.

Senator KENNEDY. Let me ask about the process, if I could, please. The Department of Justice has a process—it is called the EARS process—for the evaluation of U.S. Attorneys. It has been there for years and years. Am I correct that the Department of Justice's periodic, comprehensive evaluation of U.S. Attorneys is called EARS reports for Evaluation and Review Staff reports?

Attorney General GONZALES. Senator, that evaluation is an evaluation that occurs of United States Attorneys Offices. It occurs every 3 or 5 years. It is a peer review, Senator. It is a review conducted by Assistant United States Attorneys.

Senator KENNEDY. I am asking you, Did you have an opportunity, since it does review the performance of U.S. Attorneys, did you have an opportunity to review that document which is the standard document for the Justice Department in the evaluation of U.S. Attorneys?

Attorney General GONZALES. Senator, I did not review the document, but, however, it would be just one of many factors, I think, that should be appropriately considered in evaluating the performance of United States Attorneys. Just one of many factors.

Senator KENNEDY. Let me ask you some others. Did you speak personally with any of the replaced U.S. Attorneys about their performance? Have you at this time talked to any of the U.S. Attorneys who were—

Attorney General GONZALES. Who were replaced?

Senator KENNEDY. Yes.

Attorney General GONZALES. I have spoken with Mr. Bogden.

Senator KENNEDY. He is the only one?

Attorney General GONZALES. He is the only one, yes.

Senator KENNEDY. Did you speak with any of the Assistant U.S. Attorneys in the affected offices of the U.S. Attorneys? Did you talk

to any of the Assistant U.S. Attorneys, those that are serving with the U.S. Attorneys that have been replaced? Did you speak with any of them?

Attorney General GONZALES. I certainly did it with respect to San Diego. There may be Assistant United States Attorneys who may be serving as the Acting U.S. Attorney that I may have met with in connection with my visit to visit with United States Attorneys after—sometime in the weeks of March 12th and thereafter.

Senator KENNEDY. So you may have met with someone that was in one of the offices?

Attorney General GONZALES. I believe that I probably met with everyone who is serving in the affected offices, who is serving in the Acting U.S. Attorney capacity, and certainly with respect to San Diego, I did visit the San Diego office, and I spoke to the—

Senator KENNEDY. This is before the firings?

Attorney General GONZALES. No, sir. This was well after the firings.

Senator KENNEDY. Did you perform any systematic review of the effect of the ongoing prosecutions of removing U.S. Attorneys? What would be the impact on ongoing prosecutions that those U.S. Attorneys were involved in? Did you do an evaluation of that?

Attorney General GONZALES. Senator, I think that is a good question. I think it is important for the American people to understand that prosecutions are done primarily by Assistant United States Attorneys. Obviously, U.S. Attorneys are important. They provide leadership. They establish morale. But this institution is built to withstand change and departures in leadership positions. And so if we have information about a particularly important public corruption case, that would be something we would consider. But if we did not have information about a public corruption case and we were contemplating changes, would it be wise to reach into the division and get information about that case? I don't believe that would be a good idea.

Senator KENNEDY. My time is just about wrapped up. Did you speak with others in the Department about the performance of any of these U.S. Attorneys—individually, did you? Did you speak to anyone else in the Department of Justice about any of these U.S. Attorneys, about their performance, prior to the time that they were fired, other than Mr. Sampson?

Attorney General GONZALES. Yes, sir.

Senator KENNEDY. Who?

Attorney General GONZALES. Senator, I don't recall in connection with this review process that Mr. Sampson was engaged in, but obviously, issues came up with respect to Ms. Lam and her performance. And I recall a meeting at the Department. I don't recall everyone who was there, but I do recall a discussion about the numbers. And, again, Ms. Lam is a wonderful prosecutor and I acknowledge her service, but I had genuine concerns about her efforts in pursuing gun prosecutions and particularly her effort with respect to immigration prosecutions. This is a very important border district, and given the current debate about immigration reform, I felt that we should do better, much better in this district. And, yes, there was some discussion with others about Ms. Lam.

Senator KENNEDY. My time is up. Thank you.

Attorney General GONZALES. Senator, there may have been other discussions. I don't want to leave you with the impression those were the only discussions.

Chairman LEAHY. Thank you.

I am advised that Senator Grassley has stepped out and is going to a funeral. Senator Brownback, on the list I have from Senator Specter, you are next.

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

Welcome, Attorney General. I would like to get just a series of facts out on the table on why this list of U.S. Attorneys out of the 93 were terminated. You have talked already some about David Iglesias and Carol Lam. You just addressed some of the reasons there. And I recognize, as you state, that these are people that serve at the will and at the pleasure of the President, so you can terminate them for cause, without cause, whatever it might be. But it appears you have come today prepared to discuss the reasons for the termination of these various U.S. Attorneys, and I think it is important that we find out what those reasons are, given the allegation that a number of them were fired for inappropriate reasons.

So I want to just go down the list with you, if I could. Daniel Bogden of Nevada, why was he terminated?

Attorney General GONZALES. Senator, this is probably the one that to me, in hindsight, was the closest call. I do not recall what I knew about Mr. Bogden on December 7th. That is not to say that I was not given a reason. I just don't recall the reason. I didn't have an independent basis or recollection of knowing about Mr. Bogden's performance.

Since then, going back and looking at the documents, it appears that there were concerns about the level of energy generally in a fast-growing district, concerns about his commitment to pursuing obscenity, which is important for the Department. It is a law. We have an obligation to pursue it. And just generally getting a sense of new energy in that office.

Now, in hindsight—and I had a discussion with the Deputy Attorney General on the evening of Mr. Sampson's testimony, because I went to the Deputy Attorney General and I asked him, Okay, do we stand behind these decisions? And if you look at some of the documents, you can see that the Deputy Attorney General agonized over this one. And I think that is good. That is a good thing that we are thinking about what is the effect of making this kind of decision on people. But at the end of the day, we felt it was the right decision.

Now, I regret that we didn't have the face-to-face meeting with Mr. Bogden beforehand and let him know. And one of the things I have learned is that the Department does not have, has not had a good enough mechanism, in my judgment, to communicate with United States Attorneys. There should be at least one face-to-face meeting, at least, with the U.S. Attorney and with the Deputy Attorney General or the Attorney General. So if we are aware of concerns or if we have concerns, we can convey those to the U.S. Attorney. And my regret with respect to Mr. Bogden is that, in fact, that meeting did not occur.

Nonetheless, in thinking about it, I believe it was still the right decision. However, because of the fact that Mr. Bogden was not no-

tified of the decision, I did talk to Mr. Bogden, as I indicated that I had. And what I offered to Mr. Bogden was my help in securing employment moving forward. If there was anything that I could to help him, I wanted to do that because I struggled as well over this decision.

Senator BROWNBACK. Paul Charlton in Arizona, and if you could be as concise as possible, I would appreciate that. But I want to give you a chance to say why.

Attorney General GONZALES. What I recall about Mr. Charlton, when the recommendation was made to me, is I recalled knowing of his poor judgment in pushing forward a recommendation on a death penalty case. These kinds of decisions, of course, are very, very important, and I take them very seriously. But we have a process in place to carefully evaluate death penalty decisions of the Department around the Nation.

Obviously, the views of the local prosecutor are very, very important. I made a decision around, I believe, May 15th, somewhere around there, about a particular case, and he came back to me 2 months later, first going through the Deputy Attorney General's Office and then back to me to have me reconsider the case. And I am not aware of any new facts here, but the Deputy Attorney General, the Capital Unit Review Committee has already made a recommendation to me about this particular case. I had already made a decision on this particular case.

Since the decision on December 7th, I have also learned that he exercised poor judgment in the way he pushed forward a policy with respect to interviewing of targets. He wanted to record those interviews. He implemented that policy on his own without consideration of how it would affect other offices around the country, without consideration of how the other units like the FBI would feel about it.

In hindsight, there may be good reasons to pursue such a policy, but to implement it unilaterally on his own, in my judgment, I considered was poor judgment, but that is something that I became more familiar about as I have studied the documents.

Senator BROWNBACK. Kevin Ryan, Northern District of California.

Attorney General GONZALES. I was not surprised to see Mr. Ryan on the list, and, again, it is difficult for me to talk critically about these individuals who served our country, but you are asking me these questions. I was aware, as a general matter, about poor management in that office. There was disruption. Mr. Ryan had lost confidence in some career prosecutors. We had to send out a second EARS team out to that office to try to get an understanding of the sources of complaints that we were hearing. So, in essence, I would say it is a question of poor management.

Senator BROWNBACK. Margaret Chiara of the Western District of Michigan.

Attorney General GONZALES. Same issue. She is the other person, quite candidly, Senator, that I don't recall remembering—I don't recall the reason why I accepted the decision on December 7th. But I have since learned that it is a question of similar kinds of issues: poor management issues, loss of confidence by career individuals. We had to send someone out from Main Justice to help

mediate some kind of personnel dispute. So it was a question simply of someone not having total control of the office.

Senator BROWNBACK. H.E. Bud Cummins of Arkansas.

Attorney General GONZALES. Mr. Cummins obviously is someone who was on a different track, and because he was on a different track and was asked to resign on June 14th and not December 7th, there has been some confusion about Mr. Cummins, was he part of the seven. He was asked to resign on June 14th. I myself was confused, quite frankly, when I testified on January 18th. I had forgotten that, in fact, Mr. Cummins had been asked to resign on June 14th, and the reason I did is because Mr. Cummins left basically the same time as everyone else did.

Mr. Cummins was asked to resign because there was another well-qualified individual that the White House wanted to put in place there that we supported because he was well qualified. I also understand—this is after the fact—that, in fact, Mr. Cummins had expressed a desire—and I do not want to put words in his mouth because I think he may have testified, maybe not—he has testified about this, but there was a newspaper article that appeared in the Arkansas Times indicating that because of having four kids he had to put through college, don't be shocked if he didn't serve the rest of his term. So it was a question of seeing that there may be a vacancy coming up and having a well-qualified candidate to go in that office.

Senator BROWNBACK. John McKay, Western District of Washington.

Attorney General GONZALES. Mr. McKay, when I accepted the recommendation on December 7th, generally I recall there being serious concerns about his judgment. That is what I recall when I accepted the recommendations, and what I have since learned, of course, is that it related to an information-sharing project. It is not the way that he—it is not that he pursued this. We expected him to. He was doing a good job with respect to that. It is the way he pursued it and exercising poor judgment that involved some of his colleagues and a letter that he sent to the Deputy Attorney General, that his colleagues would not have signed on the letter if they had known the Deputy Attorney General would not welcome the letter. And he nonetheless asked them for their signature, and the Deputy Attorney General was surprised by the letter. It angered his colleagues, it angered the Deputy Attorney General, and it was an indication of poor judgment.

There was also an instance where he gave an interview in Washington where he basically told our State and local partners, Don't come to me for any more help in terms of partnerships because I just don't have the resources to do it. That was inappropriate. If, in fact, there were concerns about resources, he should come to us, try to let us help him with it. But to go out and give an interview and tell State and local partners, Don't come to us because we can't help any more"—and I am paraphrasing here. I want to be fair to Mr. McKay. That also demonstrated poor judgment.

Senator BROWNBACK. Thank you for giving the information on each of these; I am glad to hear the factual basis. I hope we can get into that more during this hearing, and I hope too that as this wears on, there is a chance for you to reach out to some of these

individuals as well, as you have discussed, I guess, with Mr. Bogden in Nevada. I think that is something that would be useful as well.

Attorney General GONZALES. Thank you, Senator.

Senator BROWNBACK. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I am just curious on one thing. You said, if I understand your answer to the question from Senator Brownback, that on Cummins, when you had testified on the 18th, you had overlooked what had happened on the 17th. Did you ever send a followup to that testimony to clarify the issue?

Attorney General GONZALES. Senator, I don't recall sending a follow-up. Quite frankly, I think if you look carefully—I don't know if there was a misstatement or a mistake in my testimony.

Chairman LEAHY. Because witnesses often do correct their testimony afterward. We always leave the record open so people can do that.

Attorney General GONZALES. Senator, there was a specific question about Mr. Cummins, and I did not indicate that the reason for Mr. Cummins was because there was another well-qualified individual.

Chairman LEAHY. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Gonzales, there have been allegations that voter fraud and public corruption cases have been influenced by partisan political considerations in my State of Wisconsin. We have seen documents showing State party efforts, Republican party efforts to influence these type of prosecutions routed through Karl Rove's office directly into the office of your former chief of staff.

So, Mr. Attorney General, was Mr. Steve Biskupic, U.S. Attorney in the Eastern District of Wisconsin, ever on the list of U.S. Attorneys who were to be dismissed? It has been reported in the papers, both in the Washington Post and the Milwaukee Sentinel, that he was to be fired, but the Justice Department has not made public any documents to show that?

Attorney General GONZALES. Senator, I was never aware that Mr. Biskupic was on a list, obviously, when I made my decision. I am aware that he may have appeared in a category which would indicate that there were concerns about Mr. Biskupic. But I think he has already issued a press release saying he never knew about that and that it never would have influenced and did not influence any decisions that he made with respect to cases in Wisconsin.

Senator KOHL. I appreciate that, but the question is: Was he on a list of U.S. Attorneys who were being considered for dismissal?

Attorney General GONZALES. Senator, I believe I testified that I believe that he was listed as someone, yes, that—

Senator KOHL. So my question is: Why was he then taken off the list?

Attorney General GONZALES. Senator, again, this was a process that was ongoing, that I did not have transparency into. I don't recall being—transparency with respect to Mr. Biskupic. I don't recall being aware of discussions about Mr. Biskupic. Mr. Biskupic is a career prosecutor. He was appointed United States Attorney through a bipartisan panel. With respect to the case I think every-

one is focused on, he made charging decisions after consulting with the then Democratic State Attorney General and consulting with the Democratic local prosecutor, and he believed it was the best—his best judgment to charge that case based on the evidence.

Senator KOHL. I do appreciate that, but I am trying to understand why he would have been on a list and then taken off a list. There must have been a reason for one and then the other.

Attorney General GONZALES. Senator, with all due respect, there are other people that would have that information that are witnesses, fact witnesses. I have not consulted with them because I did not in any way want to compromise the integrity of this investigation or the investigation at the Department.

Senator KOHL. That is fine. Could you get back to me within a week with respect to the question of why he was on the list and then why he was taken off the list?

Attorney General GONZALES. With all due respect, Senator, the person who was responsible for compiling the list was Mr. Sampson, and he is the person that would have the answer as to why—he would be the best person as to why Mr. Biskupic was on a list or off a list or anybody else that was on or off a list.

Senator, I will go back and see if there is something that I can do, but I want to be very careful about talking to fact witnesses, and I am not going to do that. I don't want to compromise the integrity of this investigation or the integrity of the Department investigations.

Senator KOHL. Mr. Attorney General, once appointed by the President, confirmed by the Senate as Attorney General, we all understand that you are expected to cast aside all partisan politics and serve only the interests of justice and of the American people. The Justice Department is expected to investigate and prosecute those who violate our laws completely blind to their partisan political affiliation. Public confidence in your fidelity to these ideals, of course, is essential. Without the public's confidence in the impartial administration of justice, our entire judicial system is called into question.

Sadly, your actions have severely shaken the confidence of the American people in you and in your ability to fulfill your public trust. According to recent polls, as many as 67 percent of Americans believe that these eight U.S. Attorneys were fired for political reasons, and over half of the American people believe that you should resign. Moreover, press accounts have detailed low morale among U.S. Attorneys across the country as a result of these events.

I am sure we can agree that the integrity of the Office of the Attorney General as an institution is more important than the self-preservation of any one person who sits in it. Many Americans wonder, therefore, what is the rationale for you to remain as the Attorney General. Given the low morale, the history of mismanagement, the apparent lack of independence from the White House, and, most importantly the taint of politics trumping justice in your tenure, would you explain to the American people why it is so important that you should remain in this office?

Attorney General GONZALES. Let me first address the question about taint of politics, and let me just start with an example, Senator.

Six weeks before the election, this Department took a plea from Congressman Bob Ney. Six weeks before the election. We could have taken the plea after the election, and I am sure when we took that plea, there were some Republicans around the country probably scratching their heads wondering: What in the world are they doing?

Well, what we are doing is doing what is best for the case. That is what we did. We don't let politics play a role, partisan politics play a role in the decisions we make in cases. And we have prosecuted Members of Congress, we have prosecuted Governors, Republicans. And so this notion that somehow we are playing politics with the cases we bring is just not true, and the American people need to understand that, because when you attack the Department for being partisan, you are really attacking the career professionals. They are the ones, the investigators, the prosecutors, the Assistant U.S. Attorneys, they are the ones doing the work. And so when someone says that we politicize a case, what you are doing is criticizing the career folks, and that is not right.

In terms of why I should remain as Attorney General, you are right, this is not about Alberto Gonzales. This is about the Department of Justice and what is best for the Department. And as I look back over the past 2 years, I look back with pride in the things that we have accomplished—a lot of good things with respect to protecting our kids, protecting our neighborhoods, protecting our country.

I have admitted mistakes in managing this issue, but the Department as a general matter has not been mismanaged. We have done great things, and we will continue to do great things. And I will work as hard as I can to improve morale.

Obviously, this was an unfortunate incident for the Department, but the work of the Department continues, and it's very important for the American people to understand that. Cases are still being investigated, cases are still being prosecuted, because these are career folks and all what they care about is making sure justice is done. And that's what I care about, and I've instructed every United States Attorney, I don't want an investigation or a prosecution sped up or slowed down because of what has happened here. I expect everyone at the Department of Justice to do their job, and it continues.

Senator KOHL. Well, I appreciate that. The point is still, I believe, that at the moment, two-thirds of the American people believe that these U.S. Attorneys were fired for partisan political reasons, and over half of the American people believe that we would be better off if you resign.

Now, I am sure you would agree that the perception of the American people with respect to the Attorney General and his position and his impartiality in the dispensation of justice is critical. If after these hearings are over, if a week or two or three from now the American people still feel that way, how would you then feel about the importance of your tenure as the Attorney General of the United States?

Attorney General GONZALES. Senator, I have to be—I have to know in my heart that I can continue to be effective as the leader of this Department. Sitting here today, I believe that I can. And every day I ask myself that question: Can I continue to be effective as leader of this Department? The moment I believe I can no longer be effective, I will resign as Attorney General.

Senator KOHL. Yes, and if the American public's perception is negative, how does that impact your perception?

Attorney General GONZALES. Senator, part of my goal today is to educate and information the American public about what happened here. The notion that there was something that was improper that happened here is simply not supported by the documents. I do not think it is supported by the testimony, much of which of it I haven't seen. It's certainly not the reason that I asked for these resignations. And I have tried to reassure the American public I am committed to getting to the bottom of this. I can't interfere with this investigation, but I've asked the Office of Professional Responsibility to work with the Office of the Inspector General and let's find out what happened here. If, in fact, someone did something, made a recommendation for improper reasons, yes, there is going to be accountability. Absolutely.

Senator KOHL. Thank you very much, and thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I should note, just for the audience, we have people here both supporters of the Attorney General and opponents of the Attorney General. You are guests of the U.S. Senate, and nobody is more protective of First Amendment rights than I. But if signs are being held up and are blocking the views of people, I don't care whether the signs are for the Attorney General or opposed to the Attorney General, if signs are being held up, blocking the views of others who have just as legitimate a right to be here as everyone else, the people doing that will be removed.

We are going to go to Senator Hatch, and then I am going to go to Senator Feinstein, and then we will take a 10-minute break. Thank you.

Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Welcome, Mr. Attorney General.

Mr. Attorney General, do you make decisions at the Justice Department based upon the polls?

Attorney General GONZALES. No, sir, I don't.

Senator HATCH. No, you don't, do you?

Attorney General GONZALES. Senator, I make decisions on what the case is based on the evidence, not based upon whether or not the target is Republican or Democrat. And, of course, I have been appointed by the President, confirmed by the Senate, to make the decisions based on my best judgment.

Senator HATCH. I take it not whether it favors you or disappoints you?

Attorney General GONZALES. Sometimes, Senator, in doing my job I am going to make people unhappy.

Senator HATCH. On March 19th, one of my Democratic colleagues said that he would be surprised if you were Attorney General a

week later. Well, I am glad to see you here a month later, personally, because we have worked rather extensively together, and I have seen an awful lot of good work done there that you have been describing to a degree here today. And you cannot even begin to touch all the good things that have been done.

You have said here today that you want to help Congress and the public understand what happened in the removal of these U.S. Attorneys. Your actions back up your words. I applaud you for making available the Justice Department's top officials and staff for testimony and interviews, as well as thousands and thousands of pages of documents. I am afraid that some simply do not want to go where the evidence tells us to go. Some appear to have decided in our country today instead where they want to go, and they are fishing for anything that they can claim will back up their preconceived conclusions.

Now, it is one thing to conduct legitimate oversight over matters that are a subject of legislative concern. It is another to traipse around on ground committed by the separation of powers to another branch of Government. I think that is what has been going on here, and I think it is unfortunate and I think it is wrong.

You have stated this before, but let me ask you just once more for the record, because this is important. Were any of these eight U.S. Attorneys asked to resign in retaliation for or to interfere with any case that they brought or refused to bring?

Attorney General GONZALES. That is not the reason I asked for the resignations, Senator. From everything that I have seen and heard—

Senator HATCH. Then the answer is no.

Attorney General GONZALES.—I don't think any one was motivated for that reason.

Senator HATCH. Okay. How many employees do you have at the Department of Justice?

Attorney General GONZALES. Around 110,000.

Senator HATCH. Around 110,000 employees. What are the main core functions of the Department of Justice that you supervise?

Attorney General GONZALES. Well, we enforce the law. We prosecute cases in our Federal courts. The FBI is the lead investigatory agency in the country. We have—

Senator HATCH. You overview the FBI.

Attorney General GONZALES. Pardon me?

Senator HATCH. You overview the FBI.

Attorney General GONZALES. The FBI comes within the jurisdiction of the Department of Justice. We have the Drug Enforcement Agency. We have the Bureau of Prisons. We have Alcohol, Tobacco, and Firearms involved, along with the FBI with respect to the tragedy that happened down at Blacksburg. And so there are many very, very important divisions that exist within the Department of Justice family that contribute to the core mission of the Department of ensuring that our laws are enforced and that justice is, in fact, delivered here in our country.

Senator HATCH. You spend a lot of time traveling in the country as well, don't you?

Attorney General GONZALES. I do. I think it's important to go out and see the components. One of the things I really enjoy is to visit

folks in the United States Attorney Offices. I like to go by and visit the United States Attorneys. I like to speak with the staff, express to them how important they are, let them know that really the success of the Department is not the Attorney General. It is not the United States Attorney. It is the career investigators, the career professionals.

Senator HATCH. You spend a lot of time down at the White House as well, do you not?

Attorney General GONZALES. I don't spend as much time as I used to spend at the White House.

Senator HATCH. What about the Cabinet meetings?

Attorney General GONZALES. Of course, I'm there at Cabinet meetings, and I'm there for policy discussions and where there's a need for me to be at the White House. As Andy Card once used to say, if you need to see the President, you see the President, if you want to see the President, you don't see the President because his time is so valuable.

Senator HATCH. If the President wants to see you, you are on call, right?

Attorney General GONZALES. Of course.

Senator HATCH. You go to intelligence meetings, right?

Attorney General GONZALES. That is correct.

Senator HATCH. Among various intelligence factions of Government.

Attorney General GONZALES. Yes. From time to time we do have meetings relating to threats to United States' interests overseas, and of course, threats to the homeland.

Senator HATCH. In fact, I have been in some of those intelligence meetings with you in the secure room in the White House, right?

Attorney General GONZALES. We do have intelligence briefings from time to time in the Situation Room, yes, sir.

Senator HATCH. Many of our fellow citizens may not have an accurate picture of what Federal prosecutors do or their relationship with the Justice Department here in Washington, what we call Main Justice. I think many people probably see U.S. Attorneys as something like independent contractors, able to call their own shots, set their own priorities, follow their own policies. There might also be another kind of misunderstanding in the other direction when people hear it said that U.S. Attorneys are political appointees. That makes understanding all of this much harder for our fellow citizens who have been characterized here today.

I would like you to help dispel these myths a little by describing what the roles and the relationships should be between the U.S. Attorneys around the country and the Justice Department, which ultimately means you and the President here in Washington.

Attorney General GONZALES. Senator, United States Attorneys are accountable to the President through me. We are accountable to the American people, and there has to be real accountability. Obviously, with respect to decision relating to prosecutions, U.S. Attorneys should have and do enjoy independence in exercising their judgment as to what cases to move forward with or not.

But with respect to policy, a President and the Attorney General, we are accountable to the American people. The President is elected based upon a set of his policies, his priorities, and the only way

to get those implemented is through the U.S. Attorney, and it's important that the United States Attorney support the policies and priorities of the President of the United States.

Now, obviously, within each specific district, there are going to be specific needs and priorities that are local, and the U.S. Attorney has to find a way to accommodate those local needs and priorities as well as the national needs and priorities because those are important to the President of the United States, and the U.S. Attorney is a member of the President's team, is subordinate and is accountable to the President, and the President is accountable to the American people for his policies and for his priorities.

Senator HATCH. I want to give you a fuller opportunity to explain your involvement in the process leading up to asking these U.S. Attorneys to resign. You made an important distinction which makes your description perfectly reasonable. You distinguished between the general supervision of U.S. Attorneys in which your involvement was extensive, and the specific evaluation for identifying who should resign in which your involvement was limited. Now this is an obvious distinction and an important distinction. Did I describe it accurately?

Attorney General GONZALES. That is correct, Senator. I had in my mind this process that Mr. Sampson was coordinating, but obviously, from time to time issues would come up with respect to the performance of United States Attorneys that in my mind I viewed as simply doing my job as the Attorney General to deal with a concern or a complaint relating to performance of that United States Attorney. I do not in my mind view that as, Okay, that person goes on the list, because I relied upon Mr. Sampson to coordinate an effort to consult with senior officials and make a decision as to where there were issues and concerns relating to performance. But the fact that I delegated this task to Mr. Sampson doesn't mean that I abdicate my responsibility as Attorney General to field complaints and to review and address concerns about the specific issues relating to a United States Attorney. And so, yes, in my mind, those were separate and apart.

Senator HATCH. My time is up, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Hatch.

What we will do, I am going to go now to Senator Feinstein, then take a 10-minute break. I am calling Senator Feinstein. As I mentioned earlier, Senator Grassley is at a funeral. If he is back, he would be next in line. If not, Senator Cornyn or Senator Sessions, depending upon which one is here.

Senator Feinstein.

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

I have essentially three questions that I would like to ask you, Mr. Attorney General. Let me go back. Whose idea was it to change the law in an amendment written by your staff, conveyed by your staff, Mr. Moschella, to Senator Specter's staff, Brett Tolman, on or about November 15th, 2005, to add in conference, without sharing it with any Member of this Committee, an amendment which effectively gave you the ability to replace U.S. Attorneys without Senate confirmation? Whose idea was this?

Attorney General GONZALES. Senator, I don't recall specifically the genesis of the idea. In going back and looking at the docu-

ments, it appears that there was some thinking about this as early as 2004. I will say this, I do support, I did support the change in the law, not in order to avoid Senate involvement, but because I, quite frankly, do not like the idea of the Judiciary deciding who serves on my staff, and that's why I supported the law.

Senator FEINSTEIN. So you essentially approved it being conveyed to the Senate in the manner in which it was conveyed?

Attorney General GONZALES. No, that's not what I'm saying. I don't have any recollection about the mechanics of getting it—of the legislative process.

Senator FEINSTEIN. So you do not have a recollection. Let me go on because my time is short. I am very confused. I am unsure whether you were really the decider on this list or not because your written comments, printed yesterday, say, "I did not make decisions about who should or should not be asked to resign." Today you said three different things: I accepted the decision of the staff; I accepted the recommendations of the staff; and then sort of a vague statement, I made my decision. Who was the decider?

Attorney General GONZALES. Senator, I accepted the recommendations made by the staff. I'm the Attorney General. I make the decision. Can I see what you're reading from? You referred to statements from yesterday. I don't recall making any—

Senator FEINSTEIN. Something entitled Statement of Alberto Gonzales.

Attorney General GONZALES. Oh, the written statement.

Senator FEINSTEIN. The written statement, the top of page 4.

Attorney General GONZALES. Okay.

Senator FEINSTEIN. So in writing, you clearly say: I did not make decisions about who should or should not. I guess, one of the problems is that all of this has been kind of constant equivocation. Apparently—

Attorney General GONZALES. Senator, you're not reading my entire statement. Maybe you did, I'm sorry. During those—Mr. Sampson periodically updated me on the review. As I recall, his updates were brief, relatively few in number, and focused primarily on the review process itself. During those updates, to my knowledge, I did not make decisions about who should or should not be asked to resign, so in connection with this review process, as Mr. Sampson gave me updates, I don't recall ever saying—even though they were still in deliberative process, ever saying, no, take that person off, or add this person. I don't recall ever doing that.

Now, certainly, after the work had been completed, Mr. Sampson brought me recommendations. I accepted those recommendations. Those were my decisions. I accept full responsibility for those decisions.

Senator FEINSTEIN. That is what I wanted to know.

Attorney General GONZALES. Yes.

Senator FEINSTEIN. You are prepared to say that you made the decision to fire these 7 U.S. Attorneys on that day, December 7th?

Attorney General GONZALES. Senator, I don't recall whether or not I made the decision that day. I don't—

Senator FEINSTEIN. I am not saying that day.

Attorney General GONZALES. No, that was your question.

Senator FEINSTEIN. Mike Battle made the phone calls that day.

Attorney General GONZALES. Mr. Battle made phone calls that day. I made a phone call to Senator Kyl. Yes, phone calls were made that day. I don't recall exactly when I made the decision.

Senator FEINSTEIN. You are testifying to us that you made the decisions without ever looking at the performance reports?

Attorney General GONZALES. Senator, that is correct again.

Senator FEINSTEIN. That is what I wanted to know.

Attorney General GONZALES. I just want to reemphasize that those EARS evaluations are the evaluations of the performance of the office. They would just be one of many factors, and I would say United States Attorneys universally would say they ought to be given the appropriate weight when looking at the performance of a United States Attorney.

Senator FEINSTEIN. Mr. Mercer, who was in charge of the process, in his transcript on the—

Attorney General GONZALES. Senator, I don't believe he was in charge. Mr. Sampson, I delegated to Mr. Sampson the task coordinating this process.

Senator FEINSTEIN. Mr. Mercer was not in charge of looking at the EARS reports?

Attorney General GONZALES. Senator, I don't recall knowing whether Mr. Sampson was in—you mean as a general matter?

Senator FEINSTEIN. Excuse me; Mr. Battle.

Attorney General GONZALES. Mr. Battle. He was the Director of the Executive Office of United States Attorneys, so the EARS evaluation is performed through that office.

Senator FEINSTEIN. He would have looked at those reports. Let me give you a question and an answer from the transcript, page 43.

Attorney General GONZALES. Senator, can I see what you are reading from?

Senator FEINSTEIN. I am reading from the staff interview on a transcript.

Attorney General GONZALES. I haven't seen that transcript. Could I see it if you're going to ask me a question about it?

Senator FEINSTEIN. May I ask the question and then I will send it down?

Attorney General GONZALES. Certainly, I'm sorry.

Senator FEINSTEIN. The question is: "What did you do in response to her request to identify certain U.S. Attorneys and/or districts?" Answer: I "basically wondered about the request. I had my secretary print out a list of all the U.S. Attorneys just to see if I could look at the list and see if there was anybody on there who may have been involved in some issues of misconduct or things of that nature that somebody maybe didn't know about, and I could report that to someone. I looked at the list, nobody jumped out at me. I put the list away." If you would like to see it—

Chairman LEAHY. I think, without—

Attorney General GONZALES. Could you just give me the page number, Senator?

Chairman LEAHY. I will offer extra time to the Senator from California in this.

Mr. Attorney General, I sent you a letter notifying you of this subject and referring to the transcript so you would not be surprised.

Attorney General GONZALES. Thank you, Senator.

What page is that on, Senator?

Senator FEINSTEIN. It is page 43.

Attorney General GONZALES. And your question is?

Senator FEINSTEIN. My question is, did anybody that was involved in the unprecedented group firing of U.S. Attorney ever look at their performance reports prior to putting them on the list?

Attorney General GONZALES. Senator, I don't know that.

Senator FEINSTEIN. Oaky. You said today—

Attorney General GONZALES. But I would just say again, I want to emphasize, about the appropriate way to put on a EARS evaluation. You could have a great EARS Evaluation, which means you have a great team, but you could have a U.S. Attorney who's not doing a very good job.

Senator FEINSTEIN. You said today, "We could do much better with regard to Carol Lam." So let me be clear. Carol Lam was ranked as one of the top ten prosecutors in the country for her prosecutions and her conviction rates. San Diego reached its lowest crime rate in 25 years during her tenure. She brought down the Hell's Angels gang in San Diego. She was told by Deputy Attorney General James Comey that he was satisfied with her prosecution strategy for gun crimes. She brought indictments against the Arellano Felix Cartel, a significant success in the fight against drugs. She gained a national reputation for her work on public corruption cases, which was the FBI's second highest priority just after terrorism. She was praised by the Border Patrol, the Immigration and Customs Enforcement, local leaders of the FBI, the San Diego City Attorney, judges in her district, and many others.

The letters have said immigration is not one of the Department's top priorities, however, immigration prosecutions accounted for the largest single crime category prosecuted during Lam's tenure. I received a letter dated August 23rd—that is just prior to the December 7th firing—signed by Will Moschella that says this: Prosecutions for alien smuggling in the Southern District under 8 U.S.C. Section 1324 are rising sharply in the year 2006. As of March 2006, the halfway point to the fiscal year, there were 342 alien smuggling cases filed in that jurisdiction. This compares favorably with the 484 alien smuggling prosecutions brought there during the entirety of fiscal year 2005.

The letter goes on. This was an answer to an inquiry I made. The letter says all is fine on the western front, the Southern District, with respect to these prosecutions. And finally, no one in the Department communicated to Carol Lam that there were concerns with the handling of her immigration cases. If this is the reason for the firing of a distinguished U.S. Attorney, should not somebody talk to her and say, look, we have a concern, and give her an opportunity to respond?

Attorney General GONZALES. Senator, she is a distinguished prosecutor, and I commend her service as a prosecutor and as a judge, and she's a wonderful person. She was acutely aware of the concerns that existed with respect to her policies. She received let-

ters directly from Congress. She met with Members of Congress. There were communications back and forth with the Department of Justice about her numbers. I think that she was aware of the fact that we had concerns.

With respect to the letter, I don't recall being aware of the letter when I accepted the recommendation. I made the decision to ask for Ms. Lam's resignation. But you can't just focus solely on alien smuggling. Illegal entry, illegal reentry are likewise important.

Ms. Lam served with distinction in a lot of other areas, and of course, she's going to have a lot of fans, and as do these other United States Attorneys that were asked to resign because there are good things that they did, but this was a very important border district, and it was appropriate for the President of the United States and the Attorney General to expect that we would make improvements with respect to both gun prosecutions and immigration prosecutions. That is the reason why I asked for Ms. Lam's resignation. She had served for 4 years, and we felt it was the appropriate time to make a decision to try to improve performance with respect to, certainly with respect to immigration prosecutions.

Senator FEINSTEIN. If I might, you mentioned the House members. I would like to bring to your attention an e-mail sent on August 2nd that indicates she is meeting with Issa and Sensenbrenner. This is from Rebecca Seidel to Mark Edley. "Sounds like she handled well and it was actually constructive. See below." Then there is a litany about the meeting, very cordial, very constructive, et cetera.

Attorney General GONZALES. Senator, there is no question that the record is full of discussions and concerns that the Department had about Ms. Lam's performance which related to immigration and gun prosecutions. That is the reason why I decided to ask for her resignation, to make a change. That's the reason why.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. We will take a 10-minute recess, and then Senator Cornyn will be next.

[Recess 11:17 a.m. to 11:30 a.m.]

Chairman LEAHY. The Committee will be in order, and again, I would remind people that you are here as guests of the U.S. Senate. We have both supporters and opponents of the Attorney General. That is fine. I think the Attorney General would agree with me, we protect the right of people to do that, but I will not have you disrupting anybody on either side, disrupting these hearings. These hearings are important. The Attorney General is entitled to be heard, the Senators are entitled to ask their questions, and we will have the kind of decorum expected by the Senate, just so everybody understands.

Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

General Gonzales, you and I have known each other a long time, and I believe that you are a good and decent man. But I have to tell you that the way that this investigation has been handled has just been really deplorable. You say that the process was flawed and you made mistakes in managing it, and I would like to ask you: How should you and the Department have conducted this process, if at all?

Attorney General GONZALES. I believe that the review was appropriate, quite frankly. I think it is appropriate to ensure that public servants are doing their job, and that if we can make improvements, I think I have an obligation as the Attorney General to pursue those improvements.

Looking back, things I would have done differently, I think I would have had the Deputy Attorney General more involved, directly involved. I think that I should have told Mr. Sampson who I wanted him to consult with specifically. I should have asked him, Who are you going to consult with? I should have told him I want the recommendation to include these people, and I think I should have asked him, Who do you think it ought to include as well?

I should have told him the factors that I thought were important for him to consider. I should have told him this is a process that should not take 2 years; it is a process that should be completed in probably about 6 months, 6 to 12 months, something like that. And I think I would have told, I should have told him there ought to be a face-to-face meeting with every United States Attorney during this review, and it ought to involve the DAG or it ought to involve me, and we should have a list of particulars and talk with them about issues or concerns that we have and give them an opportunity, give the United States Attorney an opportunity to respond to those concerns that we have raised. And so I think these are the things—when I talk about a more rigorous, a more structured process, I think these are the kinds of things, in hindsight, that I wish would have happened.

Now, I want to be very, very careful about formalizing a review process. Quite frankly, I raised this issue in my United States Attorney dialog. United States Attorneys do not want a formal evaluation process. They don't want it. They want to report to the DAG and to the Attorney General, and so what we are going to do is try to improve communication as opposed to implementing a formal process.

I think it is also unfair to the President of the United States, quite frankly. If you have a formal evaluation process and that process shows that a United States Attorney is doing a great job but the President wants to make a change, politically it may be tougher for the President to do that.

And so I think for those reasons, I would not have a formalized process, but I would have had a more structured and a more rigorous process in the manner that I've described.

Senator CORNYN. Well, what I am struggling to understand about this controversy is. President Clinton replaced 93 United States Attorneys in one fell swoop. There is no requirement that any cause for replacement of a U.S. Attorney be stated because they serve at the pleasure of the President of the United States. That is one of the consequences of the election.

And so if, in fact, there is no evidence—and I have not heard of any evidence—that these U.S. Attorneys were replaced with the purpose in mind of interfering with an ongoing investigation or prosecution—your comments along that line have been backed up by the FBI Director and others that there is no evidence of that—then I can only conclude that we find ourselves here today, you find yourself where you are today, as a result of injecting performance-

based rationale into the decision to replace the United States Attorney. My recollection is that the Deputy Attorney General, Mr. McNulty, first offered those performance-based rationales for replacement of these attorneys, each of whom had served 4 years, and this is not a lifetime tenure job. It is not like a Federal judge. And it would have been much better to tell each of these United States Attorneys, "Thank you for your service. You have served for 4 years, and now it is time for someone else to have an opportunity to serve their country in this important job." Wouldn't that have been a better way to address this in retrospect?

Attorney General GONZALES. Senator, that was, as I have gone back and reviewed sort of the implementation plan, in essence, sort of the talking point. It was not to get into specifics about issues or concerns about performance.

But if you look at the documentation, it is clear that we struggled—not struggled, but this was an endeavor to identify those areas where there were issues or concerns about performance. Where we made a mistake, clearly, I think, is once we said performance, we should have defined that, because performance to me means lots of things. It means whether or not you have got the appropriate leadership skills, whether or not you have got the appropriate management skills. It may mean whether or not you support the President's policies and priorities. It may mean that you don't have—do you have a sufficient—do you have relationships with State, local, and Federal partners to discharge the mission of the office?

And so there are lots of things that fall within, in my judgment, the definition of "performance related," and I think that having said "performance related," we should have defined what we meant by that. It did not mean that the person was a bad lawyer, necessarily a bad manager. It may have been an instance where the person no longer continued to be the right person at the right time for that position.

Senator CORNYN. Well, I think that invariably, when people's performance is placed in issue, then they feel the necessity to defend themselves, and that should not have been required of them in a public forum like this, because, unfortunately, their reputations now have been affected by this present controversy. And what concerns me even more is there have been attempts, I know on the House side particularly, to identify people who were reviewed who were not relieved and to further drag them and their reputations through this process. I think that would be a disservice to them and a serious mistake to engage in that kind of fishing expedition.

But, Mr. Attorney General, since I do not have a chance to ask you questions like this very often, let me change the topic just briefly to decisions made by Federal prosecutors in recent border prosecutions. Senator Feinstein asked you about Carol Lam and some of her immigration-related prosecutions, but, in particular, I have received a number of complaints from constituents about the prosecution and jailing of two Border Patrol agents from the El Paso area, Agents Ramos and Compean. I assume you are familiar with that. I am confident you are given the attention that it has received, and I would like to ask you to answer these questions,

and I will ask you the questions, and my time will run out, and you feel free to answer them.

Do you believe that the public has been fully informed by the news media about this case? Do you agree that a hearing by this Committee on that case at which time all of the facts can be explored would be a legitimate exercise of our oversight responsibility? Would you, in fact, welcome such a hearing? And would you pledge on behalf of the Department of Justice full cooperation with the Committee as we prepare for such a hearing?

Attorney General GONZALES. Senator, it is hard for me to answer the first question. There is a lot, I think, of misinformation or disinformation about what happened here. I have known the prosecutor for many years, and I have confidence in his judgment. A jury agreed with the fact that these border agents who—let me just say, Border Patrol agents should be saluted as heroes. They serve this very important function for our country, sometimes at the risk of their lives. But a jury agreed that in this particular case, these two individuals broke the law. And not only did they break the law, but they tried to hide their crime. Mr. Sutton, again, following the evidence, did what he thought was right based upon the circumstances of this particular case.

With respect to a hearing by the Committee in terms of what happened here, I will say that the Department will try to be—as always, will fully cooperate. We will try to be as helpful as we can. And I would be happy to consider your request for a hearing. There is already a lot of information out there, but if we have not provided more information about this, I would be happy to do so.

We want the Committee to be reassured that, in fact, there was nothing improper that happened here as well, that Mr. Sutton, again, followed the evidence, a jury agreed that, in fact, a crime had been committed, and this was the right result. And if there is information that we have that we can provide to the Committee to reassure the Committee, I would be happy to look at that.

Senator CORNYN. I know a hearing was scheduled, and then it was postponed, and my hope is that it can be rescheduled and we can have that oversight hearing to make sure all of the facts get out—not rumor, innuendo, and speculation but the facts—so we can conduct our proper oversight responsibilities and the American people can be reassured of what the facts actually are.

Thank you, Mr. Chairman.

Chairman LEAHY. I just want to make sure I fully understand something. It was mentioned—and I understand this to be a fact—that President Clinton replaced 93 of the U.S. Attorneys from the previous administration. How many of President Clinton's U.S. Attorneys were replaced by President Bush?

Attorney General GONZALES. Eventually, Senator, I believe—I don't know—

Chairman LEAHY. It was either 92 or 93, I think you will find.

Attorney General GONZALES. Over a period of time, that is correct, sir. There was a conscious decision made that we would not follow the model used by this President's predecessor, that it was too abrupt and disruptive, and that we felt that we ought to do the resignation on staggered terms.

Chairman LEAHY. Just because I get a lot of calls from people saying, "Well, didn't President Clinton replace"—as I recall it, just in the period of time I have been here, President Carter replaced all of the Ford-Nixon U.S. Attorneys. President Reagan replaced all of President Carter's. Former President Bush eventually replaced most of President Reagan's. President Clinton replaced President Bush's. And then this President Bush replaced President Clinton's. I cannot speak about what happened before I was in the Senate, but that is my recollection.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman, and let me just note that I hear a lot in my State about these border guard incidents as well, and I look forward to whatever information is coming forward on that, or hearings.

Mr. Attorney General, you have sworn an oath today, and that oath carries with it certain legal consequences, but you have a duty to the American people as a public servant to tell the truth when you speak to the public in a press conference, a news interview, or by publishing an op-ed piece in the newspaper, don't you?

Attorney General GONZALES. Senator, I believe that when I speak to the American people and to the public that I should be truthful, and I endeavor to be truthful.

Senator FEINGOLD. Let me then go back to the subject that Senator Kohl brought up that is of particular interest to us in Wisconsin and the question of the case of Georgia Thompson. This was the highly publicized public corruption case which got a lot of attention in Wisconsin during much of 2006, especially since it happened during the re-election campaign of the Governor of Wisconsin.

On April 5th, right after oral argument in the case, the Court of Appeals for the Seventh Circuit ordered that Ms. Thompson be immediately released from prison and her conviction was summarily reversed. I thought the report was wrong because it is so unusual for an appeals court to simply release somebody at that level. The appellate judges suggested that the evidence in the case was extremely weak and said essentially that the case should have never been brought.

Can you understand why many citizens of my State, as they see this U.S. Attorney scandal widen, are now questioning whether the U.S. Attorney in Milwaukee could have possibly brought the Thompson case for political reasons?

Attorney General GONZALES. Senator, I don't—look at the facts here. Again, this was a career prosecutor. The charging decision was made in consultation with the then Democratic State Attorney General and a Democratic local prosecutor.

When you allege or anyone alleges—I am sorry. When anyone alleges that, in fact, there may have been politics involved in this case, what does that say to that Attorney General, to that local prosecutor, to the career investigators and career prosecutors?

Senator FEINGOLD. Let me interrupt here because time is limited. I did not ask you—and I am not alleging that there were political considerations here. I am asking, Can't you see how this U.S. Attorney scandal or problem that has occurred throughout the Jus-

tice Department leads to a situation where people wonder if there are political situations, considerations?

Attorney General GONZALES. Senator, I can't speak to what may be in the minds of the people in your State. Again, I am doing everything I can—

Senator FEINGOLD. Yes, I can, and I can tell you this overall problem here has led to some very unfortunate thoughts about the situation that may or may not be justified. I am just trying to highlight what a problem this whole scandal has created.

Do you plan to have the Department's Office of Professional Responsibility review the Georgia Thompson case?

Attorney General GONZALES. Sir, am I?

Senator FEINGOLD. Yes, are you planning to have the Department's Office of Professional Responsibility review this case that I just—

Attorney General GONZALES. Senator, I don't recall whether there has been action on that, but I would be happy to consider that.

Senator FEINGOLD. I hope you will because I think it is very important for the reason I just gave you.

I also understand from press reports that the U.S. Attorney's Office in Milwaukee has provided documents to the Justice Department that are responsive to the letter that Senator Kohl and I sent, along with Chairman Leahy and other members of the Committee, last week on this incident. When can we expect a response to our letter and the production of the documents we asked for?

Attorney General GONZALES. Senator, it is a recent request. I am told that we are talking about a voluminous amount of records. We are in discussions with, I understand, Committee staff and trying to do what we can to get documents up as quickly as we can.

Senator FEINGOLD. I hope it will be soon. Now, let me ask you about something that has been a major part of the questioning of Senator Specter, Senator Kennedy, Senator Feinstein, and others, and these are factual questions. I hope there can be quick answers.

Kyle Sampson has testified that he kept you generally informed about the process of identifying U.S. Attorneys who might be asked to step down. Did you ever ask him for specific information about who he was speaking to in connection with this process or what he was doing to follow-up and check out the information he received?

Attorney General GONZALES. Senator, what I recall is telling Mr. Sampson, "Make sure the White House is appropriately advised," because these are political appointees, and telling him that I expected him to consult with the senior leadership of the Department, people who would know best the qualifications, the performance of United States Attorneys.

Senator FEINGOLD. This is what you told him to do, but I am asking whether you checked back with him after he did it.

Attorney General GONZALES. Senator, I can't recall whether or not at the time he made the recommendations that I said, "Who did you consult with and whose recommendations are these?" I will tell you what I understood. What I understood—

Senator FEINGOLD. Let me continue. That is a sufficient answer. You said you don't recall having done that. Did you at any time probe the information that Kyle Sampson provided you, including

the recommendations that he ultimately made in the seven U.S. Attorneys to be fired?

Attorney General GONZALES. Senator, I don't recall having specific questions about specific reasons. I do recall that when the recommendations were made, I was not surprised to see five of the names on the list.

Senator FEINGOLD. Did you ever talk to Deputy Attorney General Mr. McNulty about whether he was comfortable with the process that was under way?

Attorney General GONZALES. With the process that was under way? I don't recall such a conversation, but afterwards, on the evening of Mr. Sampson's testimony—

Senator FEINGOLD. Oaky. I am just interested in the facts prior to. Did you ever talk to the head of the Executive Office of U.S. Attorneys or anyone else, other than Mr. Sampson, about whether the process was identifying the proper U.S. Attorneys to be relieved of their positions?

Attorney General GONZALES. What I recall, a conversation with Mr. Sampson. That is what I recall, Senator.

Senator FEINGOLD. Did you at any time prior to your meeting on November 27, 2006, ask for a report in writing on the progress of the project?

Attorney General GONZALES. I don't recall asking for a report in writing.

Senator FEINGOLD. How about when the final decisions were made? At any time prior to November 27, 2006, when you approved the firings, were you given or did you request a written memo or report giving the justifications for each of the decisions?

Attorney General GONZALES. Senator, I don't recall that occurring. Again, what I recall is Mr. Sampson presenting to me a recommendation, which I understood to be the consensus recommendation of senior officials at the Department.

Senator FEINGOLD. Well, in light of the fact that you had so little to do with the decision and made so little effort to understand—

Attorney General GONZALES. I had everything to do with the decision. It was my decision.

Senator FEINGOLD. Well, so little to do with the basis for the decision or why it was done, and you made so little effort to understand the reasons behind them, you really had no basis for telling the American people in your USA Today op-ed of March 7th that these U.S. Attorneys had lost your confidence, did you?

Attorney General GONZALES. Senator, what I understood was that the recommendations reflected the consensus judgment of the senior leadership of the Department and that, therefore, the senior leadership had lost confidence in these individuals, thus the Department had lost confidence.

Now, I will say I regret the use of those words, but, clearly, I understood that the senior leadership—that the recommendation made to me reflected the consensus view of the senior leadership of the Department, of individuals who would know better than I about the qualifications of these individuals.

Senator FEINGOLD. Well, I recognize that you have stated this now, but you could have taken immediate steps to correct the misstatements in this op-ed. You could have sent a letter to the

editor. Instead, you let what is essentially a false statement sit out there, harming the reputation of dedicated public servants, and I think that is inexcusable. In light of the fact that you had so little to do with the decisions and made so little effort to understand the reasons behind them, you can't really say with certainty, as you did in your testimony today, that "There is no factual basis to support the allegation, as many have made, that these resignations were motivated by improper reasons." You can't really say that, can you?

Attorney General GONZALES. Senator, I know the basis on which I made my decision, and I'm not aware of anything in the record, I'm not aware of any testimony which would seem to support the allegation that someone was motivated by improper reasons in making a recommendation to me. I don't think the documents support such an allegation. But just to be sure, I have asked the Office of Professional Responsibility to work with the Office of Inspector General to confirm this. I want to get to the bottom of this as well, Senator, just as you do, and I want to reassure the American people that there was nothing improper about what happened.

Senator FEINGOLD. I appreciate that sentiment at this point, but you didn't know then and you don't know today how each of these people actually made it onto that list that you were presented with on November 27th, do you?

Attorney General GONZALES. Senator, I have gone back and searched the record. I have spoken with the Deputy Attorney General and asked him whether or not he stood by the decision. And so that is his view, that is my view. The decision stands. It should stand. And I believe it was the right decision. I regret the way in which it was implemented. There were obviously mistakes in the review process. I have outlined to Senator Cornyn the things that I would have done differently that in hindsight I think would have been more appropriate.

Senator FEINGOLD. Well, you know, I am obviously taking that as a no to the question I actually asked, but, you know, it is pretty clear that this is the situation, that at the time you had no basis to know exactly how these people came to be on the list. The fact that various justifications have been made up or concocted after the fact does not cut it with me.

Attorney General GONZALES. Senator, if you look carefully at the documents, you can see that there were people at the Department of Justice looking at various issues with respect to U.S. Attorneys, a lot of documentation with respect to immigration and gun prosecutions with respect to Carol Lam. There is some documentation with respect to obscenity and Mr. Bogden. There is documentation with respect to the information sharing and Mr. McKay. So there is documentation, Senator, about these reasons.

Now, there may be other evidence or information in the minds of fact witnesses that you have access to that I don't have access to, but it's because I want to respect the integrity of this process.

Senator FEINGOLD. There is no credibility to the notion that it was your considered judgment that those justifications were the reason for removing those people at the time. There is simply nothing in the record that demonstrates that you had a sufficient effort made to make that determination.

Attorney General GONZALES. Senator, I thought I had a good process in place. I think I am justified in relying upon the judgment of the senior leadership of the Department of Justice. I think I'm justified in relying upon the people who know a lot more about the qualifications and performance of United States Attorneys and accepting that recommendation. I did have in my mind at least information or reasons with respect to five of these individuals. I was not surprised that they were recommended to me based upon my knowledge.

Senator FEINGOLD. Thank you, Mr. Chairman, for the extra time.

Chairman LEAHY. Thank you very much.

Senator Sessions.

Senator SESSIONS. Mr. Attorney General—

Chairman LEAHY. Before we start the clock on Senator Sessions, just so we will know what the timing is, after Senator Sessions it will be Senator Schumer, Senator Graham, and Senator Durbin.

Thank you. Go ahead, Senator Sessions.

Senator SESSIONS. Mr. Attorney General, I think the thing that caused a lot of us concern was you had a press conference at the Department of Justice—it was a formal matter—to address these issues, and in that press conference you stated, "I was not involved in seeing any memos, was not involved in any discussions about what was going on." And at a later press conference, you said, "I don't recall being involved in deliberations involving the question of whether or not a United States Attorney should or should not be asked to resign. I didn't focus on specific concerns about individuals."

Now, Mr. Sampson testified that there was a meeting—a final meeting, I guess—when this was discussed in some detail and that you were present. Do you recall that meeting and where it took place?

Attorney General GONZALES. Senator, I have searched my memory. I have no recollection of the meeting. My schedule shows a meeting for 9 o'clock on November 27th, but I have no recollection of that meeting. My understanding, as I reviewed Mr. Sampson's public testimony, was that he had hazy recollections about it as well.

But, in any event, I have no recollection of that meeting.

Senator SESSIONS. Well, do you recall who Mr. Sampson said was there present along with you?

Attorney General GONZALES. Senator, I recall, looking at the documentation on the calendar, who would be there. It would be the Deputy Attorney General, and I have no memory—

Senator SESSIONS. McNulty.

Attorney General GONZALES. Yes. I have no memory of this, but I think the calendar shows that the invitees were the Deputy Attorney General; the Principal Associate Deputy Attorney General, Mr. Will Moschella; Kyle Sampson, the Chief of Staff; Mike Battle, the Executive Director of the Executive Office of United States Attorney Attorneys; Monica Goodling, senior counselor in the Attorney General's Office; and myself.

Senator SESSIONS. And this was not that long ago. This was in November of last year?

Attorney General GONZALES. According to my calendar, November 27th.

Senator SESSIONS. And Mr. Sampson seemed to indicate that he understood it was a momentous decision, that there would probably be political backlash. He even performed some outline about how that should be managed, and you don't recall any of that?

Attorney General GONZALES. Senator, I can only testify as to what I recall. Believe me, I have searched my mind about this meeting. I would have no reason not to talk about this meeting.

At some point, of course, Mr. Sampson presented to me the recommendations, and at some point I understood what the implementation plan was. But I don't recall the contents of this meeting, Senator. I am not suggesting that the meeting did not happen.

Senator SESSIONS. I know, but I am worried about it. Mr. Battle, who was there, testified that you were there, and he thought you were there most of the time. Would you dispute Mr. Battle?

Attorney General GONZALES. Senator, putting aside the issue, of course, sometimes people's recollections are different, I have no reason to doubt Mr. Battle's testimony.

Senator SESSIONS. Well, I guess I am concerned about your recollection, really, because it is not that long ago, it was an important issue, and that is troubling to me, I have got to tell you.

Attorney General GONZALES. Senator, I went back and looked at my calendar for that week. I traveled to Mexico for the inauguration of the new President. We had National Meth Awareness Day. We were working on a very complicated issue relating to CFIAS, and so there were a lot of other weighty issues and matters that I was dealing with that week.

You have to remember that this was a process that had been ongoing for 2 years. This wasn't something that just showed up 1 day on my desk. And I'm not downplaying the importance of this issue—

Senator SESSIONS. Well, what about you mentioned you made a call to Senator Kyl? Was that on this day, about one of the U.S. Attorneys in his district, his State?

Attorney General GONZALES. Sir, I don't understand what the question is.

Senator SESSIONS. You indicated you made a phone call to Senator Kyl—

Attorney General GONZALES. Yes, that was—

Senator SESSIONS [continuing]. About the decision you had made.

Attorney General GONZALES. That was on December 7th, as I recall it, December 7th.

Senator SESSIONS. That was later on.

Attorney General GONZALES. The day we were implementing—the day the plan was being implemented.

Senator SESSIONS. Well, Mr. Gonzales, with regard to United States Attorney Iglesias, there are concerns about vote fraud. Senator Feingold has raised concern about a United States Attorney in his district on vote fraud. Senator Cornyn has raised questions about a decision by a United States Attorney in Texas on prosecuting Border Patrol agents. So I would suggest first, there is nothing wrong with questioning a United States Attorney by a politician or anyone else, raising questions about it. But I am going to

tell you what I think Mr. Iglesias was entitled to as a member of the Department of Justice who is out there in the field. I think he should have been inquired of about this voter fraud case. And I am going to tell you, I have prosecuted voter fraud cases. They are the most controversial things you can imagine. And sometimes they look like they are easy to prosecute, and I have been criticized as Attorney General for not being aggressive in that, and I have been criticized as a United States Attorney over those cases.

So I would just suggest to you that that is a delicate matter, and I think somebody should have met with him to ascertain his judgment on that.

Attorney General GONZALES. You are absolutely right. It is a delicate matter. It is one thing to tell Mr. Iglesias, "How are you doing on voter fraud cases generally?" But if you are talking about inquiring about a specific case, that is really delicate because simply inquiring into the case sends a message to the United States Attorney. And if you mention, "Oh, by the way, the home-State Senator, the guy who recommended you for this job, is concerned about how you are doing on this case," that is really dangerous. And so—

Senator SESSIONS. Well, perhaps, but, you know, we are all—United States Attorneys have to be tough, too. I mean, they have to defend what they do, and if Senator Feingold wants to ask about a voter fraud case, somebody at some point, I think, should inquire as to what he can say about that case and to form an opinion on it.

Let me ask you a couple of things I think that were somewhat important from your perspective. Apparently there was a suggestion from Harriet Miers, Counsel to the President, that all the United States Attorneys should be fired, you should start over again after the first 4 years of the Bush administration. I thought you responded well, as I understand it, to that. What did you say to that?

Attorney General GONZALES. Senator, my recollection is that I didn't think that would be a good idea, and let me just—I don't know whether or not that was Harriet Miers' idea, whether even she supported the idea. But I recall Mr. Sampson coming to me and telling me that this was an idea raised by Ms. Miers.

Senator SESSIONS. You rejected that.

Attorney General GONZALES. Yes.

Senator SESSIONS. Then Kyle Sampson proposed—Senator Feinstein has expressed concern about the new law that allows appointment without a potential confirmation hearing here. She asked about that. And Mr. Sampson said these appointments should be made under that new Act. I believe he testified that you disapproved and said no, and that, "the Attorney General was correct." Is that a fair statement?

Attorney General GONZALES. Senator, I never liked this idea, quite frankly, because I believe it is important for United States Attorneys to be Presidentially appointed and confirmed. They've got to knock heads sometimes with other Federal officials and with State and local officials. I just think it makes them look stronger to have been through that process. And quite frankly, I thought it was kind of a dumb idea, because the first time we would do it as

a matter of routine the Senate would simply change the law, and so I never liked the idea.

And the first opportunity, the first concrete time opportunity came up with respect to Mr. Griffin in the Eastern District of Arkansas, and I had conversation with Senator Pryor, and I told Senator Pryor we're going to put in Tim Griffin in an interim basis. I want to see how he does. You should see how he does. Let's see how he does.

Senator SESSIONS. Not utilize the new Act?

Attorney General GONZALES. Pardon me?

Senator SESSIONS. You did not utilize the new—

Attorney General GONZALES. Even before the change in the law, the Attorney General had the authority to put someone in on an interim basis for at least 120 days. That's been true for many, many years. What changed here was eliminating the 120-day requirement. But I had told Senator Pryor I wanted Mr. Griffin in for a period of time. Let's see how he does. And in a subsequent conversation with Mr. Pryor I asked him, "Can you support Mr. Griffin as the nominee?" And he made it clear to me that he would not support him by not giving me a yes answer, and so I said: Well, then I cannot recommend him to the White House, because if you don't support him, I know he will not be confirmed. We'll look for someone else, and give me names that we ought to consider.

And so at the first concrete opportunity that came up with respect to this interim authority and avoid Senate confirmation, what I did was consult with the home State Senator, solicit his views, and when I believe that he was not going to be supportive of Mr. Griffin as a nominee, I said, fine, we'll look a different direction.

Senator SESSIONS. My time is expired.

Chairman LEAHY. Of course, under the law that we then voted to repeal, you could have kept him in there whether Senator Pryor wanted him or not. You know, Mr. Attorney General, you said in answer to Senator Sessions' question you do not recall the November 27 meeting where you made the decision.

Attorney General GONZALES. Senator, I don't know that a decision was made at that meeting.

Chairman LEAHY. How can you be sure you made the decision?

Attorney General GONZALES. Senator, I recall making the decision. I recall making the decision.

Chairman LEAHY. When?

Attorney General GONZALES. Sir, I don't recall when the decision was made.

Chairman LEAHY. We may go back to that. Count on it.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman LEAHY. And I will ask, again, I will advise the people in the audience, this is a serious matter. Out of respect both for the Senate and the Attorney General, I would ask not to have any displays of either approval or disapproval. You certainly are going to have plenty of time to state that publicly to one way or the other to the press, but not here.

Senator SCHUMER. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General. First I want to just go back to an interchange that you had a couple of minutes ago. You told

Senator Feinstein that Carol Lam was, quote, these are your words, "acutely aware of the Department's concerns about her immigration enforcement."

Now let me read to you a portion of Mr. Sampson's public testimony on March 29th. He said, "I'm not suggesting that someone did give Carol Lam notice," these are his words. "I think we did not give—no one to my knowledge talked to Carol Lam about the concerns we had in the leadership of the Department about her office's immigration enforcement."

This is Kyle Sampson, the man you said was at the center of the whole decisionmaking process saying she was not given notice, and yet, a few minutes ago you told Senator Feinstein that she was, "acutely aware."

Attorney General GONZALES. Notice of what, Senator?

Senator SCHUMER. Notice both case of immigration enforcement, both—

Attorney General GONZALES. Senator, I'm not going to characterize Mr. Sampson's testimony. What I will tell you is what I recall, and I will tell you what I have learned from looking at the documents. I believe in looking at the documents, there was communication with Ms. Lam about how she was doing with respect to immigration. There was a lot of communication by Members of Congress with Ms. Lam about immigration. And so she was aware that there was some concern, certainly interest, about how she was doing in—otherwise, why would we contact her?

Senator SCHUMER. Senator Feinstein just informs me Carol Lam was not aware of the Justice Department's views on her prosecution of immigration. Kyle Sampson says she was not aware. And you are saying that the Department made her aware, and this is what we have been through all morning. The people that we have interviewed, whether it is Kyle Sampson or Mercer or Battle, have contradictory statements as to what you say. I am sure when the Department has trouble with a U.S. Attorney they do not tell a Congressman to go tell her. Which is right?

Attorney General GONZALES. Senator, I recall sitting in a meeting concerned about Ms. Lam, and saying that those numbers needed to change, and I expected that information to be communicated. Now, Ms. Lam may not have been told that in fact, if you don't change your policies, there's going to be a change, but I believe, looking at the documents—and I never spoke to her directly—but I believe looking at the documents that she had knowledge that there was certainly an interest about her immigration numbers. And why would we have an interest but for the fact that we were concerned about those numbers.

Senator SCHUMER. Kyle Sampson said no one told her. She said no one told her.

Attorney General GONZALES. No one told her what? No one told her that if—that there was any interest or concern, or no one told her that if you don't change, you're going to be removed?

Senator SCHUMER. I will yield to my colleague.

Senator FEINSTEIN. If I may, Attorney General, Carol Sampson said she was never spoken to—

Senator SCHUMER. Carol Lam.

Senator FEINSTEIN. Excuse me. Carol Lam said she was never spoken to by the Department about their concern on her immigration prosecutions.

Senator SCHUMER. Let me just say, Mr. Attorney General, this is a serious hearing, you have had months to prepare. The U.S. Attorney in question says she was not spoken to. Kyle Sampson, at public testimony, not the private transcripts, not a private conversation, says the same.

Attorney General GONZALES. Senator, I did not say that Ms. Lam was aware that if her numbers didn't change, we would ask her to resign. What I said was that she was aware of the concerns, and certainly the interest that we had about her performance. There's no question about that. If you look at the letters, if you look at the e-mail communication, there is no question about that.

Senator SCHUMER. Sir, I am going to move on. I think the record will state just what we have stated, that she does not believe she was talked to and Kyle Sampson does not believe she was talked to about immigration concerns. That was Senator Feinstein's question. That is what Carol Lam said. That is what Kyle Sampson said. I am going to move on here.

Attorney General GONZALES. But why would Members of Congress send her letters about her immigration reform?

Senator SCHUMER. Sir.

Attorney General GONZALES. Why would they want to have meetings with her?

Senator SCHUMER. Sir.

Attorney General GONZALES. Why did we send her communications about immigration? Because there was concern about her numbers.

Senator SCHUMER. Is it general policy of the Department of Justice, when they have problems with a U.S. Attorney, to let a Congress member tell them that something is wrong, or is the Department supposed to communicate directly with the U.S. Attorney?

Attorney General GONZALES. Here's what I'll say, I think we should have done a better job in communicating with Ms. Lam. I think we should have done a better job in communicating with all of these United States Attorneys. I've already conceded that, and that's one of the things that we're going to institutionalize going forward.

Senator SCHUMER. But, sir, the issue goes beyond that. It goes to who is telling the truth around here. You said a minute ago she was told. She is saying, Kyle Sampson is saying she was not told. It is beyond doing a better job, it is getting to the real truth in a hearing where you have had a month to prepare, where all of these things are public. It is a key question, and it is still an answer that contradicts what others have said. But I am going to move on because I have limited time. this is about another issue. There is a real question raised by this investigation about whether you and the Department of Justice intended to bypass the Senate's role in confirming the U.S. Attorney as it relates to the law that Senator Feinstein passed and all but two of us in the Senate voted for, and equally troubling, as I mentioned, is a real question about whether you were honest with the Members of Congress about your intent, and this is a serious matter.

Attorney General GONZALES. I agree, Senator.

Senator SCHUMER. To emphasize how serious I want to read to you what Senator Pryor had to say on the floor of the Senate about his interactions with you.

Attorney General GONZALES. Can I see his transcript?

Senator SCHUMER. Yes. But I will read it. It is very clear. And I am sure you know it, his searing words, as you will hear.

Attorney General GONZALES. I would like to see it.

Senator SCHUMER. We will get it to you. As everyone here knows, Senator Pryor is one of the most temperate members of the Senate. He is mild mannered, and his words are all the more striking for that reason. He said: "The Attorney General not only lied to me as a person, but when he lied to me, he lied to the Senate and he lied to the people I represent." I spoke to Senator Pryor yesterday. He stands by those words.

Kyle Sampson wrote to Harriet Miers last September—that is what he wrote—he wrote that they wanted to do this plan of getting around the Senate and appointing interim U.S. Attorneys, and he also told Congress that the White House never rejected the idea of evading the Senate confirmation in the Eastern District of Arkansas. According to Kyle Sampson, you became aware of this idea or plan in early December of 2006. He told you about it. You did not reject it.

Then on December 19th Kyle Sampson is promoting this astonishingly perverse plan. He is going forward with it. And this poster, which we have here—and I will get you a copy of what it says—shows it. Sampson's advice to the White House is, "We" meaning the Department, "We should gum this to death to run out the clock." He lays out a specific plan for running out the clock. The Department of Justice should ask Arkansas Senators to meet Tim Griffin, give him a chance. After that, the administration to pledge to desire a Senate-confirmed U.S. Attorney and so forth. The plan was to use these tactics to delay so Griffin could stay in without Senate confirmation until the end of the President's term.

But now, 4 days before Kyle Sampson sends that plan, you personally talked with Senator Pryor. Kyle Sampson testifies that he was in the room. You talked to him twice—he was in the room on one of those occasions—about Tim Griffin. Kyle Sampson says you talked with Senator Pryor two times. He was in the room and you said to Senator Pryor that you wanted to go through a Senate confirmation. This is in December. What would you think if you are in Senator Pryor's shoes? There is a plan to circumvent U.S. Attorneys early in December. You go along with that.

Attorney General GONZALES. I didn't go along with it.

Senator SCHUMER. On December 19th a memo was sent to implement it. Yet on December 15th you are on the phone with Senator Pryor saying, oh, no, no, you are going to get confirmation.

So which is it? Again, did Kyle Sampson put out this memo completely on his own? And if he did, I mean you cannot have it both ways. If your chief of staff is implementing a major plan that contradicts what you just told a U.S. Senator from that State, in my view you should not be Attorney General. And if on the other hand, what you said to Senator Pryor contradicts the plan you also

should not be Attorney General. Can you explain what happened to you?

Attorney General GONZALES. Yes.

Senator SCHUMER. Because I am totally sympathetic with what Senator Pryor said.

Attorney General GONZALES. Mr. Sampson also testified 15 to 20 times in various ways that I either rejected this plan, I never liked this plan, thought it was a bad idea, never considered it, would not have considered it.

Senator SCHUMER. No. He said that you did know about it. He told you about it and you did not reject it.

Attorney General GONZALES. Senator, 15 to 20 times he said I either rejected it, didn't like it, thought it was a bad idea, wouldn't consider it, didn't consider it.

Senator SCHUMER. Oab. Then he went ahead, when you did not like the plan, on December 19th?

Attorney General GONZALES. Senator, I didn't—

Senator SCHUMER. That was later that you did not like the plan. Kyle Sampson said in December you had no rejection of the plan. But let's even assume you did not like it. What are we to think as U.S. Senators? You do not like a plan your chief of staff, the man in charge of everything, even though you are saying do not do this plan, puts out something to go ahead and go forward. Who is running the Department?

Attorney General GONZALES. Senator, I wasn't aware of this e-mail, but again, I want to be very, very clear about this. I never liked this plan.

Senator SCHUMER. You never liked the plan, and your chief of staff, 4 days after you assure Senator Pryor otherwise, puts out a detailed, step-by-step process on how to implement the plan. Does that indicate someone who is running the Department?

Attorney General GONZALES. Senator, Mr. Sampson has testified that this was a bad idea, and it was a bad idea, and it was never accepted, not only by me, but he also testified as to the principles.

Senator SCHUMER. Sir, Mr. Sampson said it was a bad idea in retrospect in February and March. In December he was going full bore ahead with the plan, as the memo you have just been shown shows.

Attorney General GONZALES. Senator, and he's also testified—if we're going to go on his testimony—that this was a plan I never liked, that I rejected it, that I didn't consider it—

Senator SCHUMER. No. That is not what he testified to, sir. Go look at the transcript. In December he says you did not reject the plan when he talked to you about it.

Attorney General GONZALES. Sir, I don't recall the exact timeframe, but he also said that I never liked this idea, I didn't consider it and wouldn't consider it.

Chairman LEAHY. Gentlemen.

Senator SCHUMER. I would just say, sir, that it defies credulity that your chief of staff, 4 days after you tell somebody you're going one way, goes exactly the opposite way and says, says that you never rejected the plan when you say you did.

Thank you, Mr. Chairman.

Chairman LEAHY. Obviously, though, you accepted the use of the provision in the PATRIOT Act to replace a number of Senators, and now in probably the strongest bipartisan vote I have seen in the Senate in years, we voted to remove that from the PATRIOT Act.

Attorney General GONZALES. Senator, if you look at the record, the reauthorization of the PATRIOT Act was March 9th, and the administration has nominated to virtually all these vacancies. We are pursuing and have been pursuing and respecting the role of the Senate, and I take issue with Senator Schumer's characterization.

Chairman LEAHY. We will go back to that. Senator Graham has been waiting patiently, but I would note that when you talk about sending up nominations to these vacancies, you sent two nominations, 21 vacancies. That is one out of 10.

Attorney General GONZALES. Senator, sometimes it's because we have to wait for recommendations from home State Senators, so let's look at their performance as well.

Chairman LEAHY. Sometimes I think one would look for the possibility of a nomination before they started—

Attorney General GONZALES. We want to continue working with the Senate.

Senator GRAHAM. Thank you, Mr. Chairman. Is it my turn?

Chairman LEAHY. I will let that one go. We have a difference of opinion.

Go ahead, Senator Graham.

Senator GRAHAM. Let us make sure that we understand the two things we are talking about in terms of plans. One plan was to get rid of all 93 U.S. Attorneys at once; is that correct?

Attorney General GONZALES. Sir, I don't know if I would call it a plan. It was an idea that was raised.

Senator GRAHAM. And it was shot down.

Attorney General GONZALES. That is correct.

Senator GRAHAM. This plan that you are talking about with Senator Schumer involves what?

Attorney General GONZALES. As I understood it, what I expected Mr. Sampson to do was coordinate a review of all U.S. Attorneys, and make an evaluation, make a recommendation to me as to where there were issues or concerns of particular U.S. Attorney districts where it may be appropriate to make a change for the benefit of the Department.

Senator GRAHAM. This December memo that he is talking about, or e-mail, what is the point there? From your point of view, how do you reconcile the conversation with Senator Pryor and the e-mail?

Attorney General GONZALES. Senator, it's difficult for me to reconcile the conversation. All I know is what I communicated to Senator Pryor in good faith.

Senator GRAHAM. Was?

Attorney General GONZALES. Was that we wanted to put Mr. Griffin in on an interim basis. I didn't know Mr. Griffin that well, and I wanted to see how he did, and I recall telling Senator Pryor—

Senator GRAHAM. And the reason Mr. Griffin was going to be put in is because the White House wanted him to have an opportunity to serve in this position?

Attorney General GONZALES. This was a well-qualified individual, and, yes, the White House had a desire to have him serve.

Senator GRAHAM. And it was no problem with Mr. Cummins' performance, it was just a preference for somebody new in the second term?

Attorney General GONZALES. I would say that's a fair statement.

Senator GRAHAM. Now, if you told Mr. Sampson 15 or 20 times this is a bad idea, why did it not sink in?

Attorney General GONZALES. Sir, I didn't tell him 15 or—I don't recall telling him 15 or 20 times. As I reviewed the transcript from his testimony, he was asked repeatedly about whether or not was this something the Attorney General supported or approved, and my recollection is, is that 15 to 20 times he said something like, I didn't consider it, I wouldn't consider it, thought it was a bad idea, I rejected it, it was rejected by principles. So 15 or 20 times, as I recall, this question was posed to Mr. Sampson in one way or another to try to get a sense—

Senator GRAHAM. But he always said you never bought into this idea?

Attorney General GONZALES. Well, sir, he never said that, as I recall, in his testimony. And again, the first opportunity really where this came up—

Senator GRAHAM. But he always said that you disagreed with this plan?

Attorney General GONZALES. I believe he said I didn't like it. Look, I know I didn't, I never liked it. I thought—again, I thought—

Senator GRAHAM. And what did you not like?

Attorney General GONZALES. What I didn't like was the fact that I think it's more important to have U.S. Attorneys nominated by the President and confirmed by the Senate because I believe it—you know, that certainly the appearance of more authority, and it makes it more effective.

Senator GRAHAM. The White House had a different view?

Attorney General GONZALES. Sir, I can't speak for the White House, quite—

Senator GRAHAM. Where did this idea come from?

Attorney General GONZALES. Which idea, sir?

Senator GRAHAM. The idea of Senate confirmation being changed?

Attorney General GONZALES. Well, let me—I can't speak to where the idea came from, but what I can say is that I supported the idea because I don't—I supported a change in the law, not the idea of avoiding Senate confirmation. I supported the change in the law because I didn't like the notion of a judge telling the Attorney General who should be on his staff, and the prior law had a requirement that after 120 days of an interim appointment, then the chief judge in the district makes the decision about who serves as the acting—the acting United States Attorney.

Senator GRAHAM. Just some personal advice, you know, we all respect Senator Pryor, and he said some pretty harsh things, which

is out of character, so I would just advise you to set down with him and walk through what happened, because I think he is a reasonable fellow, and you all straighten that out if you can.

Attorney General GONZALES. Senator, I couldn't agree more. I have a great deal of admiration for Senator Pryor, and I think that's a good idea.

Senator GRAHAM. I guess my basic problem is that you apologize here in April to all the U.S. Attorneys that have gone through pretty hard times about their job performance, and you gave a very good explanation to Senator Brownback about each person. But it took us a long time to be able to nail that down, and you have given news conferences where things were—you did not have any ownership of the process, basically, you delegated it. You made the final decision, but the process itself—is it fair to say that when you made your final decision it was based on trust of your senior team more than it was knowledge?

Attorney General GONZALES. I think that's a fair assessment. Again, what I understood was that the recommendation that would come to me would be a consensus recommendation of people that I trusted that would know most, certainly better than I, about the qualifications and performance of United States Attorneys.

Senator GRAHAM. My basic question is that the decision to replace people based on poor performance that you would roll out to the Nation, because eventually it was your decision, I know you have said this, but it really does bother me that people like Mr. Iglesias apparently were never able to tell their side of the story. If someone came to me and said, this person has to go, they are not doing their job well in terms of prosecuting a particular case or a series of cases, they need to go, no one seemed to contact Mr. Iglesias and say, "What is your side of the story?"

Attorney General GONZALES. Senator, I agree with that. I think in hindsight, certainly, what I discovered is that we don't have good enough communication between me—

Senator GRAHAM. And you said Ms. Lam did have notice of her poor performance.

Attorney General GONZALES. Senator, I think Ms. Lam certainly had notice of the fact that there was interest, if not concern, about her immigration numbers. There were meetings. There was communication with her.

Senator GRAHAM. I guess what I am trying to wonder, is this really performance based or do these people just run afoul of personality conflicts in the office and we were trying to make up reasons to fire them because we wanted to get rid of them?

Attorney General GONZALES. Sir, I think if you look at the documentation, I think you can see that there is documentation supporting these decisions.

Senator GRAHAM. Mr. Attorney General, most of this is a stretch. I think it is clear to me that some of these people just had personality conflicts with people in your office or at the White House, and we made up reasons to fire them. Some of it sounds good, some of it does not, and that is the lesson to be learned here.

Attorney General GONZALES. Senator, I respectfully disagree with that, I really do.

Senator GRAHAM. I do believe this, that you never sanctioned anybody being fired because they would not play politics a particular way.

Attorney General GONZALES. I would not do that.

Senator GRAHAM. I do believe that your associates have prosecuted both Democrats and Republicans. I do not believe you are that kind of person. I do not believe that you are involved in a conspiracy to fire somebody because they would not prosecute a particular enemy of a politician or a friend of a politician. But at the end of the day, you said something that struck me, that sometimes it just came down to these were not the right people at the right time. If I applied that standard to you, what would you say?

Attorney General GONZALES. Senator, I think what I would say, what I would say—Senator, what I would say is that I believe that I can continue to be effective as the Attorney General of the United States. We've done some great things in the past 2 years.

Senator GRAHAM. And you have done some very good things, I agree with that.

Attorney General GONZALES. I acknowledge the mistakes that I have made here. I've identified the mistakes. I know what I would do differently. I think it was still a good idea.

Senator GRAHAM. What kind of damage do you believe needs to be repaired on your part with the Congress or the Senate in particular?

Attorney General GONZALES. Senator, I think I need to continue to have dialog with the Congress, to try to be as forthcoming as I can be to reassure the Congress. I've tried to inform the Congress that I don't have anything to hide. I didn't say no, to the document request. I didn't say "no, you can't interview" to my internal staff. You know, I asked OPR to get involved. I've done—everything I've done has been consistent with the principle of pursuing truth and accountability.

Senator GRAHAM. Finally, you are situationally aware that you have a tremendous credibility problem with many Members of the Congress, and you are intent on trying to fix that. Today is a start, right?

Attorney General GONZALES. Absolutely, Senator.

Senator GRAHAM. Thank you.

Chairman LEAHY. Senator Durbin of Illinois.

Senator DURBIN. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for being with us today. When you were White House counsel, did you ever sit in on these meetings with the Attorney General and Karl Rove to discuss judicial nominations and nominations for U.S. Attorneys?

Attorney General GONZALES. Senator, that's an internal White House process of making decisions about judicial nominees and U.S. Attorneys. I was a part of that committee. Mr. Rove would, I would say infrequently, but he would occasionally be present at these meetings.

Senator DURBIN. Do you recall the conversation leading up to the nomination of Patrick Fitzgerald to be the U.S. Attorney for the Northern District of Illinois?

Attorney General GONZALES. I do not.

Senator DURBIN. You were not present?

Attorney General GONZALES. I do not recall. I'm sorry, I thought your question was "do you recall the conversation?" I don't recall the conversation. I don't recall whether or not I was present. I suspect I probably was, but I don't recall.

Senator DURBIN. It has been reported that Mr. Rove had misgivings about Patrick Fitzgerald because of the political impact it might have in my State of Illinois. Do you remember any statements by Mr. Rove to that effect?

Attorney General GONZALES. I don't recall, Senator. Where has it been reported?

Senator DURBIN. It has been reported in the New York Times. I can read portions of it to you, but it is in a March New York Times article just recently published. But I would like to ask you this: you took over as Attorney General, if I am not mistaken, in January of 2005?

Attorney General GONZALES. I believe it was in February of 2005, Senator.

Senator DURBIN. February 2005. At the time you knew who Patrick Fitzgerald was?

Attorney General GONZALES. Yes, sir.

Senator DURBIN. He was a rather high profile U.S. Attorney having been chosen as Special Counsel by Deputy Attorney General Comey to investigate the Valerie Plame incident and the involvement of the Vice President's Office and other offices; is that correct?

Attorney General GONZALES. That is correct.

Senator DURBIN. Shortly after you arrived, there was an evaluation made of Patrick Fitzgerald's performance as U.S. Attorney. Do you remember that evaluation?

Attorney General GONZALES. Senator, I think you—no, sir, I don't. I don't know what evaluation you're referring to. Could you just, please, clarify?

Senator DURBIN. The evaluation I refer to was by Mr. Sampson.

Attorney General GONZALES. Okay. I'm aware now of what you're referring to.

Senator DURBIN. And you are aware of the fact that Patrick Fitzgerald, who had been designated Special Counsel, who was in the process of investigating any criminal wrongdoing by members of the President's or Vice President's staff, was given a recommendation that said he had "not distinguished himself either positively or negatively." Do you remember that?

Attorney General GONZALES. Senator, now I'm aware of this. I didn't know about this at the time, but subsequent—I mean recently I've become aware of this issue.

Senator DURBIN. So these evaluations by Kyle Sampson of U.S. Attorneys were never shown to you?

Attorney General GONZALES. Senator, I don't recall ever seeing these evaluations.

Senator DURBIN. Let me ask you point blank: do you think that was a fair evaluation of Mr. Fitzgerald at that time?

Attorney General GONZALES. Well, let me say a couple of things. One, I recused myself and had been recused with respect to Mr. Fitzgerald and the investigation. Two, even if I weren't recused, I would have serious questions about an evaluation of a U.S. Attor-

ney involved in this kind of prosecution. And third, let me just say that based upon my own personal knowledge and experience, I think Mr. Fitzgerald is an outstanding prosecutor.

Senator DURBIN. Are you aware of the fact that Kyle Sampson testified under oath that he recommended to Harriet Miers that Patrick Fitzgerald also be removed as a U.S. Attorney as part of this purge?

Attorney General GONZALES. Senator, I'm aware of what he said. I remember reading the transcript. I'm not sure that it was a recommendation, per se. I'm aware of what he said in his testimony, yes, sir.

Senator DURBIN. Did he speak to you before he made that recommendation, and tell you that he was going to ask for Patrick Fitzgerald to be removed in the middle of this investigation of the White House?

Attorney General GONZALES. I don't recall him speaking to me about that, sir.

Senator DURBIN. It did not happen, it did happen, or you do not recall?

Attorney General GONZALES. Senator, again, you're talking about events that happened over 2 years, thousands of conversations. I don't think that conversation occurred.

Senator DURBIN. Mr. Gonzales, this is the highest profile U.S. Attorney in America.

Attorney General GONZALES. Yes.

Senator DURBIN. He is investigating the White House, including people that you have worked with for years, and now your chief of staff is going to make a recommendation to the President's White House counsel that he be removed as U.S. Attorney and you cannot remember that conversation?

Attorney General GONZALES. Senator, I don't think that conversation happened. I don't think he ever made that recommendation to me or raised it. And I wouldn't characterize it as a recommendation. I would refer you back to his testimony. But whatever it was, I don't think he raised it with me.

Senator DURBIN. Did you ever have a conversation after the appointment of Patrick Fitzgerald as a Special Counsel to investigate the White House over the Valerie Plame incident, with either the President or Mr. Rove about the removal of Patrick Fitzgerald?

Attorney General GONZALES. Senator, I believe the answer to that is no.

Senator DURBIN. Could I ask you about the other U.S. Attorneys that were removed? Did you ever have a conversation with Karl Rove about the removal of David Iglesias?

Attorney General GONZALES. Senator, I recall a conversation with Mr. Rove. It wasn't a recommendation or a discussion about removal of Mr. Iglesias. But there was a discussion that I recall Mr. Rove had with me about voter fraud cases in three districts, including New Mexico, which of course, Mr. Iglesias is United States Attorney.

Senator DURBIN. What did Karl Rove say to you?

Attorney General GONZALES. Senator, my recollection, the conversation was basically, I've heard complaints about voter fraud prosecutions or lack of prosecutions, and again, I could be—I'm

paraphrasing. I don't recall precisely what he said, but it was generally about voter fraud prosecutions or voter fraud cases in three districts, including New Mexico.

Senator DURBIN. And there was no conclusion to that conversation about the fate of Mr. Iglesias?

Attorney General GONZALES. Senator, I believe that I communicated this information to Mr. Sampson, but I don't remember or recall what happened after that.

Senator DURBIN. How about the fate of Mr. Iglesias himself? Was that something that you were party to, the decision for his removal?

Attorney General GONZALES. It was my decision.

Senator DURBIN. And now that you reflect on that decision, having looked at his performance and considered the calls that were made by Members of Congress, do you still think that was the right decision?

Attorney General GONZALES. Senator, I think that is a very fair question. Obviously—and, by the way, this is a matter being investigated by the Congress, so I am not conceding that, in fact, what Mr. Iglesias said was true. Senator Domenici and Congresswoman Wilson will have the opportunity to present their story. But if a Member of Congress contacts a U.S. Attorney to put pressure on him on a specific case, that is a very, very serious issue. And if, in fact, we had known, if the Deputy Attorney General, I believe, had known about these calls, which Mr. Iglesias admitted that he did not contact us, would it have made a difference? It probably would have made a difference. But now we are looking in hindsight, and so what we also know is that Mr. Iglesias did not report these conversations. That was a serious transgression. He intentionally violated a policy meant to protect him.

And so as we weigh these additional facts, my conclusion is that I stand by the decision that Mr. Iglesias should no longer serve as United States Attorney.

Senator DURBIN. In the situation with Carol Lam, did you have any conversations with Karl Rove about her fate?

Attorney General GONZALES. Senator, I don't recall having any conversations with Mr. Rove about Ms. Lam in connection with this process.

Senator DURBIN. Let me conclude, Mr. Chairman. I thank everyone for their patience here. I am going to send this article down to you, and I wish you would take a look at it. It is an article published in the Chicago Tribune April 17th by Patrick M. Collins. Do you know Mr. Collins?

Attorney General GONZALES. I don't believe I do, sir.

Senator DURBIN. Mr. Collins served as an Assistant U.S. Attorney from 1995 to March 2007, was the lead prosecutor in the trial of a former Governor of Illinois, worked with Mr. Fitzgerald. He believes that your continued service creates a problem for people who have served in his position as Assistant U.S. Attorney, and he believes that, frankly, it raises questions about their impartiality when it comes to public corruption cases. He says in conclusion here, "all U.S. Attorneys 'serve at the pleasure of the President,' . . . But they must never serve only to please the President."

Attorney General GONZALES. I agree with that.

Senator DURBIN. And I think what we have heard here about some of the political considerations, comments about "loyal Bushies" by Kyle Sampson, the involvement of Mr. Rove in decisions about the fate of some of these U.S. Attorneys, raises serious questions as to whether or not your continued service is going to make it difficult for professional prosecutors in the Department of Justice to do their job effectively.

Attorney General GONZALES. Senator, if I could respond, I think, again, it's absolutely true that this is not about Alberto Gonzales. It's about what's best for the Department and whether or not I can continue to be effective in leading this Department.

I believe that I can be. I think that there are some good things that working with this Committee I can accomplish on behalf of this country. Clearly, there are issues that I have to deal with, and I am going to work as hard as I can to re-establish trust and confidence with this Committee and Members of Congress, and, of course, with the career professionals in our Department. And all the credit, everything that we do, the credit goes to them. And so when there are attacks against the Department, you're attacking the career professionals.

Senator DURBIN. Mr. Gonzales, that is like saying if I disagree with the President's policy on the war I am attacking the soldiers.

Attorney General GONZALES. What I'm saying is—

Senator DURBIN. The fact of the matter is—

Attorney General GONZALES.—you should attack me. You should attack me.

Senator DURBIN.—your conduct in this Department—your conduct in this Department has made it more difficult for these professionals to do their job effectively—

Attorney General GONZALES. And I'm going to deal with that.

Senator DURBIN.—and if you ignore that reality, then you cannot be effective as an Attorney General.

Attorney General GONZALES. Senator, I understand that, and I'm going to work at that. What I'm saying is that be careful about criticizing the Department. Criticize me.

Senator DURBIN. Mr. Gonzales, this testimony today is from you about your reputation. It is not about the reputation of the men and women working in these offices.

Attorney General GONZALES. Thank you, Senator.

Chairman LEAHY. What we will do is, so everybody will understand—Officer?

What we will do, if I might have the attention of everybody here, we will break for lunch until 2 o'clock. After lunch, provided the funeral is over, we will recognize Senator Grassley, then Senator Cardin, then Senator Coburn, then Senator Whitehouse, then Senator Kyl, then Senator Biden, and we will go to a second round. Is that OK with you, Senator Specter.

Senator SPECTER. Yes, sir.

Chairman LEAHY. We stand in recess.

[Whereupon, at 12:37 p.m., the Committee was recessed, to reconvene at 2 p.m., this same day.]

AFTERNOON SESSION [2:35]

Chairman LEAHY. I want to welcome everybody back. As you understand, we had votes in the Senate, which delayed us coming

back, but it was the Port Security Act, which is a significant piece of legislation, which I know the Attorney General and everybody on this Committee has supported, and a significant piece of legislation which we passed, and I thank all the Senators who supported it.

As I mentioned this morning, Senator Grassley had to be at a funeral and would have been recognized much earlier this morning, but we will begin, Senator Grassley, with you.

Senator GRASSLEY. Thank you very much.

General Gonzales, I have reserved judgment on what has happened with the firing of U.S. Attorneys. I have to admit that it has been difficult. The inconsistent information has, unfortunately, made what may be a perfectly explainable situation into something that many have already concluded was misconduct. Your testimony today—and I left about the time you were starting your opening statement, so I have missed everything since then. But your testimony today, it seems to me, is extremely important, at least for me, to sort through all the facts and draw my own conclusions. I hope your testimony sets the story straight and clears the waters.

No one seriously takes issue with the statement that U.S. Attorneys serve at the pleasure of the President. The President has the authority to hire or fire U.S. Attorneys. If an individual was not pursuing his priorities aggressively enough or if the President wanted to give another candidate an opportunity, those things are not against the law. However, it is improper for a President to fire a U.S. Attorney for retaliatory reasons or to impede or obstruct a particular prosecution for unjust political or partisan gain. We do not want to see the independence and integrity of our attorneys compromised to a point where they are not serving their district in the interest of justice.

I do not know if the U.S. Attorneys were fired because they were pursuing or not pursuing investigations or prosecutions based on political motivation. But once the administration started to make representations to Congress and the American people about how or why the firings came about, those representations had to be accurate and complete. Yet documents produced by your Department are inconsistent with public statements and congressional testimony of other officials and we just do not have a straight story on what transpired and whether the motivations for what happened were pure.

You are well aware that I am very serious about conducting congressional oversight. Oversight is a core responsibility of my job as a Member of the Senate. I am an equal opportunity oversight person when it comes to that. Over the years I have looked into both Republican and Democrat administrations with the same vigor. So to get complete and truthful information is important for me, but I feel that on many occasions this administration has made a concerted effort to thwart my oversight efforts. Just last week, the Justice Department tried to block a convicted felon from testifying before the Finance Committee. I was glad to say that the Federal courts disagreed with you, and in the end we got our witness.

I know that the Justice Department has produced documents to the Judiciary Committee in response to our request for information on U.S. Attorney firings, but your representations to Congress need to be accurate and complete, or else our oversight activities will not

be able to get to the bottom of anything. We should not be getting conflicting statements from the Attorney General and/or his staff. We should not be getting conflicting statements at all. The story needs to be consistent, complete, and, of course, it must be the truth. We and the American people expect nothing less from our top law enforcement officials.

So, General Gonzales, I hope that you will be able to be complete and forthcoming and candid with me as I ask questions. I am looking for my first question to see what the environment was and the situation all this took place. I would like to start by asking you for an explanation as to why there are so many inconsistencies. There is something about the environment you work in that would produce these inconsistencies. How does that happen?

Attorney General GONZALES. Senator, I think as an initial—well, first of all, I regret the inconsistent statements, and as I said in my opening statement, the misstatements are my mistakes, and I accept responsibility for it.

I think as an initial matter, when I came out on March 13th and gave the press conference, I made some statements that were, quite frankly, overbroad. I should have been more precise in my statements. One of the reasons is because—one of the primary reasons is because I had not gone back and looked at the documents. I hadn't gone back and looked at my calendar, for example, about the November 27th meeting.

And so, in hindsight, maybe I got out there too quickly, or certainly my statements were too broad. I felt a tremendous need to come out quickly and defend the Department about accusations about improper conduct. And that is why I made the statements on March 13th, and in hindsight that was a mistake, because obviously we had not gathered up all the documents which we have now produced to the Congress. But I accept full responsibility for not being more careful.

Senator GRASSLEY. So you are not running a Department where there is enough protocol so that everybody can be on the same page?

Attorney General GONZALES. I wouldn't say that, Senator. Again, this was a situation where there was a lot of information—we are talking about a 2-year process, and conversations and meetings that happened over a 2-year process. And I did not do my job in making sure that I had all the information before I made my first public statements. And those first public statement, I should have been more careful about those statements.

Senator GRASSLEY. Oka7. In prior statements, you indicated that you really had not been involved in any discussions or deliberations to remove the U.S. Attorneys. But e-mails indicated that you had discussions with Mr. Sampson about this in late 2004 or early 2005 and that you attended a November 2006 meeting just prior to the firing. Mr. Sampson testified before this Committee that your statements were not fully accurate, and your testimony today backtracks on what you said earlier.

Why is your story changing? Can you tell us when you first got involved and the extent of your participation in the process to evaluate and replace U.S. Attorneys? And, additionally, who came up with the plan to evaluate U.S. Attorneys?

Attorney General GONZALES. Yes, sir. Well, the reason why my statements initially were incorrect is because I had not gone back and looked at the record. Since then, I have tried to clarify it. I think Mr. Sampson even in his testimony said that I have clarified my statements.

The meeting—the e-mail that you are referring to, the discussion that happened in either—I think January 2005, as I recall, Senator, would relate to a discussion that would have happened in Christmas week, between Christmas and New Year's, and just weeks before my confirmation. And so I don't have a recollection of that discussion, quite frankly, but what we have tried to do since this time, since early March, is gather up as much information as we can and provide to the Congress documents and make people available so that we can get to the bottom of what happened here.

And I'm here to provide what I know, what I recall as to the truth in order to help the Congress help to complete the record, but there are clearly some things that I don't know about what happened, and it is frustrating to me as head of the Department to know that—to not know that still today. But I haven't done that—I haven't talked to witnesses because of the fact that I haven't wanted to interfere with this investigation and Department investigations.

Senator GRASSLEY. Who did you discuss the review with at the White House? Did you question any of the recommendations? Were you comfortable with the process and the methodology for the final recommendations? And what was your personal input in that process?

Attorney General GONZALES. Senator, as to whether or not I had a specific conversation with individuals about the review process is not something that I can recall having that kind of conversation. I had understood that there was a process in place where Mr. Sampson would consult with the senior leadership in the Department, people that knew the most information about U.S. Attorneys, and that he would bring back to me a consensus recommendation of the senior leadership of where there were districts in terms of issues and concerns about the performance of United States Attorneys.

Still today, I think that was an appropriate thing for a manager to do, is to try to identify where there were areas of improvement. Clearly, there were mistakes made in the implementation of this plan and the review of this plan, and I accept responsibilities for those mistakes.

Senator GRASSLEY. The red light is on, but there was a question just prior that you did not answer. Who came up with the plan to evaluate U.S. Attorneys?

Attorney General GONZALES. Senator, I think—that was my plan. I believed it was appropriate to look to see whether or not the United States Attorneys were doing a good job. Were they doing their job? I felt that was a good management decision to simply look to see whether or not the United States Attorneys were doing their job. I think the American people want to know that public servants are serving them.

Chairman LEAHY. Did you get all you need?

Senator GRASSLEY. Yes.

Chairman LEAHY.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman.

Mr. Gonzales, I have listened to the entire hearing here today, listened to your response to my colleagues' questions, answering my colleagues' questions, and I find some things troubling. But I think what concerns me the most is after reviewing all the facts involved in the dismissal of the U.S. Attorneys, having a chance now to really go into detail and understand all the problems that have developed, you stand by the decision to remove these U.S. Attorneys.

You have acknowledged, and rightly so, that dismissing U.S. Attorneys would be wrong if it interferes with or influences a particular prosecution for partisan political gain. Your former Chief of Staff, Mr. Sampson, stated basically the same thing when he said it would be wrong if it was an effort to interfere with or influence a prosecution of a particular case for political or partisan advantage. Yet Mr. Sampson acknowledged that a factor that was used in the consideration would be losing the trust and confidence of important local constituencies in law enforcement or government. Mr. Sampson confirmed—a question that I asked him—that local political concerns from partisans may have been influential in the firing.

You have said a couple times that you had confidence in the process that had been set up. How did you know that wrong political considerations were not being used in the advice that was being given to you on the firing of these U.S. Attorneys?

Attorney General GONZALES. Senator, I think that's a fair question. I certainly know the reasons on which I made my decision, and I, quite frankly, relied upon people that I trusted to make a recommendation to me. I think I'm justified in relying upon the Chief of Staff to bring forward to me a consensus recommendation of the senior leadership of the Department.

I'm not aware of anything in the documentation or anything with respect to testimony that would support the allegation there was anything that was improper that happened here. But, again, as I've said before, just to reassure myself, I did ask the Office of Professional Responsibility and they are working with the Office of the Inspector General to ensure that nothing improper happened here.

Senator CARDIN. I asked Mr. Sampson at a hearing in this Committee, "What safeguard did you have in the process to make sure that that was not being done?"—that is, improper political considerations. Mr. Sampson replied, "I don't feel like I had any safeguards in the process."

Attorney General GONZALES. Senator, I would never ask someone to leave their position as United States Attorney for an improper reason. The truth of the matter is, of course, public corruption cases, for example, as a general matter, are not tried by the United States Attorney. They are tried by the Assistant United States Attorney and assisted by career people.

Senator CARDIN. But the person who is giving you the advice, who puts it all together, says there are no safeguards in the process to filter out improper local political pressure that may have been exerted to influence who is on that list. And yet you have said

in your testimony, "I also have no basis that anyone involved in the process sought the removal of U.S. Attorneys for improper reasons." How do you know that?

Attorney General GONZALES. Senator, based on what I know—and, again, it wasn't just the Chief of Staff. I was relying upon what I understood to be the consensus recommendation of the Department, in particular, the Deputy Attorney General. U.S. Attorneys report to the Deputy Attorney General. He is a former colleague. I don't believe that he would make a recommendation based upon improper reasons that a former colleague, a United States Attorney, should be removed.

Senator CARDIN. Now you know that of the seven U.S. Attorneys who were removed on the same day, five had controversial political investigations in their jurisdiction, including in New Mexico, where there was a probe of State Democrats and Republicans were unhappy that in Nevada there was a probe of a Republican Governor in Arizona, there were probes of two Republican Congressmen in Arkansas, there was a probe of a Republican Governor in Missouri, in California Representative Cunningham's investigation which was being expanded; and Washington declined to intervene in the disputed gubernatorial election that angered local Republicans. You now know all that. This was a unique process that was being used. It had not been used before to remove this many attorneys for this type of a reason.

Don't you see that this might have been interpreted as trying to send a message to U.S. Attorneys around the country to stay away from sensitive political corruption cases?

Attorney General GONZALES. Senator, I think that is a fair question, and I spoke with the United States Attorney community, I think the week of March 12th, and I told them what I expected, and that is, no one should speed up or slow down a prosecution or investigation in any way; that we follow the evidence, we make decisions on cases based on the evidence and not based upon the target is a Republican or Democrat. And if you look at the record of the Department, Senator—

Senator CARDIN. That is not really my question. My question is the public perception.

Attorney General GONZALES. Yes, of course, I—

Senator CARDIN. Mr. Sampson acknowledged a lack of foresight that people would perceive it as being done to influence a case for improper reasons. Your former Chief of Staff has already acknowledged that.

Looking at all the information we now know, do you still stand by the decision that this was the right thing to do, the dismissal of these attorneys?

Attorney General GONZALES. I do, Senator. I do. One thing we have to understand—and I have gone back and thought about this a lot, believe me, and looking at the documents, and I had a conversation with the Deputy Attorney General about this, whether or not this was still the right decision, did he stand behind his recommendation. And based on what I know today, I do stand behind the decision because I have no information to tell me that, in fact, the decisions were based upon improper motive.

Senator CARDIN. So you disagree with Mr. Sampson on the way that he had analyzed what is out there. Or do you think perception is Okay?

Attorney General GONZALES. No, I don't—I think perception is very, very important.

Senator CARDIN. Do you disagree with the perception that is out there?

Attorney General GONZALES. I don't disagree with the perception. I think perception—

Senator CARDIN. But you would still do the same thing again.

Attorney General GONZALES. Senator, but I have also admitted mistakes in the way we did this and that it should have been done a different way. The process should have been more rigorous and more structured.

Senator CARDIN. Let me just challenge you on the process for one moment. I delegate to my senior staff for advice on a lot of issues, but they try to understand where I am coming from on these issues. You had some very sensitive political discussions on at least three of these U.S. Attorneys. Your senior staff knew about those discussions. Did it ever appear to you that maybe they understood that when they made the recommendation to you that they were trying to adhere to what they thought you wanted?

Attorney General GONZALES. Well, Senator, I think I've been very, very clear about my commitment not to improperly interfere with cases, and—

Senator CARDIN. You understood the political contacts that had already been made with you, including the President of the United States.

Attorney General GONZALES. Senator, I don't know about—I can't speak to as to what people understood about what the President of the United States may have said to me. But, listen, Senator, I have been very, very committed to ensuring that the Department makes this decision not based on politics but on the evidence. And if you look at the record of the Department in prosecuting public corruption cases in particular, it has been extremely strong all across the board.

Senator CARDIN. That is my concern. The message you sent out is that it was too strong in some of the jurisdictions. That is why you dismissed the—that is the impression: that is why you dismissed the U.S. Attorneys.

Attorney General GONZALES. I would be concerned about that perception, and that's why I spoke to the U.S. Attorney community the week of March 12th to reassure them that that is not what I expected of them.

Senator CARDIN. I would tell you that public confidence is also part of supporting the U.S. Attorney's Office, and that has been undermined by your own acknowledgment and by Mr. Sampson's acknowledgment.

Attorney General GONZALES. No question this has been an unfortunate episode.

Senator CARDIN. But you would still do the same thing again. I don't understand that. I guess that is—

Attorney General GONZALES. Senator, maybe I should rephrase it this way: I would use a different process—a different process—

Senator CARDIN. The same conclusion.

Attorney General GONZALES. Senator, it depended what the recommendation would be coming to me. But hopefully—I believe that we had a good process in place. I now know that that is not true, that it was flawed, and that we should have used a different kind of process. But I have no reason to believe that these were improper motives in terms of the basis of the recommendation.

Senator CARDIN. Thank you.

Chairman LEAHY. Thank you very much, Senator Cardin.

Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman.

General Gonzales, in one of the statements earlier today, you stated in terms of the insertion of the ability of the administration to replace U.S. Attorneys—and if this quote is not right, please pardon me; I think I wrote it down—that you didn't think someone should decide who works for you at the U.S. Attorney's Office?

Attorney General GONZALES. I said that I—I was troubled—well, I can't recall exactly what I said, but the reason why I supported a change in the law, 28 U.S.C. 546, was because of the district judges making decisions about who should serve on my staff as United States Attorneys.

We had had a recent incidence in South Dakota with respect to trying to put someone in as the Acting United States Attorney. The judge there wanted to put someone in who we had concerns about. And so we were—I supported the change in the law for that reason, not to circumvent—

Senator COBURN. I understand. All right. You testified earlier this morning about Bud Cummins, and you made a differential from him and the rest of the U.S. Attorneys and a difference in the date at which he was actually either notified or came about through that. But it was said that he had poor performance. Is that correct?

Attorney General GONZALES. Senator, based on my review of the documents—

Senator COBURN. I am asking you what was said formally by the U.S. Justice Department about Bud Cummins's performance.

Attorney General GONZALES. Senator, I don't know what all has been said about performance of Bud Cummins, but clearly—clearly—from what I can tell looking back at the documents is that Mr. Cummins was in a different situation for two reasons: one is because he was asked to resign on June 14th—

Senator COBURN. I do not want to talk about the different situation. I want to talk about was the statement said that he was being replaced because of poor performance.

Attorney General GONZALES. Sir, I don't recall specifically that statement, but if, in fact, that statement was made, then I apologize for that statement, because, in fact, Mr. Cummins was asked to resign on June 14th, and one of the reasons he was asked to resign is because there was a desire to place another well-qualified person—

Senator COBURN. Absolutely. And I have no qualms with that, which really leads me to the other area. You know, what Senator Cardin just raised, the issue that it appears—or the perception that people were replaced for other than what seems to be the facts

as you have testified and certainly looks to be the facts under a legitimate process for what you evaluate as concerns in management and leadership. But I think the damage to the Justice Department, the Attorney General, and you personally has been significant.

Several people's reputations have been harmed, including Bud Cummins. Communication has been terrible. Management has been terrible. You were asked by Senator Cardin if you would make this decision again, and you said yes because you thought it was the right decision. The question I have for you is: How would you have handled it differently in terms of implementing the decision?

Attorney General GONZALES. Well, sir, when you say implementing, you mean after the decision is made, how to implement it going—after the decision is made?

Senator COBURN. Yes.

Attorney General GONZALES. Well, one of the things I would have done, of course, is been more respectful in communicating the decision, I think a face-to-face meeting, if at all possible, involving the Deputy Attorney General or myself or certainly a phone call involving the Deputy Attorney General or myself instead of the Director of the Executive Office.

I think also if, in fact, the Department was going to say something publicly about performance related, I think we should have told these individuals the specific reasons. As a legal matter, they are not entitled to those reasons, but I think as a matter of fairness, as a matter of good management, I think it would have been appropriate to apprise them of the concerns that we had. I think it would have been better, of course, to make them aware of those concerns before the actual decision. It is one of the things that I identified as a problem in the Department and certainly one of the things that I regret, and what we are going to do is institutionalize a process where we have at least an annual meeting face to face with every United States Attorney and either the Deputy Attorney General or myself so we can talk about issues that are of concern to us.

Senator COBURN. You said earlier this was an unfortunate episode. You also said that these attorneys were evaluated based on their leadership skills and management skills. And you answered a question from Senator Graham earlier about your position in light of all this.

Why would we not use the same standards to judge your performance in handling this event that you applied to these same individuals?

Attorney General GONZALES. I think that's a fair question, Senator, and I think that I clearly made mistakes here—clearly. And I accept responsibility for those mistakes, Senator. I've tried to identify where those mistakes were made and institutionalize where we can make changes to make the Department even stronger.

I think the Department under my leadership in the past 2 years, I think we have done some great things. I think the Department has been managed in a good way. This has not been managed in a good way, and I accept responsibility for that. But I still continue to have great faith in the career people at the Department. Cases

still continue, investigations still continue. Obviously, I have a lot of work to do to restore confidence and trust. I am committed to doing that.

Senator COBURN. That is not what I asked you. I said: Why should you not be judged by the same standards by which you judged these dismissed U.S. Attorneys?

Attorney General GONZALES. Senator, again, I've identified my mistakes, and you'll make your decisions based upon my testimony, based upon the review of the record in terms of what has happened, and based upon the testimony of others. And, Senator, what I can commit to you is that—I have acknowledged mistakes. We all make mistakes. And I'm committed to addressing those mistakes and working with you to make our country even stronger.

Senator COBURN. I believe there are consequences to a mistake. I was quoted in the paper saying I think this has been handled in a very incompetent manner, and I believe most people, I do not care which side of the aisle they are, would agree with that. U.S. Attorneys' reputations that were involved, have been harmed. The confidence in U.S. Attorneys throughout this country has been damaged. The reputation of the Attorney General's Office has been tarnished and brought into question. I disavow aggressively any implication that there was a political nature in this. I know that is the politics of the blood sport that we are playing. I do not think it had anything to do with it.

But to me there has to be consequences to the accepting responsibility, and I would just say, Mr. Attorney General, it is my considered opinion that the exact same standards should be applied to you in how this was handled. It was handled incompetently. The communication was atrocious. It was inconsistent. It is generous to say that there were misstatements. That is a generous statement, and I believe you ought to suffer the consequences that these others have suffered. I believe the best way to put this behind us is your resignation.

Attorney General GONZALES. Senator, I don't know whether or not that puts everything behind us, quite frankly. I am committed—I know the mistakes that were made here, and I am committed to fix those mistakes, and I'm committed to working with you and try to restore the faith and confidence that you need to have to work with me.

Senator COBURN. Mr. Attorney General, you set the standard. You said leadership skills, management skills. They were sorely lacking in this instance, and the responsibility is to start with a clean slate, a new set of leadership skills, a new set of management skills to heal this and the country, to restore the confidence in this country.

I like you as a man. I like you as an individual. I believe you are totally dedicated to your job in this country, but I think mistakes have consequences, and I believe that should be the one that it should be.

I have no further questions.

Chairman LEAHY. Thank you, Senator Coburn.

Senator Whitehouse, you are next. So people know what is happening, it will be Senator Whitehouse, then Senator Kyl. We will then start those who want a second round, begin with myself and

Senator Specter, and we will go based on who is here and the order they are in.

Senator Whitehouse, then Senator Kyl.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Here is what concerns me, Attorney General Gonzales. The administration of justice in our country is controlled within structures. Some of them are constitutional structures. Some of them are statutory structures. But some of them are structures that have developed over time that amount to tradition and practice, but they are there for good and important reasons. My concern, after reading your testimony and hearing your testimony today is that you do not seem to be aware of the damage to those structures that this episode has caused. I would like to run a few by you just to let you know where I am coming from.

The two areas where you ask us to agree with you in your testimony, the first is that U.S. Attorneys can be fired at will by the President. That is undeniably true, but I think its use as a rhetorical point in this discussion is highly misleading, deeply misleading, because I think you and I both know that for years, for decades, there has been a tradition of independence on the part of U.S. Attorneys. Once they are appointed, unless there is misconduct, they are left to do their jobs, and that rule, that practice, has existed for good and meaningful reason, and it cannot be overlooked by just blithely saying, well, the President has to power to remove these people. That misses the point. These people make tough decision. They are out there on their own very often. Very often the Department of Justice and the political environment that surrounds it is one that you want to protect them from, and the idea that willy nilly senior staff people can come out and have the heads of U.S. Attorneys, I think is highly damaging to that piece of structure.

This was not customary practice; we can agree on that, can we not?

Attorney General GONZALES. Senator, I think that that's—I do agree on that, and I do agree with you that structures and traditions are important. I agree with that as well.

Senator WHITEHOUSE. The second piece of the structure here that I think is significant is that although you as Attorney General are in command of the administration of justice in the Federal system, there is actually very little prosecution that takes place out of Main Justice. The enormous majority of the prosecutive authority of the United States of America has been dispersed out into 93 judicial districts, and it has been dispersed to men and women who have certain characteristics. One is that they are from the local community, and when they are done they go back and they live in that local community, and it is good for the administration of justice when they are accountable in that way for their decisions, given the power and often terror that prosecutor action can create in a family.

The second is that they have to get a Senator to sign off on them, in fact, they have to get the majority of the whole Senate to sign off on them, and a President of the United States. When those things happen, it creates a corps, if you will, c-o-r-p-s, a corps of practicality, of common sense, of responsibility, of experience, that

I consider to be a huge value to the administration of justice in this country.

And in every way in which this was handled, it is highly destructive of that independence, whether it is people from Justice going out and taking these positions, whether it is ducking Senate confirmation, whether it is not bringing people from the local community up to take those positions, or whether it is the general level of disrespect that has been shown for the U.S. Attorneys through this whole process.

I guess I would like to ask you to comment, do you think that that is a structural component of the administration of justice, that dispersion of the authority out to 93 independent local U.S. Attorneys that has value and that is important and should be protected?

Attorney General GONZALES. I do think it has value, and I think that the independence of the U.S. Attorneys is important. I think U.S. Attorneys should feel independent to exercise their judgment in prosecuting cases based upon the evidence.

However, I have to qualify that a bit, Senator, in that with respect to policies and priorities, again, the President of the United States has elected based upon his policies and priorities.

Senator WHITEHOUSE. I will spot you that, Attorney General, but my point is, when you are making a decision like that, there is a counterbalance to it. When you go to Carol Lam and say, you know what, you are not doing enough immigration prosecutions, therefore, you are fired, there are all sorts of collateral consequences of that, some of which are really quite damaging and evil, particularly when you are knocking off somebody who is known among her colleagues as being really the prime United States Attorney in the country on public corruption prosecutions. It sends a really rough message. So in the balancing between the structural protections and the respect and all of that, and this question of policy, I would hazard to you that you cannot let the policy question just run away with the issue.

Attorney General GONZALES. No question.

Senator WHITEHOUSE. You have to think it through thoughtfully, and I cannot find a place in the whole tragic record of the situation in which that careful thought was administered.

Attorney General GONZALES. No question about it. No question about it that we have to take into account how decisions may affect ongoing cases. There's no question about that.

But also I think it's important for the American people to understand that even when there's a change at the top with the Attorney General or a change in the U.S. Attorney, the cases continue.

Senator WHITEHOUSE. That is true.

Attorney General GONZALES. The cases continue to be investigated.

Senator WHITEHOUSE. As you and I know, the leadership from the U.S. Attorney makes a big difference. That is why you thought these replacements were important in the first place.

Attorney General GONZALES. They do make a big difference with respect—

Senator WHITEHOUSE. If I may make my second point because I am running out of time here. It is the second thing that you suggest, which is we should further agree on a definition of what an

improper reason for the removal of a U.S. Attorney would be. Over and over again you have used the word improper as sort of your target word as to where the boundary is, where you should and should not go, but your definition of improper is almost exactly the same as Kyle Sampson's.

He came in here and testified, you said without consulting with anybody, and said that the improper reasons include an effort—and I quote—"to interfere with or influence the investigation or prosecution of a particular case for political or partisan advantage." Your testimony is to interfere with or influence a particular prosecution for partisan political gain. You loaded up those words. You have used them repeatedly, and I think that the definition of where impropriety lies, clearly, that would be improper, that would be grotesquely improper. But I think you have set the bar way low for yourself, if that is your standard of where impropriety is, and I would like to hear you comment on this. I think any effort to add any partisan or political dimension into a U.S. Attorney's conduct of his office, irrespective of whether it is intended to affect a particular case or not, is something we need to react to firmly, strongly, resolutely, and without any tolerance for it. You have set the bar so that it is not impropriety until it affects a particular case. Why did you do that?

Attorney General GONZALES. Senator, because of the accusations that have been made primarily, certainly as an initial matter, was that there was something improper, we were trying to interfere with particular cases. And that's why, certainly, the focus in my mind was to focus on, Oaky, what is the legal standard? And I think it's important for us to understand, as an initial matter, what is the legal standard, what would be improper?

Senator WHITEHOUSE. But something a lot less than that would be improper, would it not? I mean when Admiral Bing got hanged there was the famous comment: every once in a while you have to hang an admiral just to encourage all the others. If you hang a U.S. Attorney once in a while just to discourage all the others, even if your intention is not to affect a particular case, you have to agree that would be highly improper.

Attorney General GONZALES. Senator, it may be improper as a matter of management, some would have to wonder, is that really an appropriate way to manage a department? But again, Senator, you have to understand that—

Senator WHITEHOUSE. Otherwise, it would be obstruction of justice, correct?

Attorney General GONZALES. These individuals have served their 4 years, they are holding over. There is no expectation of a job here, there shouldn't be, because of the fact that they are Presidential appointees. Now, clearly, as a management issue, there is value added to a person who has served as a United States Attorney in terms of experience, expertise, and so those things are very important.

Senator WHITEHOUSE. It is more than just a management issue. It is an issue about the structure through which justice is administered in this country, and when it is broken and when it is damaged, and when the Attorney General of the United States says the only place where impropriety exists is when political and partisan

influence has risen to the point that it is intended to affect a particular case, but otherwise it is fine, I have a real problem. And I think everybody in America should have a real problem with that.

My time is expired.

Chairman LEAHY. Thank you very much.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

I think I am last, and I think just about everything has been said, but not everybody has said it. Although I would say that it has been said better by some than by others, and I think what Senator Whitehouse just did was to set out two very important points well. I am not sure that the last point was adequately answered. In addition to being wrong, if you affected a particular political corruption case, would it not also be an improper firing if it was for the purpose of generally affecting or influencing political corruption cases?

Attorney General GONZALES. That would trouble me, Senator, because—

Senator KYL. Would it not more than trouble you?

Attorney General GONZALES. Yes, sir, I think that would be wrong. I think—

Senator KYL. Okay, thank you.

Attorney General GONZALES. I think U.S.—well, go ahead.

Senator KYL. So I think you and Senator Whitehouse and I can all agree that the standard that you set forth was not the one and only situation that would be improper, but described the situation that was being attributed to the Department of Justice in this particular episode.

Attorney General GONZALES. We do not want to send a message that prosecutors should not follow the evidence and prosecute people. We want them to do that, absolutely. We don't want them to be discouraged, and I don't want them to be discouraged from coming forward and being candid with their views about issues or about cases.

Senator KYL. Let me ask you, as far as you know, since this has all occurred, has there been any difference in the way that any of the political corruption cases has been handled by the career prosecutors in any of the offices?

Attorney General GONZALES. Senator, not to my knowledge, but I think the American people need to understand that we have limited information in Main Justice about cases being prosecuted around the country. We really have limited information, for good reason, I think.

Senator KYL. Yes, indeed, and I would close this part because I have two other questions I want to ask. There are thousands of pages of documents and hundreds of hours of testimony and interviews, and I found it instructive that Senator Schumer would suggest this morning what I gather is a new conspiracy theory standard, which is if the evidence does not show any violation of what all would agree would be proper practices, in this case, an attempt to influence political corruption cases, that therefore, the burden should shift to the Department of Justice to prove that it did not happen, in effect, to prove a negative. That would be wrong. It would be unprecedented. In my view, it would be dangerous.

Since this is an oversight hearing, I would like to ask about a couple of other matters. I want to thank you, first of all, for visiting recently with me about funding for crime victims' rights. As you know, I remain very concerned about that, and I just want to follow-up on our conversation and see if we can get some additional information by having a meeting next week, not involving you, but involving both John Gillis, who is the Director of the Office for Victims of Crime, and Will Moschella. Would you assist me in setting up such a meeting next week?

Attorney General GONZALES. Yes, sir.

Senator KYL. Thank you very much. And on the other matter, relating to Internet gambling, I want to applaud your office for cracking down on Internet gambling through a number of prosecutions that have recently occurred. As you know, last October 13th, the President signed into law the Unlawful Internet Gambling Enforcement Act, and one of its purposes is to target these offshore gambling operations that are not readily subject to U.S. prosecution. The law creates tools to enforce Federal and State gambling laws, particularly with these website operators offshore. The purpose is to cutoff the financial lifeblood of Internet gambling businesses by requiring the financial institutions and payment systems to block illegal Internet gambling transactions. I know you are aware of this background, but let me just, one more quick paragraph here.

Most illegal gambling entities operate offshore beyond the personal jurisdiction of U.S. law enforcement. So the financial regulations authorized under this new law are critical to effective implementation of the law, and under Section 5364 of Title 31 U.S.C., the regulations must require financial institutions to implement policies and procedures to identify and block funds related to illegal Internet gambling. The regulatory authority is broad to allow Treasury to adapt the procedures to the expediencies of different types of payment systems. Under the law regulations are to be written by the Treasury Department and the Federal Reserve Board, in consultation with the Attorney General.

At the DOJ oversight hearing on January 18th I discussed with you the need for your office to work with Treasury so these regulations can be quickly issued, and you testified that you had already initiated discussions with Treasury, the process is moving hopefully and can be completed in an expeditious manner.

On March 15th I sent to you and Secretary Paulson, a letter signed by Judiciary Committee Members Specter, Cornyn, Sessions and Brownback, noting time was of the essence, and urging the regulations provide financial institutions with a periodically updated list of gambling operations to whom transactions should be blocked. Earlier this month I reiterated that same concern for that list with you.

Just one quick prelude to the trigger that I will pull here on my three or four questions. Both people from the Department of Justice and the Department of State have noted that a major concern that the Department has about online gambling is that Internet gambling businesses provide criminals with an easy and excellent vehicle for money laundering. That was testimony of your Deputy Assistant Attorney General of the Criminal Division, Mr. Malcolm, and from the State Department, just quoting two lines, "Internet

gambling is particularly well suited for the laying and integration stages of money laundering. Internet gambling operations are in essence the functional equivalent of wholly unregulated offshore banks with the better accounts serving as bank accounts for account holders who are in the virtual world virtually anonymous. For these reasons, Internet gambling operations are vulnerable to be used not only for money laundering but also for criminal activities ranging from terrorist financing to tax evasion."

Now, four quick questions. First, do you agree with me that regulations need to be strong in this area?

Attorney General GONZALES. Absolutely.

Senator KYL. You are familiar with the March 15th letter I mentioned. The letter notes that the House Financial Services Committee report expressly states the law contemplates a mechanism whereby banks and other financial service providers will be provided with the identity of specific Internet gambling bank accounts to which payments are to be prohibited. Does that seem reasonable to you?

Attorney General GONZALES. Senator, I think there are some operational issues for us, quite frankly, with respect to whether or not we can develop such a list. What we're saying is these guys are breaking the law, and quite frankly, as a normal matter, what we do is we prosecute that. And so I know my staff has been consulting with your staff, trying to work through this because I'm as anxious as you are to try to get these regulations working so we can do a better job of enforcing the law against these—

Senator KYL. But providing that information specifically to the financial institutions would offer them certainty as to their legal obligations and would assist them in ensuring that the law would be effectively enforced, would it not?

Attorney General GONZALES. It would certainly provide more certainty. I'm not saying it can't be done. We're trying to work through this, Senator, and I certainly understand your interest in this, and my staff is working as hard as we can to see if we can find a way to do this.

Senator KYL. What I am interested in though, since Treasury does not have access to the same information DOJ does, and the list of these improper sites needs to come from DOJ rather than Treasury, and the regulations are to be provided by Treasury in consultation with the Department of Justice, whether you will agree with us that the Department of Justice should do everything it can to gather this information together and provide it to the Department of Treasury, not just once, but on some appropriate ongoing basis?

Attorney General GONZALES. Sir, what I can commit to you is we are going to do everything we can to make sure these regulations are strong and that we get them implemented as quickly as we can. That's what I can commit to you, sir. I know this is an important issue to you. It's an important issue to me, but we need to do it the right way and I think we can—I'm not saying we can't do this list. We're still looking at this. It's very, very hard.

Senator KYL. If I can just conclude, Mr. Chairman. Treasury is just about to issue the regulations. They need input from DOJ.

Attorney General GONZALES. They sure do. Yes, sir, I'm aware of that.

Senator KYL. It needs to occur quickly.

Attorney General GONZALES. Yes, sir.

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

Chairman LEAHY. Thank you, Senator Kyl.

Mr. Attorney General, late last week the White House spokesperson claimed that an unknown number of e-mails, including those of Karl Rove from both White House accounts, apparently those sent or received, using Republican National Committee accounts were lost. Mr. Rove's attorney, in the investigation that led to Scooter Libby's conviction for lying, suggested that U.S. Attorney Patrick Fitzgerald, as part of the Department of Justice, obtained all of Mr. Rove's e-mails as part of the investigation into the leak of the identity of a covert CIA operative.

If that is the case, those e-mails would be in your possession or in the possession of the Department of Justice. What do we have to do to obtain Mr. Rove's e-mails relevant to the development and implementation of the plan to replace U.S. Attorneys and the Committee's investigation into that matter?

Attorney General GONZALES. Senator, I was not aware that—I didn't see that article, wasn't aware that Mr. Fitzgerald had that information, or if, in fact, the Department still has that information, so I would have to go back and look to see what, in fact, the facts are.

Chairman LEAHY. If he does have the information, and it involves e-mails relevant to the development and implementation of the U.S. Attorneys' plan—

Attorney General GONZALES. Sir, I believe that those—well, I don't have the answer to that, Senator. I know that they're of interest to the Committee, and obviously, the Department wants to be cooperative with the Committee. There may be White House equities here that need to be considered, and so I don't have an answer—

Chairman LEAHY. We are not talking about e-mails from the President. In fact, the President does not use e-mail, as I understand, am I right?

Attorney General GONZALES. As far as I know, that's correct, sir. But the fact that they may have been communications over an RNC account doesn't mean that they're not Presidential records. If, in fact, it relates to Government business and they're transmitted over an RNC account, they could nonetheless be Presidential records, and so there would be a White House interest in those records.

Chairman LEAHY. These are the records supposedly that were lost though.

Attorney General GONZALES. Senator, I don't know the significance of these e-mails. What I'm saying is if, in fact, they exist—

Chairman LEAHY. Let me ask you this. The White House Counsel's Office is responsible for the establishment and oversight of these kind of internal rules, conduct. When you served as White House Counsel—you were there for 4 years—what was the policy and practice with regard to Karl Rove and other political operatives

at the White House using Republican National Committee e-mail accounts to conduct official Government business?

Attorney General GONZALES. Well, of course, Senator—

Chairman LEAHY. That would be a policy set by your office. What was the policy?

Attorney General GONZALES. Senator, there were a few people in the White House, as I recall, who used nongovernmental communications equipment. That was done actually, quite frankly, for legitimate reasons in terms of not wanting to violate the Hatch Act and using Government facilities for political activity that is permitted under the Hatch Act for certain individuals in the White House.

Chairman LEAHY. What was the policy? Could they conduct official business on those—

Attorney General GONZALES. I think the intent of the policy, as I recall, Senator, is that those e-mails were to be used primarily for nongovernmental purposes, but in fact, but if there was governmental transactions or communications communicated over these nongovernmental communications equipment, that there ought to be some kind of effort to preserve that communication if, in fact, these are Presidential records.

Chairman LEAHY. There ought to be or was there a policy that there had to be?

Attorney General GONZALES. I think the policy—I have to go back and look at it—was the policy was that it should be preserved, printed out or somehow forwarded to a Government computer.

Chairman LEAHY. Are we talking about two or three computers or a number of computers?

Attorney General GONZALES. Senator, I don't recall the number.

Chairman LEAHY. If the White House spokesperson says as many as 50 current White House officials had these separate RNC or other outside e-mail accounts to conduct official business, would that sound accurate?

Attorney General GONZALES. Sir, I would have no way of knowing.

Chairman LEAHY. As White House Counsel, did you conduct any audit or oversight of the use of nongovernmental e-mails by White House personnel?

Attorney General GONZALES. Senator, I don't recall there being an audit. We provided guidance, but I don't recall such an audit.

Chairman LEAHY. Is there anybody investigating this issue now?

Attorney General GONZALES. At the Department of Justice or at the White House?

Chairman LEAHY. Are you aware of anyone investigating this issue now?

Attorney General GONZALES. Senator, from what I understand in the papers is that I think the Counsel's Office is looking to see what happened here. I don't know if that's what you mean by an investigation. I think there is an effort, but I haven't spoken to the Counsel's Office about this issue as to whether or not they're doing an investigation to see what happened.

Chairman LEAHY. And you are not doing any investigation from the Department of Justice?

Attorney General GONZALES. Senator, I'm not aware that there is an investigation that's ongoing with respect to this issue.

Chairman LEAHY. In all likelihood, something like that would be brought to your attention, would it not?

Attorney General GONZALES. Well, Senator, I'm aware of it, so—you mean investigation? Senator, I don't know if such an issue would be brought to me. I expect the career folks to simply do their job and—

Chairman LEAHY. You have been Attorney General since 2005. Have you done anything to ensure that political operatives, Mr. Rove and others, or his deputies, not use the Republican National Committee e-mail accounts for official Government business?

Attorney General GONZALES. Senator, again, that would not be necessarily illegal or criminal. The obligation—

Chairman LEAHY. Have you taken any official position on it?

Attorney General GONZALES. As Attorney General, I don't believe—I don't recall taking such a position, sir.

Chairman LEAHY. What was Monica Goodling's role in the process of evaluating U.S. Attorneys and choosing U.S. Attorneys for termination?

Attorney General GONZALES. Senator, I don't know of everything that she did in connection with this issue. Her job at the Department was senior counselor. She was also the White House liaison. She worked on budget issues and special projects. She, in essence, supported Mr. Sampson. Since Mr. Sampson was coordinating this effort, my assumption is that she coordinated Mr. Sampson's efforts in connection with this review process.

Chairman LEAHY. I noted a reporter for Newsweek, Michael Isikoff, highly respected, wrote about your testimony, what it does not say. He observed you never say if you talked to Harriet Miers. An even more conspicuous omission is your failure to mention talks about the subject of U.S. Attorneys with Karl Rove, the President's chief political adviser. I had asked you to include in your written statement a full and complete account of the development of the plan to replace U.S. Attorneys. Have you told us all you can recall about your role, and the White House's role in the development of the plan to replace U.S. Attorneys?

Attorney General GONZALES. In terms of what I know, Senator, and not in terms of what I have since learned, it is already in the documents. I suspect the Committee, Members of this Committee, have a lot more information about what happened here. I'm here to supplement the record by telling you what I know.

Chairman LEAHY. You told us all you can about your role?

Attorney General GONZALES. Senator, I think the written statement reflects what I recall with respect to the development of the plan. There are some conversations that are not included that I've tried to try to inform the Committee about in response to certain questions today.

Chairman LEAHY. The President ever tell you specifically to fire a U.S. Attorney?

Attorney General GONZALES. I don't recall the President ever telling me specifically to fire a United States Attorney, sir.

Chairman LEAHY. Part of my problem is, we have had a number of statements about the dismissal of these eight U.S. Attorneys. I

just want to know which one is the accurate one, your January 18th testimony, or your March 7th op-ed in USA Today, or your March 13th press conference, or your March 26th interview with Pete Williams on MSNBC, or your written testimony that was submitted in advance today, or your live testimony here today? Which one is the one we should grab hold of and say, this is the accurate statement, this is the one we can go to the bank with?

Attorney General GONZALES. Senator, again, I've not done anything intentional, and I have made misstatements, and those misstatements, those are my mistakes, and I accept responsibility for it. If there were specific issues that you have questions about, I'm happy to try to answer your question.

Chairman LEAHY. It would be—well, my time is up. I do have a lot of specific questions, simply because those statements I mentioned, each one on this subject, each one varies.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Understandably, most of the questions today have been on the issue of the replacement of United States Attorneys, but there are many other issues of great concern coming within the purview of the Department of Justice on this oversight hearing. And I would like to turn to the massacre at Virginia Tech on Monday. The Congress has acted on campus safety. In 1990, legislation was enacted known as the Jeanne Clery Act after a young woman was brutally raped and murdered in Lehigh University in Pennsylvania. And that law requires campus authorities to notify in a timely way the campus community on crimes considered to be a threat to other students or employees.

Well, we do not have a crime which was reported as to Cho Seung-Hui, but there were a number of indicators, which I want to explore with you to see what might be done by way of amendments to the Act or other legislation.

In late 2005, two female students complained separately that they were stalked by Cho. He contacted them inappropriately, personally, online and by phone. Campus police obtained a court order requiring Cho to be evaluated at a psychiatric facility, and he was released after an overnight study finding him to be potentially suicidal.

Cho's work in an English class alarmed his professor, who said that Cho wrote exceedingly dark essays about death and murder. He was eventually removed from the class for his antisocial behavior, and another professor reportedly tutored Cho and had a signal with somebody in the room to mention the name of a specific individual if there was some threat.

The law obviously cannot reach every potential threat or identify them. But what I would ask you to do, Attorney General Gonzales, is to undertake a more detailed study as to what we know about Cho Seung-Hui and to see if there is any ambit that law enforcement could act on.

One thought comes to me. When two women reported that he stalked them, they could have been compelled to come forward. The State, the prosecutor, has the authority to subpoena witnesses. It is a crime against the Commonwealth, against the State, not just the individuals. So that might have been undertaken to give more

of a background for some action. But to the extent that we can find some way to deal with these signals, it would be very useful. The public ought to—we ought to be doing what we can to reassure the public that we will look at the facets of what has happened here.

The President had a town hall meeting after the Amish incident on October 10th of last year in Lancaster, Pennsylvania, where there was talk about a clearinghouse that could be set up by the National Association of Sheriffs. You were at that meeting, along with the Secretary of Education. Has anything been done on that, looking to identify this kind of aberrant, unusual behavior which might mark or give some insights into people who would be at risk? We talk often about at-risk youth, trying to give them mentors. Has anything been done on that report on the sheriffs' clearinghouse?

Attorney General GONZALES. Senator, with respect to the specific conference, one of the things that we focused primarily on as the Department of Justice was to ensure the development of stronger relationships between State and local police and the schools, but—

Senator SPECTER. Would you deal with my question before you go to some other subject?

Attorney General GONZALES. I'm not aware that there has been any effort, Senator. That doesn't mean that there hasn't been with respect to this issue of—

Senator SPECTER. Well, would you—

Attorney General GONZALES [continuing]. Signs or marks, but I would be happy to look at it.

Senator SPECTER. Would you check that out and get back to us?

Attorney General GONZALES. Yes, sir.

Senator SPECTER. There are a couple of other subjects I want to take up with you. The National Security Letters have been misused, flagrantly, by the FBI. We had a very rugged session with FBI Director Mueller where we found that in structuring the PATRIOT Act, we gave law enforcement additional powers, but we were very careful to put restraints on them. But those National Security Letters were misused. They were used under limited procedures for exigent—that is, emergency—circumstances, misused, supposed to have documents to follow-up.

What have you done, Mr. Attorney General, to act to see to it that those problems are corrected?

Attorney General GONZALES. Senator, I've spoken with the Director several times about this. I was very upset about this. I'm going to have—

Senator SPECTER. Spoken to him? Upset about it?

Attorney General GONZALES. Yes.

Senator SPECTER. What did you do specifically?

Attorney General GONZALES. I asked the National Security Division and our Privacy Officer to work with the FBI in trying to find out what happened here. And—

Senator SPECTER. Wait a minute. Wait a minute. We know what happened. They misused the letters.

Attorney General GONZALES. They did, so we're trying to—

Senator SPECTER. The question is: What corrective action have you taken?

Attorney General GONZALES. Senator, we are involved in the oversight and auditing of field offices, and moving forward, we are going to be doing field office sites, 15 a year, so that people—so we have a better idea of what is ongoing.

I think one of the things that Mr. Mueller—

Senator SPECTER. Attorney General Gonzales, I want to take up one more subject, and I have got very limited time. What I would like you to do on that subject is tell us what you as Attorney General have done. You have responsibility over the FBI, and we know what Director Mueller has done. And this Committee would be interested in knowing specifically what you have done in terms of your oversight to see to it that the FBI complies with the law.

Attorney General GONZALES. I would be happy to, Senator.

Senator SPECTER. Let me take one other subject up very briefly. You wrote to Senator Leahy and me on January 17th of this year concerning the Foreign Intelligence Surveillance Court and the Terrorist Surveillance Program, writing to us that "authorizing the Government to target for collection international communications in or out of the United States has now been given to the FISA Court, which would have to be preceded, where there is probable cause"—that is the regular proceeding. So that the President has discontinued the Terrorist Surveillance Program. Is that correct? That program has been discontinued?

Attorney General GONZALES. That is correct.

Senator SPECTER. In deference to sending all these cases before the Court?

Attorney General GONZALES. That is correct, sir.

Senator SPECTER. Okay. We do not have time to go into this in any detail, and it may be something that you cannot talk about in an open session. But I would like to know the specifics and details on what is done to provide probable cause to the FISA Court in light of the tremendous number of interceptions involved here. Interceptions from the U.S. going out are supposedly in a smaller number, but I would like the information on that. And, more specifically, on the quality of the factors required to establish probable cause on the communications coming from outside the United States in. And the final question on that subject for the moment is: In the light of the change in the approach, what is the need for the legislation which you have submitted last Friday, April 13th? If you would provide those responses in writing, we would appreciate it.

Attorney General GONZALES. Yes, sir.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter.

Senator Feinstein.

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

I want to take you back once again, Mr. Attorney General. I may be very slow—

Attorney General GONZALES. No, you are not, Senator.

Senator FEINSTEIN [continuing]. But I do not understand how this list was compiled. The list was essentially 10 percent of the entire Attorney General's staff. Kyle Sampson, your former Chief of Staff—I am going to talk about the senior so-called leadership of the Department—and the person you said you delegated this

task to, testified that he did not put people on the list. He said, "It wasn't like that. It wasn't that I wanted names on the list. I was the aggregator." That is page 184 of his transcript.

Mike Battle, Director of the Executive Office of the United States Attorneys, said, "I had no input. Nobody asked me for my input." That is the interview page 82.

Bill Mercer, Acting Associate Attorney General and No. 3 at DOJ, said, "I didn't understand there was a list. I didn't keep a list. It was just that any time I had a particular concern, I made that known to different people."

And you testified this morning that you did not know the reasons U.S. Attorneys were put on the list until after you decided to fire them.

I am very interested and I would like to send down to you the plan—it is three pages—that was distributed at the meeting on November 27th and ask you to take a look at it.

Attorney General GONZALES. Thank you, Senator. Let me respond to a couple of things that you said.

First of all, I haven't read the transcript for Mr. Battle and Mr. Mercer—

Senator FEINSTEIN. Well, it is pretty accurate, and I gave you the pages, so your staff can check it out.

Attorney General GONZALES. Thank you.

I don't know that I testified that I didn't know the reasons when I made the decision. I recall knowing reasons as to five, but I don't recall remembering the reasons as to two.

Senator FEINSTEIN. Okay. Let's go on. If you could look at this—and I think this is one of the—this is a small thing, but apparently this three-page plan was distributed at that meeting. Do you recall seeing it?

Attorney General GONZALES. Senator, I don't recall the meeting, and I don't recall seeing this document. But I have no reason to doubt that this was a document that—

Senator FEINSTEIN. Okay. Well, let me give you one point of—and this is a just a minor point of irritation. Senator calls. The Republican Senators get calls. For the Democratic Senators where U.S. Attorneys are being fired, the political lead gets the call, whatever that is. I think, you know, it's Senators that confirm. It's Senators that should have the knowledge, not necessarily the political lead.

And if you would go to step 3 on page 2, it is entitled, "Prepare to withstand political upheaval." And it goes on to say, "U.S. Attorneys desiring to save their jobs likely will make efforts to preserve themselves in office."

And then, "This is what people should say."

On the question of who decided, the talking point is, "The administration made the determination to seek the resignations, not any specific person at the White House or the Department of Justice." And to this time, we do not know who actually selected the people to be put on the list. I would like to know who selected the individuals that were on that list.

Attorney General GONZALES. Senator—

Senator FEINSTEIN. Somebody had to. A human being had to.

Attorney General GONZALES. Senator, I'm not going to characterize Mr. Sampson's testimony, but let me tell you what I understood and what I expected, was that Mr. Sampson would speak with the senior leadership in the Department, people that knew about the performance of United States Attorneys, and he would come to me with a recommendation, a consensus recommendation, including his views.

That is what I understood. That's what I understood was coming to me, because Mr. Sampson—

Senator FEINSTEIN. Well, Mr. Sampson testified he didn't. He was just the aggregator.

Attorney General GONZALES. No, and I'm not saying that—that is—if that's what he testified, I'm sure that's his perception of his role. What I'm testifying today is what I viewed Mr. Sampson's role was, was to get information but to present to me a recommendation that also included his own, and the reason that was important—not as important as others, like the Deputy Attorney General, but Mr. Sampson had been involved in Presidential personnel, in filling senior leadership positions at the Department of Justice, the top legal positions at other agencies. And so he had experience in making personnel decisions.

Senator FEINSTEIN. All right. I want to ask other questions. But perhaps you can understand that this has become a serious matter, and seven out of the eight were involved in public corruption prosecutions, and yet nobody knows who selected them for this unusual thing to this very moment.

Now, I would like to go on with something else. From documents and interviews, we know the following. The White House was involved in the removal of Bud Cummins. Karl Rove called you and asked about three districts: Milwaukee, Philadelphia, and Albuquerque.

Attorney General GONZALES. Senator, I don't recall whether he called or whether it was a visit. It may have been a call.

Senator FEINSTEIN. Omay. You got a call from the President about New Mexico in the fall of 2006.

Attorney General GONZALES. Senator, I think that was a conversation. I don't think it was a phone calls.

Senator FEINSTEIN. Conversation, thank you. And Harriet Miers discussed whether to remove Debra Yang from Los Angeles. Now, she resigned, so she was not part of this.

But given all these inquiries that we know about, how could you say just 3 weeks ago that the White House did not play a role in adding or taking off names?

Attorney General GONZALES. Well, Senator, the fact that there may have been a conversation with the President indicating a concern about election fraud and a particular issue, in my mind I never would have equated that with the process, this review process that was ongoing with respect to—that Mr. Sampson was coordinating.

Senator FEINSTEIN. Okay. Now let's continue this. This is why this is so strange. When Mr. McNulty came and briefed us in the Judiciary Room on the second floor, he mentioned the reasons were performance. And then we began to ask to see the EARS reports that Senator Kennedy referred to this morning, and I believe we

have all taken a look at them, and we see stellar professional performance reports. We pick up USA Today, and we see a ranking that they did, placed seven of them in the top ten U.S. Attorneys in the United States. And I have a very hard time with your telling me to this day you don't know who suggested that each of these seven people on that December 7th list, nobody knows how they got there.

Attorney General GONZALES. Well, Senator, first of all, I don't know—the USA ranking, I don't know where that comes from and what it's based on. But, Senator, you, the Committee, I'm assuming, I'm presuming, has interviewed the people involved in this process and can ask that question. I would like to know. I would like to ask that question. But out of respect for this investigation, I have not done so. The only thing that I can do today is to give you the information that I know, the truth as I recall it, and that is what I am trying to do here today, is to tell you that I received the recommendation—what I presumed was that—most importantly, what I cared about is did this reflect the recommendation of the Deputy Attorney General. That would be the most important thing.

Senator FEINSTEIN. But if I were you, I would want to know who selected this individual and what was their thinking. Why did they put that individual on this list? Everybody knew from the plan that it was going to be heavy going, that there were going to be problems. It would just seem to me that you would want to know these things.

Attorney General GONZALES. Senator, no question that—

Senator FEINSTEIN. Now, when you talk about sort of an amorphous senior leadership, people think of gray-haired, very wise men making these decisions. In fact, they are very young and sometimes very ideological people.

Attorney General GONZALES. Senator, what—

Senator FEINSTEIN. And wouldn't you want to know who is making the decision? Because when Mike Battle testified to the staff of what the response was when he called these U.S. Attorneys, it was a shock out of the blue. It was a shot to the gut. They had thought they did very well. They had not been told there were problems. And they were called and they were told, "You must leave."

Attorney General GONZALES. Senator, I've already testified that, clearly, as I look back on it now, the process would have been much more rigorous, and there would have been some discussion face to face with either myself or the Deputy Attorney General.

You mentioned something that reminds me that the discussion back and forth between you—involving you and Senator Schumer about Carol Lam. I want to make sure that I am clear about this. That is, I believe based on my review of the documents that Ms. Lam, knew that there were concerns or certainly there was an interest in her performance with respect to immigration prosecutions. I don't know whether or not Ms. Lam knew that the Department of Justice had those specific concerns or that if things didn't change that she might lose her job. I wanted to make sure that you understand that.

Senator FEINSTEIN. I understand this, but let me tell you, we all get concerns all the time. But if I were employed by Justice, I would be curious as to what my bosses think, not the flack that I may or may not be getting from other places, because the flack, to some extent, comes with the territory.

Attorney General GONZALES. Senator, I expected that my concerns about her immigration prosecution numbers and her gun prosecution numbers would be communicated to Ms. Lam. That is what I understood.

Senator FEINSTEIN. But 2 months before she was fired, in a letter to me, Will Moschella said everything was fine with her immigration numbers.

Attorney General GONZALES. Senator, I believe—

Senator FEINSTEIN. She has told us she was never contacted by the Department about immigration.

Attorney General GONZALES. Senator, I—

Senator FEINSTEIN. My time is up.

Attorney General GONZALES. Thank you.

Chairman LEAHY. Did you want to respond to that question?

Attorney General GONZALES. That's fine, sir.

Chairman LEAHY. I would certainly allow you to if you want to.

Attorney General GONZALES. Thank you, sir.

Chairman LEAHY. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. I think we all will agree, I think you have agreed, that this was poorly handled.

Attorney General GONZALES. Yes.

Senator HATCH. Contrast that with the years of service you have given, not only at the White House but at the Justice Department, and all of the really good things that you have been able to do. I mean, how many times do you have to be flagellated over that? Let me give you another illustration.

With regard to public prosecutions, do the named U.S. Attorneys always try those cases?

Attorney General GONZALES. No, sir.

Senator HATCH. Very seldom.

Attorney General GONZALES. In fact, in most cases they are tried by the career professionals, experienced—

Senator HATCH. Professional staff, right?

Attorney General GONZALES. That is correct, sir.

Senator HATCH. They are tried by professional staff. So if a U.S. Attorney leaves, that case continues on, right?

Attorney General GONZALES. The institution is built to withstand change in the leadership positions. That's the way it should be. It's always—

Senator HATCH. So am I right, if the U.S. Attorney leaves, that case continues and it is well handled?

Attorney General GONZALES. That is true.

Senator HATCH. And that is without interference by the Department of Justice. Is that correct?

Attorney General GONZALES. We have every expectation that the case will continue and move forward.

Senator HATCH. And there is no indication—well, let me say this as well. I think it is important to say this, that U.S. Attorneys serve, as everybody here has admitted, at the pleasure of the Presi-

dent. They don't serve at the pleasure of the U.S. Senate. They are confirmed by us, but they serve at the pleasure of the Senate. And you serve at the pleasure of the President, too.

Attorney General GONZALES. Yes, sir.

Senator HATCH. But you are confirmed by us. We have a role, but that is not—but our role is not that they serve at our pleasure. As I have said, I believe there are two legitimate issues in the U.S. Attorney controversy. First, were any of them removed for an improper reason? Second, did any administration officials knowingly mislead or lie to Congress or the public?

After 3 months of hearings, all kinds of interviews, and thousands upon thousands of pages of documents, the evidence shows that the answer to both of those questions is a resounding no.

Now, continuing past the point of answering those questions, it appears motivated more by partisan profit-taking than proper oversight. And because some have not been able to—they have not been able to prove either improper interference with an ongoing case or investigation or a knowing misleading of the Congress about how these U.S. Attorneys were removed, some now want to shift gears and ask why some of the U.S. Attorneys were not removed, as you saw this morning. Well, crossing this line is wrong and calls into question not decisions made about a few U.S. Attorneys in the past, but decisions made by many U.S. Attorneys in the present and future.

Now, as you said in your statement, you have recently met with U.S. Attorneys all over the country, about 70 of them, if I recall correctly.

Attorney General GONZALES. Over 70, yes, sir.

Senator HATCH. Over 70. How would this type of an approach impact them, you know, why they are not removed and their decisions, their cases, their work, to go down this road and raise suspicion, innuendo, and doubt about their service? That bothers me just a wee bit, too.

Attorney General GONZALES. Senator, the perception is something that I am very, very concerned about and something that I'm committed to try to address.

Senator HATCH. Well, in your op-ed column published last Sunday in the Washington Post and in your written statement today, you describe how you have asked the Office of Professional Responsibility separately to investigate this U.S. Attorney controversy. Now, many Americans might not be familiar with the Office of Professional Responsibility, OPR, in the Justice Department. If you would, please describe that office in general, and then focus on what you have asked the office to investigate and what you believe its work will contribute regarding this controversy.

Attorney General GONZALES. Senator, it is an office headed by a career professional. The role of the office is to ensure that the Department of Justice lawyers meet their professional obligations as lawyers, have met their ethical obligations in providing legal advice as lawyers. And that is the role of the office.

I thought it was important because of allegations of wrongdoing by lawyers at the Department for the Office of Professional Responsibility to look into this matter, because I wanted to reassure—

Senator HATCH. That is no small request, right?

Attorney General GONZALES. Well, Senator, I think it's a serious issue when you're asking the Office of Professional Responsibility to look at the conduct of a lawyer.

Senator HATCH. Once you ask them to do that, it is in their hands, not yours, right?

Attorney General GONZALES. It is certainly within their hands, and let me just add that I have recused myself—in order to avoid appearances of impropriety, I've recused myself from oversight of that investigation or the investigation of the Office of Inspector General in relation to this matter.

Senator HATCH. Well, I think we can all agree this was poorly handled.

Attorney General GONZALES. Yes, sir.

Senator HATCH. But you delegated this authority to others to handle who you had faith in, and trust. Is that a fair comment?

Attorney General GONZALES. Yes, sir.

Senator HATCH. But you have taken responsibility for—

Attorney General GONZALES. I accept full responsibility for this, Senator. I'm head of the Department. I made the decision to delegate this process. I assumed the process would be better, and it wasn't, and I accept responsibility for this.

At the end of the day, I know that I did not do anything improper, and based on what I know and have seen, I don't think anyone made any recommendations to me based on improper motives.

Senator HATCH. That is one reason why this morning I brought out how many—more than 100,000 people you supervise. You are constantly at Cabinet meetings or other meetings at the White House. Why, you are even called up here on a regular basis, although it has been infrequent, but nevertheless you have to go not just to the Senate, but the House. You have constant phone calls from us up here that you answer.

Attorney General GONZALES. Senator, there are a lot of responsibilities as Attorney General, but my job is also to be responsible for what happens at the Department, and I accept responsibility for what happened.

Senator HATCH. My point is that you are accepting responsibility, but you have a lot of other responsibilities that you have been carrying out effectively and well—

Attorney General GONZALES. I believe so.

Senator HATCH.—that I think cannot just be tossed aside like you are not doing the job down there, which is kind of the implication that comes out of this every once in a while. Let's all admit this was poorly handled. It could have been better handled. If you had more hands-on on this, maybe we would not be in this position today. On the other hand, with 100,000-plus employees, it is easy to see why something sometimes slips by, and this one certainly did.

If there was any evidence that you were interfering with an ongoing investigation or case or that you knowingly misled this Congress, that is another matter. But there is not, and I just want to point that out and say, you know, you have taken a lot of lumps here, but you have also handled yourself well, too, and I just want-

ed to make sure that there is a little more even-handedness about this.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Let me make sure I fully understand one of your answers. Were you suggesting that OPR, the Office of Professional Responsibility, operates outside political interference? Was that what you were saying?

Attorney General GONZALES. Senator, their job is to provide an evaluation about the professional performance of the attorneys within the Department of Justice.

Chairman LEAHY. Are they ever subjected to political—have you ever been aware of them being subjected to political influence?

Attorney General GONZALES. Senator, I'm not sure I can answer that. I think as a general matter, I'm not aware of that. I'm not sure I understand what you mean by "political influence."

Chairman LEAHY. Well, I am thinking about the times that OPR was asked to look into the question of warrantless wiretapping by NSA, something that eventually turned out that they should not have done, and they were told and given a political order, "Look no further."

Attorney General GONZALES. Senator, I don't know if I would characterize the political—I recommended that the Office of Professional Responsibility—I recommended to the President that the Office of Professional Responsibility be read into the program so they could conduct an evaluation of the performance of lawyers within the Department of Justice. And the decision was made by the President that that would not be the right thing to do, and that's what happened in that particular case.

Chairman LEAHY. So I just did not want to leave the impression that they operate unfettered by political influence, in that case a very, very serious matter involving this Nation, involving our laws, involving the FISA Court, they were interfered with.

Senator Cardin.

Attorney General GONZALES. Senator, could I just make one comment?

Chairman LEAHY. Sure. Of course.

Attorney General GONZALES. I think it is important for the American people to understand that the Office of Inspector General has been read into the program, and they are certainly looking into the role of the FBI in connection with this program.

Senator CARDIN. Thank you.

Mr. Attorney General, I want to make sure the record is clear about your knowledge of what Monica Goodling might be able to contribute, her input or what she knows on the process with the dismissal of the U.S. Attorneys. I just want to give you that opportunity to make sure our record is complete about your knowledge in that regard.

Attorney General GONZALES. Senator, I am not sure I have anything to add about Ms. Goodling's role. I don't have any specific recollection about what else she might have done.

Certainly after the fact, after the decision, I'm aware that she was involved with respect to preparation of testimony and things of that nature. But in connection of her involvement in the role of

this—well, let me just say this: There is within the documents, as I recall seeing them after the fact, obviously she's involved in communicating with the White House with respect to certain individuals, and she is involved in other kinds of communications. I don't want to minimize her role, but she would not be one of the persons I was relying primarily on with respect to a recommendation to me about this decision.

I relied primarily, what—I would be relying primarily on the recommendation of the Deputy Attorney General, who every one of these U.S. Attorneys reported to, and it was a former colleague. I would be interested in—it was my understanding, it was really my hope that Mr. Sampson would consult also with the Acting Associate Attorney General, also a sitting United States Attorney.

Senator CARDIN. I just want to make sure I got Monica Goodling, your recollection of whether there was anything more that should be in the record from your testimony in regards to her?

Attorney General GONZALES. Sir, I don't have any independent knowledge beyond what's reflected in the documents.

Senator CARDIN. I want to go to the issue of voter intimidation, voter fraud. In a couple of the districts voter fraud was an issue involved in the dismissal of the U.S. Attorneys. It has come up several times. You and I have talked about voter intimidation. I just tell you in my State of Maryland, in one precinct in Prince George's County, Maryland, there are more eligible voters who came out to vote and did not vote because the lines were so long that they just did not have the time to wait a couple hours to vote, than all the people in Maryland who may have cast a vote who were not eligible to vote. I mention that because there seems to be growing activities of voter intimidation to try and affect minority voters around the country. We saw that in half a dozen states by specific examples in the last election.

You have indicated that the lack of energy on voter fraud was involved in evaluation of a couple U.S. Attorneys. I did not see any evaluations at all about U.S. Attorneys being aggressive in dealing with voter intimidation. I am just wondering where the priority of the office will be.

Attorney General GONZALES. Senator, I think you've raised a very, very good point. First of all, with respect to voter fraud generally, as someone who grew up in a poor neighborhood, the one day we were equal to everyone else was on election day, and so I really appreciate how important the right to vote is. Voter fraud to me means you're stealing somebody's vote, and so I take this very, very seriously.

Having said that, in enforcing or prosecuting voter fraud we need to be careful that we don't discourage people or intimidate people from participating on election day, and I think it's important to send a strong signal that if you're going to do an investigation, be sensitive to the fact that you don't want to create, have a chilling effect, or create some kind of cloud and discourage people from participating. So that to me is very, very important.

We have guidance about that, doing those kind of investigations near an election because it's important to enforce the law, it's important to pursue voter fraud, but let's be sensitive about the effect it has on particularly minority participation.

Senator CARDIN. I agree with that. I just hope that you will take a look at the Obama bill that we have pending before this Committee.

All of the information I have seen, I agree with you on voter fraud. Voter fraud should be prosecuted. If someone tries to vote who should not be voting, absolutely they should be prosecuted. But the amount of voter fraud, from what has been seen in those areas where those studies have been done, is minuscule compared to those who are eligible to vote that have been, one reason or another, unable to cast their vote. There has been an increasing amount of activity, whether it be voting machines that do not work in minority areas, as happened in Maryland, or whether it is literature that is handed out that is blatantly wrong, intimidating voters that they may be arrested if they try to vote in minority communities, or giving the wrong election day or giving wrong information about political endorsements that are racially motivated. That, to me, has a very serious effect on minority participation in voting, and needs to be a priority.

I am somewhat concerned that as you are looking at the aggressiveness of the U.S. Attorney's Office to carry out a policy on making sure that everyone's vote is properly counted, that we have balance here in making sure that we give the Attorney General the tools that you need to counter voter intimidation, and that we work together to really make sure that every vote can count in this country, and we have not reached that yet, so we need to have that balance.

Senator CARDIN. Senator, you and I have spoken about this. I believe that you met with the head of the Civil Rights Division. This is something that's important to me personally, and so it's something I would be anxious to work with you about. I think there needs to be a balance.

Thank you. Mr. Chairman, I yield back the balance of my time.

Chairman LEAHY. Thank you. We told the Attorney General before Senator Cardin asked questions we were going to take a 10-minute break, and that is my mistake that we did not. We will stand in recess for 10 minutes.

[Recess 4:06 p.m. to 4:20 p.m.]

Chairman LEAHY. I would note that we have a statement from Senator Biden for the record, which I will put in the record.

Senator Whitehouse has asked for a question. I think Senator Schumer may have something further. Unless Senator Specter has something further—I will not. The Attorney General has had a long day here, and I would hope that we will soon wrap this up. I mention this also for the press and others so they will know where we are. And I have discussed it already with the Attorney General.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman. Mr. Chairman, with your permission may I give two documents to the witness?

Chairman LEAHY. Yes, and we will not start the clock until he has had a chance to see them.

Senator WHITEHOUSE. Great. Thank you. We will circulate them to anybody who is here.

Back to structure again, Attorney General Gonzales, I assume that we can agree with the proposition that in the enforcement of the laws, the Department of Justice should be independent.

Attorney General GONZALES. Yes, sir.

Senator WHITEHOUSE. Can we also agree that one of the institutions of Government that the Department of Justice needs to be independent from in the enforcement of the laws is the White House?

Attorney General GONZALES. No question about it, Senator. If you are talking about prosecuting someone in the White House, yes, we should be independent from them when making those kind of decisions.

Senator WHITEHOUSE. And indeed, over a long history, there have been concerns about influence from the White House to the Department of Justice and people, indeed, members of this Committee, have expressed concern about the White House-Justice connection over many years. Is that not also correct?

Attorney General GONZALES. I think that is a legitimate concern. I think that is very important. I think it's one of the reasons, for example, that Attorney General Ashcroft recused himself in connection with the Plame investigation.

Senator WHITEHOUSE. The documents that I have given you are two letters. One is from Attorney General Reno to Lloyd Cutler, the Special Counsel to the President, dated September 29, 1994. It lays out the policy for contacts between the White House and the Department of Justice in the Clinton administration. And to give credit where credit is due, it is my understanding that the distinguished Senator Hatch, who was then the Chairman of this Committee, had substantial interest in this and viewed it as a significant area of oversight, and I want to commend him for that.

What it does—the language is behind me—it says that with regard to initial contacts involving criminal or civil matters, they should only involve the White House Counsel or Deputy Counsel or the President or Vice President and the Attorney General or Deputy or Associate Attorney General, period.

The more recent memorandum, the other document that you have in front of you, is from April 15, 2002. It represents the policy of the Bush administration regarding White House-Department of Justice contacts, and there in the highlighted part on the front, it says that these contacts regarding pending criminal investigations and criminal cases should take place only between the Office of the Deputy Attorney General and the Office of the Counsel to the President.

And then if you flip back to the very last page, there is sort of an exemption paragraph that exempts further the President, the Vice President, the Counsel to the President, national security and homeland security officials, staff members of the Office of the Attorney General if so designated, and staff of the Office of the President, the Office of the Vice President, the Office of the Counsel to the President, the National Security Council, and the Office of Homeland Security.

So I asked my staff to take a look at what the difference was between those two, in effect, and if you could, this is, in effect, during the previous administration. This was the Clinton protocol, and

there were four people—the President, the Vice President, the Deputy White House Counsel, and the White House Counsel—who could participate in these kind of discussions about cases and matters and initiate them with the Department of Justice. And on the Department of Justice side, the only people who were qualified to engage in those discussions were the Attorney General, the Deputy Attorney General, and Associate Attorney General. So they had narrowed very carefully the field of people who could have these discussions, which I think is a very important safeguard, to narrow that portal, to police it. It is almost like there is an airlock there for those communications.

Now, here is the result that I asked my staff to put together if you count all the people who are eligible under the new program. That to me—your staff can check on exactly how accurately we have done it, but there are, I want to say—what were the numbers? It is 417 folks in the White House who were eligible to have these contacts and about 30-some in the Department of Justice.

Again, from a structural point of view, my question to you is: When over years this issue of White House to Department of Justice contacts has become so significant, when, you know, even on the Republican side of the Judiciary Committee there is intense concern about this over the years, and it has been narrowed down to a fine portal like this—you were the White House Counsel at the time—what possible interest in the administration of justice is there to kick the portal so wide open that this many people now can engage directly about criminal cases and matters as compared to before?

Attorney General GONZALES. Senator, I think you have raised a good point here, one that I was concerned about at the Counsel's Office, and I remain concerned as Attorney General, in terms of making sure that communications between the White House and the Department of Justice remain in the appropriate channels. I do recall being concerned about that as White House Counsel.

Senator WHITEHOUSE. Quite a pronounced change, isn't it?

Attorney General GONZALES. Well, it is a pronounced change. However, it is my understanding of the policy—and, again, this is DOJ policy that occurred April 15, 2002—was that communications with respect to individuals at the National Security Council would not be with respect to particular cases, but with respect—

Senator WHITEHOUSE. This is national security aside. This is not national security. This is criminal cases and civil cases, initial contacts between the White House and the Department of Justice.

Attorney General GONZALES. Senator, let me say this: I'm not aware that there are initial contacts between the White House and the Department of Justice as an initial matter with respect to specific criminal cases, or if there are—let me put it this way. I don't think there should be. I think it is very, very important—I agree with you. It is important to try to limit the communications about specific criminal cases between the Counsel's Office and the Department of Justice.

Senator WHITEHOUSE. But when I see the rules opened this much, it makes me wonder to what extent this safeguard is considered significant in this administration. And then we hear stories like we have heard of United States Attorney McKay reporting that

when he went to the White House to be interviewed, he was told by White House Counsel Harriet Miers that he had—and this is the word he used, in quotes—"mishandled" the voter fraud investigation in the recent election.

Now, I have met Harriet Miers. She strikes me as a very careful, intelligent, thoughtful lawyer. She would not throw around a word like "mishandled," I don't think, which implies a very significant degree of evaluation. And it seems to me that one of two things is true about that conversation. Either she had no idea what she was talking about and she misused that term, or she had some idea of what the evidence was in the voter fraud case in McKay's district that did not go forward. And what I would like to know is: Do you know which one it was? And if it was the latter, how on Earth did she get evidence regarding a Department of Justice case sufficient to form the professional opinion that the United States Attorney had mishandled that case?

Attorney General GONZALES. Senator, I am not familiar with the conversation that occurred between Mr. McKay and Ms. Miers. Like you, I am—

Senator WHITEHOUSE. Did you see the story on it, though?

Attorney General GONZALES. I'm aware of the reports, but sometimes—

Senator WHITEHOUSE. Didn't that send up a big red flag?

Attorney General GONZALES. Sometimes stories are wrong, and the fact that she also may have been aware of the reports, knowing that this was an issue in this district, that she may have inquired about, well, what happened here, is there something to worry about, without having any specific knowledge about the underlying facts of the case. But I don't know. I am just—

Senator WHITEHOUSE. Has there been any effort to run down what happened that caused a White House Counsel to reach an evaluative opinion about an ongoing prosecution, or even in a closed prosecution, I gather, just by way of safeguarding how information is traveling back and forth across this now wide open screen?

Attorney General GONZALES. Well, I think the safeguards you are referring to I think are very, very important. I'm not sure that there would have been a prosecution relating to—the absence of a prosecution—well, to answer your question, I'm not aware of any going back and looking at what happened here. Again, I don't know if what the reports are even stating are even accurate. But I, like you, am concerned about the level of contacts and ensuring that the communications between the White House and the Department of Justice occur at the appropriate—within the appropriate channels.

Senator WHITEHOUSE. Mr. Chairman, I know I am over my time, but if I could ask a couple quick questions about OPR and—

Chairman LEAHY. I think this is significant, and I am going to not take the other questions I was going to ask. I find the chart astounding. It goes beyond anything I have seen in 32 years here. Please go ahead and finish your questions.

Senator WHITEHOUSE. OPR and OIG are both investigating this matter.

Attorney General GONZALES. Yes, sir.

Senator WHITEHOUSE. OPR reports are ordinarily not public. OIG reports ordinarily are. Can we be assured that the result of the OPR/OIG investigation will, in fact, be made public?

Attorney General GONZALES. Senator, I think, as I indicated in response to an earlier question, that I am recused from the oversight of these two investigations, and so as a technical matter, I'm not sure that's going to be a decision for me to make, quite frankly. And Mr. McNulty, the Deputy Attorney General, has likewise recused himself, and so Paul—

Senator WHITEHOUSE. So who do we talk to?

Attorney General GONZALES. It is Paul Clement, the Solicitor General.

Senator WHITEHOUSE. All right. When you look at the record—you have asked us several times to look at the record of the Department, the record of public corruption prosecutions. Would you object to us asking the Office of Inspector General to look at the record of public corruption prosecutions and give us a confidential report, stripped of any sort of telltale information, so that we can actually test the proposition that you have invited us to look at?

Attorney General GONZALES. Senator, I don't know whether or not that is really—as a general matter as to whether or not lawyers have discharged their professional responsibilities, it is not a matter within the purview of the Office of Inspector General. But I believe it falls within the purview of the Office of Professional Responsibility, and I would be happy to go back again—I am not even sure I'm recused from making that decision. But I understand your request, and we will see—

Senator WHITEHOUSE. I think it is actually properly OIG. And my last point is that it was originally your choice to refer this matter to the Office of Professional Responsibility, correct?

Attorney General GONZALES. Yes, sir.

Senator WHITEHOUSE. Now, a suspicious mind would say, well, wait a minute, OPR never makes a report, and more than that, OPR is limited to evaluating the conduct of attorneys within the Department of Justice when they are acting as attorneys. It does not evaluate their administrative actions. It does not evaluate whether they have subjected themselves to political influence. And my question to you is: Who in this entire process that led to the termination of the U.S. Attorneys was at any point in this acting as a lawyer and not administratively?

Attorney General GONZALES. Well, you raise a good question, and I want to be careful about what I say here because my recollection may be a little fuzzy. But I believe that in talking with our Acting Chief of Staff, Chuck Rosenberg, I spoke with him about the possibility of doing some kind of joint investigation, and so I think the Office of Inspector General is going to be looking at many of the issues that you are concerned about.

I am told that the Office of Inspector General had on their own decided that they were going to do an investigation, and, therefore, I really can't claim and shouldn't claim credit.

Senator WHITEHOUSE. A good thing.

Attorney General GONZALES. Which is fine, but I guess the point I'm making is I believe that these issues in terms of jurisdiction and who is going to look at what has been resolved between those

two offices. And my understanding is they are going to pretty well cover the waterfront with respect to the decisions about these eight U.S. Attorneys, whether or not did anyone intentionally try to mislead Congress. And so I think these issues are being looked at by both these offices.

Senator WHITEHOUSE. And I guess my final question to you then is: In choosing OPR as the place that you wish to refer this investigation, did you take into account that OPR does not ordinarily make their findings public and that they are ordinarily limited to the conduct of lawyers in their conduct as lawyers, the things that might subject them to bar disciplinary activity and there is really no relation between anybody's conduct here that is being questioned and their conduct as lawyers? Typical misconduct—this is your thing—Brady violations, Giglio violations, Federal Rule of Criminal Procedure 16 violations, improper conduct before a grand jury, improper coercion or intimidation of witnesses, improper use of peremptory strikes, improper questioning of witnesses, introducing of evidence, misrepresentations to court, improper opening and closing arguments, failure to diligently represent the interests of the Government, failing to comply with court orders, scheduling orders, Hyde amendment fees violations. None of that has anything to do with what we are questioning today, why OPR?

Attorney General GONZALES. Senator, I think that is a fair question, and I think that is the reason why I raised with our Acting Chief of Staff, is to have the Office of Inspector General also look at this. But, again, I can't claim and won't claim credit for asking OIG to look into this because my understanding is they were already thinking about doing that or they were already beginning to look at it.

I don't recall in making the decision about OPR thinking about, well, this is going to be a private report to me, because, again, on March 8th, when I met with the Chairman and others, I volunteered we would turn over documents voluntarily. I volunteered that we would make DOJ officials voluntarily. And so my actions have been consistent with the principle that we want to get to the truth here. That is very important to me.

Senator WHITEHOUSE. Well, I have long overextended my questioning, and I appreciate very much the courtesy of the Chairman and the Ranking Member and the Senator from New York in allowing me to do so.

Chairman LEAHY. Thank you.

I understand the Senator from New York needs a couple minutes.

Senator SCHUMER. That is all I need, yes.

Chairman LEAHY. Go ahead.

Senator SCHUMER. Thank you, Mr. Chairman.

Mr. Attorney General, at the beginning of the hearing, we laid out the burden of proof for you to meet, to answer questions directly and fully, to show that you were truly in charge of the Justice Department, and most of all, to convincingly explain who, when, and why the eight U.S. Attorneys were fired. You have answered "I don't know" or "I can't recall" to close to a hundred questions. You are not familiar with much of the workings of your own Department. And we still don't have convincing explanations of the

who, when, and why in regard to the firing of the majority of the eight U.S. Attorneys.

Thus, you have not met any of these three tests. I don't see any point in another round of questions. And I urge you to re-examine your performance and, for the good of the Department and the good of the country, step down.

Mr. Chairman, I yield. I yield my time.

Chairman LEAHY. Thank you.

Attorney General GONZALES. Mr. Chairman, may I respond?

Chairman LEAHY. Of course you may.

Attorney General GONZALES. Respectfully, Senator Schumer, I think all Cabinet officials should ask themselves every day what is best for the Department that you lead, and it is something that I ask myself every day. I agree with you that I have the burden of proof of providing to you the reasons why I made my decision.

But the burden of proof as to whether or not something improper happened here, respectfully, Senator, I think lies upon those making the allegations. And I have done everything I can to help you meet your burden of proof in terms of coming up here and testifying and making other DOJ officials available and providing documentation.

But I think in terms of whether or not something improper has happened here, respectfully, Senator, I think that burden lies upon you and others who are alleging that something improper happened here.

Senator SCHUMER. Mr. Chairman? That would be true if this were a criminal trial, sir. Our standard for Attorney General isn't simply no criminal standard. It is a much higher standard than that. And when you answer so many questions "I don't know," "I can't recall," when major details of important issues are not at your fingertips or even in your knowledge, and most of all, no, sir, when you fire U.S. Attorneys, the burden is on you to give a full, complete, and convincing explanation as to why. And people on both sides of the aisle failed to get that.

So, sir, in my view, no, no, no, when you fire people who have good evaluations, who have devoted themselves to this country, the burden of proof lays on the person who did the firing, who took responsibility for the firing.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Specter.

Senator SPECTER. Mr. Attorney General, we begin with the recognition of the long, arduous route you have taken with great difficulty and accomplishment, as I said at the start, Harvard Law and the State Supreme Court in Texas and White House Counsel and Attorney General of the United States. And I think you have been as forthcoming as you could be in your testimony today. But the issue of credibility, I think your credibility has been significantly impaired because of the panorama of responses you have made, where you denied being involved in "discussions," and then your three key assistants contradicted you on that, where you then shifted to not having been involved in deliberations, and I went over with you the long list. You did touch the issues as to U.S. Attorney Lam in San Diego and what would happen to U.S. Attorney

Iglesias in New Mexico and what would happen to U.S. Attorney Cummins in Arkansas. And then your denial of knowing about memoranda, and you were at meetings where documents, memoranda, were distributed. So I think inevitably there is a loss of credibility just necessarily.

You and I talked informally during the luncheon break, and you elaborated upon one of your answers where you said that when you were questioning U.S. Attorney Lam's record to stay, that it was different from what you had asked Chief of Staff Kyle—

Attorney General GONZALES. Sampson.

Senator SPECTER [continuing]. Sampson to investigate. And in my view, there is absolutely no difference. Those are the same thing. And that when you looked at Ms. Lam's performance, you were involved in the deliberation, the judgment as to what happened to her.

Now, that was difficult for me to understand how you could try to make that distinction, but I know you are doing that in good faith. But the net result is, I think, necessarily a loss of credibility, and I say that to you candidly and in a friendly way.

When you come to the issue of the request of all these U.S. Attorneys to resign, I agree with the conclusions that it doesn't do any good to ask any more questions because I think we have gone about as far as we can go with multiple rounds of questions today. And you have been a forceful witness, and you have had a lot of staying power. But we haven't gotten really answers, and I think it is going to take a detailed analysis.

I urged you to put on the record the details as to all the U.S. Attorneys you asked to resign so that we could evaluate them, and you have not done that. You have not done that. And I still think it would be useful if you did that as to your personal views.

But perhaps it will be the Inspector General or perhaps it will be the Office of Professional Responsibility, or maybe they are not the right ones to do it, where our investigation will go forward, and we have talked to a lot of people, questioned a lot of people under oath, and we will continue to do that to try to get the answer.

When it comes to the question as to impact on the Department, Mr. Attorney General, it seems to me inevitable that there has been a morale problem which some of the questions have disclosed. There would be an implicit message, if not an explicit message, even an unintended message, that U.S. Attorneys ought to be on guard for their independence. I handled the prosecutor's job and know the importance of not being concerned about any collateral influence beyond the law and the facts. And I think that has to have had an impact on the Department.

For you to have said it is an "overblown personnel matter," I think that cannot be erased, and the clouds over a lot of these professionals cannot be erased. And the worry by those who have not been subjected to those clouds cannot be erased.

Now, I am not going to call for your resignation. I am not going to make a recommendation on that. I think there are two people that have to decide that question. You have to decide it in the first instance, and if you decided to stay on, then it is up to the President to decide. He has the appointing power. And I have signified the concerns that I have and the impact that I think it has on the

Department. But I think it is beyond the purview of Senators—I mean, Senators can do whatever they like, and I am not questioning anybody who wants to do it differently. But for myself, I want to leave it to you and the President.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

First off, I thank the Attorney General for being here. This has not been a day that I think he may have wanted. I also thank the Committee members, both Republicans and Democrats, who were here. I think most of the Senators took this very seriously and asked very serious questions.

You know, I cannot help but think—years ago we talked about our backgrounds. When I was in law school at Georgetown, I was invited with a handful of young law students who were working here for the summer, here in Washington, to meet with the then-Attorney General. I thought it would be a courtesy call, in and out. The Attorney General spent well over an hour with us—actually, considerably longer than that. We talked about the Department of Justice and how important an arm it is of the Government and how it is truly the one really independent arm of the Government. It is the Attorney General of the United States, not the Attorney General of the President, which is interesting, especially because of this particular Attorney General. He talked about the men and women who worked there, most of whom he had no idea what their political affiliations were; he just knew how professional they were.

I remember saying afterward to my wife—and I have thought about it since—how great it would be to work there or to be a prosecutor. I was blessed with the opportunity to become one for 8 years.

But I thought both when I was a prosecutor—and I know Senator Specter felt the same way—that the independence was the most important thing, and the independence of our Nation's to Federal prosecutors, it is no small matter.

When you appeared here, Mr. Attorney General, in January 2005 for your confirmation hearing, you said, "I feel a special obligation and an additional burden coming from the White House to reassure career people of the Department and to reassure the American people that I am not going to politicize the Department of Justice."

I am afraid that both from the testimony today and the evidence that we have uncovered during this investigation shows that politics have entered the Department of Justice to an unprecedented extent, and if left unchecked, it would become just a political arm of the White House. That is something I would oppose, whether it is a Democratic or Republican administration.

The Attorney General is not White House Counsel. Every President is entitled to and should have a White House Counsel. But the Attorney General is the Attorney General of the United States. If you put partisan politics, you have many people who have been appointed in a political fashion who I do not believe are confident. You have poor management. Then you add to such things as the widespread abuses of National Security Letters, and we know it goes even beyond what we have heard. You have the invasion of Americans' privacy in an unprecedented fashion. Never in this country have we had such an invasion of Americans' privacy. We

see the inaccuracies, gross inaccuracies, in the Department's FISA applications, Foreign Intelligence Surveillance Act applications.

So I say this saying we are going to have to continue and will continue. I must admit that this is a day that does not make me happy at all. I can think of very few things I have presided over or been a part of—and I have been in the majority and the minority half a dozen times. I cannot think of any time that I have been more concerned—more concerned for the system of criminal justice in this country.

So, with that, we stand adjourned.

[Whereupon, at 4:50 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to a question you posed to the Attorney General during his recent appearance before the Committee on April 19, 2007.

You asked how many days Mr. Mercer spends in Montana and pursues work as U.S. Attorney for the District of Montana. First, it is important to recognize that Mr. Mercer conducts his work as United States Attorney for the District of Montana both when he is in Montana and when he is outside the state. During his time as Acting Associate Attorney General, he has averaged four days a month in Montana, not including conferences or court appearances outside of Montana (e.g., he argued in a hearing in the Ninth Circuit Court of Appeals in Seattle in February in a Montana case).

Of course, this average does not include the substantial amount of daily work performed by Mr. Mercer in his capacity as U.S. Attorney for the District of Montana by phone, e-mail, video conference, and other forms of communication. Mr. Mercer continues to conduct the management and administrative work required of U.S. Attorneys by, among other things, participating in regular management-team meetings; screening and interviewing prospective Assistant U.S. Attorney (AUSA) candidates and other candidates for significant positions in the District of Montana; serving as a rating and/or reviewing official in some personnel-evaluation matters and as the deciding official on other personnel matters; reviewing print media reports of cases and activities of significance to the U.S. Attorney's Office (USAO); participating in an orientation session for newly-hired attorneys; reviewing all letters written by AUSAs declining to undertake prosecutions on matters referred by investigative agencies; reviewing tribal-liaison reports filed by Indian Country AUSAs; and updating and monitoring of the annual strategic plan goals for the USAO.

38236.001

The Honorable Patrick J. Leahy
Page Two

Mr. Mercer continues to provide oversight of cases and matters by, among other things, reviewing Anti-Terrorism Advisory Council and Joint Terrorism Task Force activities; reviewing all indictments before they are presented to the grand jury; reviewing civil and criminal cases to ensure that he does not have any conflicts of interest with the cases and matters handled by personnel in the USAO; providing pre-approval of any settlement offer involving damages and/or fees in excess of $500,000; consulting with AUSAs on cases in the District of Montana; ensuring compliance with Department and USAO policies; conferring with the First Assistant U.S. Attorney and Appellate Coordinator on appellate matters; determining whether to seek authorization from the Solicitor General to appeal certain adverse district court judgments; reviewing and signing all certifications required by 18 U.S.C. § 5032; reviewing and signing all ex parte requests under 26 U.S.C. § 6103; and participating in file reviews of AUSAs in the District of Montana and/or reviewing mandatory case entries in the electronic case management system.

We trust you will find this information responsive to your request. Please do not hesitate to contact this office if we may be of assistance with other matters concerning the Department.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

38236.002

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 6, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on April 19, 2007. The hearing concerned Department of Justice Oversight. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

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.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing April 19, 2007 (Part 1)

Leahy 1 **I am very concerned about the Department's lack of competence in issuing National Security Letters ("NSLs") to obtain sensitive information about ordinary Americans. Recently, the Justice Department's Inspector General reported on a pattern of unacceptable abuses of NSLs by the FBI, where time and time again the FBI did not follow the law, or even its own rules, in obtaining sensitive personal information about thousands of ordinary Americans and others. According to the Inspector General's report, one in every five of the NSL files reviewed contained violations of the law, and more than half of the NSLs reviewed did not even meet the FBI's own standards. Please state when you first became aware of the widespread abuses of NSLs at the FBI.**

ANSWER: Prior to the public release of the Inspector General's report on March 9, 2007, the Office of the Inspector General provided drafts of the report for classification and factual review. Upon learning of the findings contained in the draft report, the Attorney General was concerned, promptly ordered a detailed review of report's findings and recommendations, and directed senior Department officials, including officials at the FBI, to address the shortcomings identified by the Inspector General's report.

Leahy 2 **Please describe what, if any steps you undertook to address and stop these abuses.**

ANSWER: NSLs are, as the IG found, an "indispensable tool" in the Department of Justice's counterterrorism efforts. They are, however, a tool that must be used responsibly and in a manner consistent with applicable laws, regulations, and policies. To ensure that this vital tool is used appropriately, the Attorney General has ordered broad and significant efforts within the Department of Justice, including the FBI, to fully address the issues raised by the Inspector General's report.

First, the Attorney General has ordered the National Security Division (NSD) and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing all of the recommendations made by the Inspector General, and to report directly to him on a regular basis and advise whether any additional actions need to be taken. The Attorney General has also asked the Inspector General to report back to him in July on the FBI's implementation of the recommendations made in the IG's report.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00105 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.004

Second, the FBI Director ordered a one-time review of ten percent of all national security cases in the 56 FBI field offices and headquarters. The FBI is currently reviewing and assessing information from this review and will brief Congress on its findings. At the Attorney General's direction, the National Security Division has also begun conducting regular National Security Investigation reviews at FBI field offices, working in conjunction with the FBI. These regular reviews represent a substantial new level and type of oversight of national security investigations by career Justice Department lawyers with years of intelligence experience. This enhanced oversight capability will allow the NSD to more fully evaluate FBI national security investigations and help ensure their compliance with applicable legal requirements and guidelines.

Third, with respect to the use of so-called "exigent letters," the FBI has issued a Bureau-wide directive prohibiting the use of the type of letters described in the Inspector General's report. Following discussions between the Office of the Inspector General (OIG) and the FBI, the OIG and the FBI decided to conduct a joint investigation, led by the OIG, into the FBI's use of exigent letters. The joint review will examine whether there has been any violation of criminal law, administrative misconduct, or improper performance of official duties with regard to the use of these exigent letters. In addition, the Attorney General has asked an Associate Deputy Attorney General and the Justice Department's Office of Professional Responsibility to examine the role FBI attorneys played in the use of exigent letters.

Fourth, the Attorney General has directed the National Security Division to begin reviewing all violations that the FBI refers to the Intelligence Oversight Board (IOB) in order to identify recurring problems and to assess the FBI's response to such violations. This review will focus on whether the IOB referrals suggest that a change in policy, training, or oversight mechanisms is required. The Attorney General has instructed the NSD to report to him semiannually on such referrals and to inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues. The Department of Justice also consulted and obtained input from the Privacy and Civil Liberties Oversight Board.

Fifth, the FBI is already taking a number of steps to improve the accuracy of the reporting of NSL statistics to Congress. Last year, the FBI began developing a new NSL tracking database and plans to deploy the system to one field office for testing in July 2007. The system is expected to be deployed to all field offices by the end of CY 2007. FBI field offices are conducting hand counts of NSLs to compare against the information contained in the current database. The FBI has corrected deficiencies in its current database to reduce the potential for error, and is working to correct any known errors in the data.

Sixth, the Attorney General has asked the NSD to consult with the FBI as it reviews and makes any necessary revisions to existing FBI guidance regarding NSLs. The FBI has issued comprehensive guidance throughout the Bureau concerning the proper use of NSLs. This comprehensive guidance was been briefed prior to being finalized both to the Congress and to privacy and civil liberties groups. A number of their suggestions were incorporated into the guidance. The Attorney General has also instructed the Department's Executive

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00106 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.005

Office for United States Attorneys to review its existing training materials and guidance regarding terrorism investigations and prosecutions in order to ensure that NSLs are properly described in such materials. In addition, the FBI has initiated the development of a new training course on the use of NSLs. Once this course has been fully developed, the FBI will issue a directive mandating training for all Special Agents-in-Charge, Assistant Special Agents-in-Charge, Chief Division Counsel, and all appropriate FBI agents and analysts. While this course is being developed, the FBI's Office of General Counsel has instructed its National Security Law Branch attorneys that any time they are in a field office, no matter the reason for their visit, they must schedule mandatory NSL training.

Finally, the Attorney General and the Director of National Intelligence (DNI) jointly directed the Department of Justice's Privacy and Civil Liberties Office and the Office of the DNI to convene a working group to examine how NSL-derived information is used and retained by the FBI, and that working group has been convened and has begun its examination.

These steps, along with others that the Department of Justice is taking, demonstrate the Attorney General's commitment to ensure that National Security Letters are used responsibly as the Department, including the Bureau, continues its efforts to protect the Nation during the War on Terror.

Leahy 3 **One of the most disturbing findings in the Inspector General's Report was that the FBI improperly issued more than 700 so-called "exigent letters," seeking telephone and financial records on an emergency basis, which contained blatant factual misrepresentations. Is the Department still using these "exigent letters" in any form, and if so, what is the legal authority that the Department is relying upon to do so?**

ANSWER: As noted in the response to Question 2, above, the FBI has issued a Bureau-wide directive prohibiting the use of the type of letters described in the Inspector General's report.

Leahy 4 **The Senate Judiciary Committee has received numerous letters and briefings from the Justice Department falsely assuring us that the Department was following all appropriate legal authorities governing the use of NSLs. For example, in a November 2005 letter to then-Chairman Specter, Assistant Attorney General William Moschella asserted emphatically and repeatedly that the FBI was not abusing the process for seeking NSLs. Please explain why the Department has repeatedly misled this Committee about its use of National Security Letters.**

ANSWER: The Department has always tried to provide this Committee with accurate information regarding the use of NSLs. As you know, the Department's November 2005 letter emphasized the oversight mechanisms in place with respect to the FBI's use of NSLs, as well as the statutory, guideline, and policy restrictions on the FBI's use of NSLs. The IG's report found that these oversight mechanisms did not always work and the limitations in

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00107 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.006

place were not always followed. In addition, the IG's report found that there were errors with the reporting of NSL statistics to Congress. When the Department, including the FBI, learned of these issues, we took immediate and substantive action to address the concerns raised by the report. We look forward to fully briefing Congress and this Committee on the implementation of these remedial measures.

Leahy 5 **When he testified before the Committee on March 21, 2007, Justice Department Inspector General Fine concluded that these NSL violations were "widespread" and a "serious misuse" of the FBI's authority under the PATRIOT Act. Mr. Fine also described the pattern of abuse with regards to NSLs as ""the product of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight." Do you agree with Inspector the General's conclusions?**

ANSWER: We agree with the IG's conclusion that the use of so-called exigent letters was improper, and that the FBI committed an unacceptable number of errors in the use of NSLs.

While NSLs have enhanced America's ability to detect and avert terrorist attacks, the Inspector General's report has identified problems concerning the use of NSLs that must be addressed. The Attorney General appreciates the Inspector General's important work identifying these shortcomings. Failure to properly use a critical authority such as NSLs can erode public support for vital antiterrorism measures. The Attorney General is dedicated to remedying these deficiencies and is committed to protecting Americans from terrorist attacks while protecting the liberties that define this nation. To this end, the Attorney General and the Director of the FBI have ordered that broad and significant corrective actions be taken to address the issues raised by the Inspector General's report. These corrective actions are detailed in response to Question 2, above.

Leahy 6 **The Inspector General's report also contains several recommendations to address the widespread abuse of NSLs at the FBI. See A Review of the FBI's Use of National Security Letters, March 2007, at pages 124-126. Do you agree with these recommendations and if so, will you direct the Director of the FBI to adopt and implement all of these recommendations?**

ANSWER: The Department of Justice agrees with the Inspector General's recommendations. As noted above in the response to Question 2, the Attorney General has ordered the NSD and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing *all* of the recommendations made by the Inspector General, and to report directly to him on a regular basis and advise whether any additional actions need to be taken. The Attorney General has also asked the Inspector General to report back to him in July on the FBI's implementation of the recommendations made in the IG's report.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00108 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.007

Leahy 7 **In your written testimony, you stated that the Department is beginning a new effort to "closely examine the use of National Security Letters and other national security authorities by the Federal Bureau of Investigation (FBI)". Please describe in detail the additional steps that you have taken to address the illegal and improper use of NSLs, so that these abuses do not occur again in the future.**

ANSWER: Please see the response to Question 2, above.

Leahy 8 **In the Patriot Act and its reauthorization last year, the FBI was given independent authority to issue NSLs without any oversight by a court, or anyone outside the FBI. Basically, the FBI wanted us to trust them, and them alone, to follow the law and their own rules in issuing NSLs. Unfortunately, as the Inspector General report makes clear, the FBI has breached that trust. What are your views about whether there should be an independent review of the FBI's authority to issue NSLs?**

ANSWER: At the outset, we note that National Security Letter authorities existed prior to the enactment of the USA PATRIOT Act and have never required court approval. There is a good reason for this, and for the change in the USA PATRIOT Act that enabled the FBI to issue National Security Letters upon a standard of relevance to certain authorized national security investigations; namely, that National Security Letters are vital building blocks during preliminary stages of national security investigations, and will not be as productive a tool if they cannot be used swiftly and effectively. We therefore urge the Congress not to take steps that would diminish the effectiveness of what the Inspector General described as an "indispensable tool" in our counterterrorism efforts, and instead to allow the corrective measures ordered by the Attorney General and the FBI Director be given a chance to work.

Leahy 9 **I am very concerned about the Department's lack of competence in conducting terrorism investigations under the Foreign Intelligence Surveillance Act ("FISA"). The Washington Post reported recently that an internal review at the FBI revealed numerous errors and inaccurate information in secret applications for wiretap and other warrants before the Foreign Intelligence Surveillance Court ("FISC"). In fact, it appears that these problems began as early as 2005, when the Chief Judge of the FISA Court wrote to you complaining of inaccuracies in the FBI's FISA applications.**
a) Given the concerns expressed by the Chief Judge of the FISC in 2005, why have you allowed this serious credibility problem with the Department's FISA applications to fester for two years?

ANSWER: We respectfully disagree with your statement that the issues raised by the Chief Judge of the FISC were not promptly addressed by the Justice Department. The inaccuracies the Chief Judge described were, in fact, brought to the FISC's attention by the Department's Office of Intelligence Policy and Review (OIPR) after OIPR attorneys and agents of the Federal Bureau of Investigation (FBI) discovered them. After receiving the Chief Judge's letter, OIPR and the FBI moved swiftly to implement additional requirements

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00109 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.008

and procedures to ensure the accuracy of applications submitted to the FISC. Those requirements and procedures are described in the response to Question 10, below.

It also bears noting that while we are concerned about any errors in FISA applications, the vast majority of the errors the Chief Judge described did not implicate facts material to the FISC's determinations of probable cause. It also is important to note that even those few applications that contained errors that implicated facts material to the probable cause determination, upon being notified of the error, the FISC did not order the termination of any electronic surveillance or physical search authorities, find any declarant in a FISA application to be less than credible, or otherwise sanction the Government as a result of the inaccuracies described in the 2005 letter.

Leahy 10 **What, if any, steps have you take to correct the problem with inaccurate FISA applications?**

ANSWER: The Department has long-standing procedures and practices designed to ensure the accuracy of FISA applications. In April 2001, the FBI adopted procedures for this purpose. In addition, for several years, OIPR and FBI attorneys have periodically traveled to FBI field offices and reviewed selected applications to ensure their accuracy.
During an accuracy review, the FBI field agent assigned to a FISA application is required to produce documented support for each factual allegation contained in the application, excluding standard language used to describe foreign powers and techniques. If a material inaccuracy is discovered, or if the agent is unable to produce such support for an allegation during or after the review, OIPR notifies the FISC and the FBI. Of course, such notice is also given if OIPR or the FBI discovers such an inaccurate or unsupportable statement in a FISA application in any context other than an accuracy review. Additionally, reports of each trip are prepared by experienced OIPR attorneys and disseminated to the FBI. The relevant lessons then are passed on to OIPR and FBI personnel through training sessions, which are updated based on the results of the reviews.

By early 2006, however, it became apparent that the procedures adopted in 2001 were not always being followed. The FBI undertook to develop and implement an in-house training program, to better specify exactly what was expected from all participants and to mandate the creation of sub-files containing the materials on which the agents rely to support the factual allegations in their FISA applications. This requirement helps field agents ensure that they have support for every factual allegation before an application is submitted to the FISC. We believe the efforts of OIPR and the FBI have resulted in a reduction of inaccuracies in FISA applications. OIPR and the FBI are committed to continuing these efforts and to submitting complete and accurate applications to the FISC.

Leahy 11 **Do you believe that it is necessary to require federal agents to appear before the FISC and swear under oath regarding the accuracy of these applications to ensure that the Department is providing truthful and accurate information to the Foreign Intelligence Surveillance Court?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00110 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.009

ANSWER: FISA requires an application to be "made by a Federal officer in writing upon oath or affirmation." 50 U.S.C. §§ 1804, 1823. Accordingly, FBI Supervisory Special Agents (SSAs) assigned to Headquarters swear, under penalty of perjury, that the allegations set forth in FISA applications are true. In many instances, the FISC also requires personal appearances by OIPR attorneys and FBI SSAs. We do not believe that this system needs to be altered.

Leahy 12 **In January, the Department announced that the Bush Administration was terminating the Terrorist Surveillance Program ("TSP") and that the surveillance activities under this program would now be subject to review by the Foreign Intelligence Surveillance Court ("FISC"). In response to requests from me and many other Senators to review the FISC's order, the Department provided a copy of this classified order to the Senate Intelligence Committee. The Department allowed Senator Specter and me to review the order, but has not allowed other Judiciary Committee members to do so, and has not provided a copy of the order to the Committee. However, the FISA statute, 50 U.S.C. § 1871(a)(4), requires that the Department also report to the Judiciary Committee on any "significant legal interpretations of [FISA]" before the Court or "presented in applications or pleadings filed with" the Court. The law further requires that the Department provide "copies of all decisions or opinions" of the Court that "included significant construction or interpretation of the provisions" in FISA. Given that the FISA applications and FISC order(s) at issue involve new legal interpretations of FISA, why has the Department refused to provide the Judiciary Committee copies of the orders?**

ANSWER: The provision you reference, 50 U.S.C. § 1871, requires the Department to report semiannually, in a manner consistent with national security, specified information concerning its FISA applications with respect to the preceding 6-month period. These reports are to include "a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review" and "copies of all decisions (not including orders) or opinions" of these courts. The Department will issue its next semiannual report at the end of June, and that report will be consistent with these requirements.

We emphasize the extraordinary steps that the Department has taken to keep the Congress informed with respect to the January 10 Orders, which go beyond any reporting obligation in FISA. The Department has provided copies of these highly classified orders, the Government's applications, and exhibits attached to the applications (including supporting memoranda of law) to both Intelligence Committees. Additionally, the Department has briefed members of the Intelligence Committees on the new orders, consistent with their oversight authority relating to intelligence matters and the National Security Act. We have also briefed you and the Ranking Member of this Committee on this matter, and have made exceptionally sensitive documents, including the orders, applications, and supporting memoranda of law, available to you. We would be pleased to brief you again on these matters if you so desire.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00111 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.010

Leahy 13 **I have been concerned for some time about the Department's record on enforcing our Nation's civil rights laws. Recently, the Citizens Commission on Civil Rights released a report entitled "The Erosion of Rights: Declining Civil Rights Enforcement Under the Bush Administration," documenting how the Justice Department has mismanaged the Civil Rights Division by politicizing the hiring and firing of career level attorneys and making Section 5 Voting Rights Act case determinations on the basis of politics rather than law. As the Nation's chief law enforcement officer, are you concerned that the public's confidence in the Department of Justice to enforce our civil rights laws and to protect their civil liberties has been severely diminished?**

ANSWER: The Department's record of accomplishments during this Administration demonstrates our strong commitment to civil rights enforcement. The report referenced in your question ignores the Civil Rights Division's significant accomplishments over the past six years in numerous areas, such as prosecuting human trafficking offenders; convicting law enforcement officials for willful misconduct, such as excessive force; enforcing Section 203 of the Voting Rights Act; helping more than 3 million Americans with disabilities through Project Civic Access; ensuring constitutional policing by law enforcement agencies; and protecting the religious liberties of all Americans. Indeed, recent years have seen the Civil Rights Division launch several initiatives to protect the civil rights of Americans. Our many accomplishments demonstrate that the Civil Rights Division is fully committed to combating discrimination consistent with the Federal laws passed by Congress. Our extraordinary record of success in the courts demonstrates a record of fair and even-handed law enforcement through cases that are thoroughly grounded in the facts and the law.

The Division's many accomplishments are the result of the talent, hard work, and dedication of the Division's professional attorneys and staff. These records could not have been achieved without a high level of teamwork between career attorneys and political appointees. While the report alleges that political appointees are unwilling to draw on the expertise of career staff, quite the contrary is true. The Division's political appointees consistently rely on career attorneys for expertise in their respective areas of civil rights enforcement.

The policy of the Assistant Attorney General is to maintain open communication between the sections' career staff and the Office of the Assistant Attorney General. In contrast to the allegations in the report, he conducts regular meetings with all Section Chiefs and has met with trial attorneys to discuss their cases. Moreover, his Deputy Assistant Attorneys General communicate daily with career section management as well as conduct regular meetings with the sections they oversee.

We find it unfortunate that the report's mischaracterization of the Division's hiring procedures unfairly casts doubt on the demonstrated excellence of the outstanding attorneys whom the Division has been fortunate to hire. While the report claims that hiring decisions are made by political appointees with little or no input from career staff, this simply is not accurate. The Civil Rights Division hires attorneys through a collaborative approach that

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00112 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.011

includes both career employees and political appointees. The Assistant Attorney General places great weight on the recommendations of career section management in all personnel matters, including hiring decisions. The Division hires outstanding attorneys from an extremely wide variety of backgrounds. There is no political litmus test in making hiring decisions.

Leahy 14 **Recently, the New York Times had two front page stories about the scant evidence of voter fraud, despite efforts by the Justice Department to prioritize prosecutions of this crime. The first article was about the Election Assistance Commission's report and a previously unreleased draft report on voter fraud. Investigative reporters revealed that the draft report concluded that little voter fraud existed around the nation. One of the two election lawyers who were hired to draft the report was a Republican from Arkansas. He acknowledged in an email that the finding of little voter fraud would be unwelcome by the conservative members of the Republican Party, but he and his Democratic colleague were "unwilling to conform results for political expediency." Apparently, the politically appointed members of the Election Assistance Commission were, in fact, willing to conform the report results for political expediency because they actually altered the report to inflate the findings on voter fraud and to find specifically that registration drives by nongovernmental groups are a source of fraud when nothing in the original report supported that conclusion. The second New York Times story connects the alteration of the EAC's findings on voter fraud to the Justice Department's inability to demonstrate any organized efforts to skew federal elections. Despite the Department's intense focus on criminally charging individuals for "voter fraud," scant evidence of actual voter fraud had been found. Why has the Department prioritized the prosecution of voter fraud when there is scant evidence that this crime is being committed?**

ANSWER: As an initial matter, we do not agree that there is scant evidence of voter fraud in this country. In fact, during the past five years almost 100 persons have been convicted by the Department of various types of vote fraud offenses, including vote buying, ballot fraud, multiple voting, and registration fraud. Moreover, voter fraud tends to be an invisible crime; like bribery, its participants have a motive to conceal their illegal conduct, not to complain about it. Hence the frequency of voter fraud cannot be equated with the number of federal voter fraud convictions. In addition, most election fraud is directed at local elections, and, with a few exceptions, local election fraud is not reachable under current federal criminal statutes. Finally, the Department's experience in supervising the nationwide prosecution of voter fraud over the past three decades is that many types of voter fraud, such as vote buying and absentee ballot fraud, target the economically and socially disadvantaged, who are generally reluctant witnesses against those who corrupted or stole their votes.

Voter fraud is a form of public corruption and it is easy to understand why. Although these crimes have different short-term objectives (stealing an election, on the one hand, and using public office for private gain, on the other), both types of offenses strike at the heart of our representative form of government. Regardless of whether a public official accepts a bribe after being sworn into office or prior to his or her election, the result is the same: a

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00113 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.012

corrupt official serving in a position of public trust who is responsive to private interests rather than the public good. In short, voter fraud destroys honest elections, and, if successful, destroys honest government. Accordingly, the Department has made the investigation and prosecution of all public corruption offenses, including voter fraud, a law enforcement priority.

In 2002, then-Attorney General John Ashcroft established a Department-wide ballot integrity initiative to spearhead its enforcement responsibilities in two overlapping areas: the protection of individual voting rights and the protection of society's interest in the integrity of the election process by deterring and prosecuting voter fraud. The initiative recognizes that it does little good to protect a person's voting rights if that person's vote is subsequently diluted or eliminated by fraud.

Since the creation of the initiative almost five years ago, almost 100 persons have been convicted of voter fraud offenses throughout the country. As noted above, the number of convictions is not an accurate reflection of the frequency of these crimes, nor do conviction numbers measure how many instances of voter fraud have been deterred. However, they do reflect the Department's continuing efforts to protect the integrity of future elections by utilizing the tools that Congress has provided to prosecute those who have corrupted the election process.

Leahy 15 **What impact has the Department's focus and devotion of resources on prosecuting voter fraud had on the Department's other efforts to enforce the Nation's civil rights laws, including voting rights laws?**

ANSWER: The Department is committed to evenhandedly enforcing the laws that Congress has passed with respect to both ballot access and voter fraud.

Prosecuting voter fraud has not impinged on the Department's enforcement of the Nation's civil rights laws. The Department has long divided responsibility for voting matters between the Civil Rights and Criminal Divisions. The Civil Rights Division is responsible for enforcing the civil rights laws that pertain to voter access as well as the small percentage of voting-related offenses involving race or the denial of other secured rights. In contrast, the Criminal Division is responsible for supervising the prosecution of those federal election crimes that do not involve voting rights offenses, such as vote buying, ballot-box stuffing, and absentee ballot fraud. These are the vast majority of federal election crimes, and they are prosecuted by the Criminal Division and the Department's United States Attorneys Offices.

The Civil Rights Division has achieved many successes during this Administration. Some of the highlights of this Administration's record in civil rights enforcement are:

During the past 6 years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1975, when the minority language provisions were enacted. Specifically, we have successfully litigated almost 60

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00114 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.013

percent of all language minority cases in the history of the minority language provisions of the Voting Rights Act.

During the past six years, we have brought seven of the nine cases ever filed under Section 208 of the Voting Rights Act in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

In the past six fiscal years (FY 2001 - 2006), as compared to the previous six years (FY 1995 - FY 2000), the Criminal Section filed 25% more color of law cases, charged 15% more defendants, and obtained the convictions of 50% more defendants.

In Fiscal Year 2004, we brought ninety-six criminal civil rights prosecutions, a record for cases filed in a single year.

From FY 2001 through FY 2006, the Division has brought 39 cross-burning prosecutions, charging a total of 60 defendants. The Division obtained the convictions of 58 defendants during that same period.

From FY 2001 to FY 2006, the Department prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted in comparison to 1995-2000.

In recent years, the Division has teamed up with local prosecutors in an effort to prosecute historical Civil Rights era murders. On January 25, 2007, the federal district court in Jackson, Mississippi, unsealed an indictment charging James Seale, 71, with two counts of kidnapping resulting in death and one count of conspiracy in connection with the 1964 abductions and murders of 19-year-old African-Americans, Charles Moore and Henry Dee. Seale, a former member of the White Knights of the Ku Klux Klan, is charged with having acted in concert with fellow Klansmen to kidnap Moore and Dee, beat them, transport them across state lines, and murder them by attaching heavy weights to them and throwing them, still alive, into the Old Mississippi River. If the defendant is convicted, he will face a maximum sentence of life imprisonment on each count.

We also assisted a Mississippi district attorney's office in reopening the investigation into the 1955 murder of Emmett Till, a 14 year-old African-American teenager, who was kidnapped and killed in rural Mississippi. We reported the results of that investigation to the District Attorney for Greenville, Mississippi, for consideration of whether to pursue state charges. A state grand jury in Mississippi declined to indict the case.

Also, in 2003, the Justice Department convicted Ernest Avants for the 1966 killing of Ben Chester White, an African-American sharecropper, on national forest land. White was murdered as part of a plot by white supremacists to lure Martin Luther King, Jr., to Mississippi so that they could assassinate him.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00115 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.014

Since the January 2001 announcement of the President's New Freedom Initiative, the Division's Disability Rights Section has secured positive results for people with disabilities in over 2,000 actions under the Americans with Disabilities Act of 1990 (ADA), including lawsuits, settlement agreements, and successful mediations.

During the past 6 years, we have obtained more than 80% of the agreements reached under Project Civic Access since it began in 1999, improving the lives of more than 3 million Americans with disabilities.

We have worked to ensure the integrity of law enforcement by more than tripling the number of settlements negotiated with police departments across the country since 2001. From 2001 to 2006, we successfully resolved fourteen pattern or practice police misconduct investigations involving eleven law enforcement agencies, compared to only four investigations resolved by settlement during a comparable time period of the previous administration.

From 2001 to 2006, the Division filed more consent decrees (4 vs. 3) with police departments under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 than in the preceding relevant time period. We have also issued more than six times the numbers of technical assistance letters to police departments (19 vs. 3).

In 2002, we established a Special Counsel for Religious Discrimination to coordinate the protection of religious liberties. We have won virtually every religious discrimination case in which we have been involved and have increased the enforcement of religious liberties in all areas of our jurisdiction. For example, we reviewed 82 cases of alleged religious discrimination in education from FY 2001 to FY 2006, resulting in 40 investigations. This is compared to one review and one investigation in the prior six-year period.

Under our post 9/11 backlash initiative, the Department has investigated over 750 incidents since 9/11 involving violence, threats, vandalism, and arson against Arab Americans, Muslims, Sikhs, South-Asian Americans, and other individuals perceived to be of Middle Eastern origin. We have obtained 32 federal convictions in such cases. We have also assisted local law enforcement in bringing more than 160 such criminal prosecutions.

During this Administration, we have used the Division's housing testing program in new ways. The program is conducted primarily through paired tests, an event in which two individuals – one acting as a "control group" (e.g., white male) and the other as a "test group" (e.g., black male) – pose as prospective buyers or renters of real estate for the purpose of determining whether a housing provider is complying with the fair housing laws. We have tested for the first time to detect discrimination against guide-dog users. We filed and settled the first case developed by the testing program that alleged that a retirement community discriminated against wheelchair users. In addition, we have tested for the first time to detect discrimination against certain minorities.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00116 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.015

During this Administration, we have filed forty cases alleging that multi-family housing was not designed and constructed in compliance with the Fair Housing Act's requirements for accessible housing. Our settlements in FY 2005 alone created more than 12,000 new accessible housing opportunities.

Leahy 16 **The New York Times article on voter fraud several weeks ago highlighted a change of Justice Department criminal policy that has occurred since President Bush took office. Craig Donsanto, head of the elections crime branch of the Public Integrity Section, noted in the New York Times article that "[p]reviously, charges were generally brought just against conspiracies to corrupt the election process, not against individual offenders." Mr. Donsanto notes however that you, as Attorney General, "authorized prosecutors to pursue criminal charges against individuals" with regard to elections. The handbook for attorneys on the federal crime of election fraud authored by Mr. Donsanto notes that "as a general rule, the federal crime of voter fraud embraces only organized efforts to corrupt the election process itself . . . [t]his definition also excludes isolated acts of individual wrongdoing that are not part of an organized effort to corrupt the voting process. If such isolated acts of fraud are to be subjected to criminal penalties, that is a task for the states not the federal government to do. Indeed, there is a still-unresolved constitutional issue that dates back to the 19th century concerning whether the federal courts have authority to hear criminal cases involving isolated incidents of electoral fraud." The Times article goes on to note how judges have criticized this new approach. Why was this change in the Departments' procedures implemented? Has the Justice Department's handbook for attorneys been updated and how were the many constitutional and federalism concerns resolved in support of your apparent change of policy in prosecuting voter fraud?**

ANSWER: The Department determined that protecting the integrity of the electoral process should include attempts to prosecute isolated-instances of voter fraud, in part to deter individual acts of election fraud in future elections and also to learn, if possible, the impact of such conduct on the election process. The cases we have brought are not by any means indicative of the dimensions of this kind of crime. There are two main reasons for this. First, unlike traditional crimes such as robbery and burglary, voter fraud generally does not produce an easily ascertainable "victim" who has motive to complain to authorities. For example, voters who are paid to vote are unlikely to report this fact, and, if questioned, are generally reluctant to admit it. Second, even when there are ascertainable victims -- such as persons whose votes are stolen either through outright intimidation or more subtle forms of aggressive "assistance" – these individuals are often unaware of the fraud or reluctant to report the person responsible.

A single instance of voter fraud dilutes the effect of a ballot that has been honestly cast. Many such instances can subvert the entire election and destroy representative government by those elected by the fraud. The Department therefore continues to believe that vote fraud offenses are serious crimes against both individuals and society. As for the prosecutions we have brought, most have resulted in convictions, and we have learned valuable lessons from those that did not.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00117 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.016

The Department recently has published an update to its 1995 election crime manual: Federal Prosecution of Election Offenses (Seventh Edition) May 2007, available at http://www.usdoj.gov/criminal/pin/.

Leahy 17 **The article also notes that the Interim United States Attorney for the Western District of Missouri, Brad Schlozman, filed indictments against a few people hired to register new voters just days before the national election last year. This is surprising since the Justice Department handbook on election fraud notes that "in election matters lacking Voting Rights Act overtones, and except where as is absolutely necessary to preserve evidence or to round out a seemingly valid complaint . . . no overt federal investigation should be conducted in election fraud matters before the outcome of the election at issue has been certified by appropriate state authorities." Mr. Schlozman claims that the Justice Department agreed to the filing of these indictments. Has this "non-interference" doctrine also been overruled by the Justice Department? On what basis?**

ANSWER: The Department's noninterference policy to which you refer has not been overruled. For the most part, the policy addresses the timing of investigations of alleged voter fraud -- not the timing of charges that have already been investigated. The policy discourages overt criminal investigation, such as interviewing individual voters, during the period immediately prior to an election or on election day. This investigative restraint is designed to avoid action that has the potential to chill lawful voting activity, interfere with the administration of the election process, or interject the fact of a criminal investigation as a campaign issue.

As noted above, the Department has published a new election crimes manual, Federal Prosecution of Election Offenses (May 2007), which provides guidance to Department attorneys regarding election crime matters. This guidance provides that federal law enforcement personnel should carefully evaluate whether an investigative step under consideration has the potential to affect the election itself. The manual counsels that "overt criminal investigative measures should not ordinarily be taken in matters involving alleged fraud in the manner in which votes were cast or counted until the election in question has been concluded . . . .", p. 92 (emphasis added). However, the policy does not "apply to investigations or prosecutions of federal crimes other than those that focus on the manner in which votes were cast or counted," because concerns about interference with the administration of the election or voting activity are not present. Id.

The Department's handling of the registration fraud prosecutions in the Western District of Missouri was consistent with the guidance set forth in the manual. The cases involved bogus voter registrations that were turned in to a voter registration group called ACORN by individuals who had been hired by ACORN to register voters. The defendants were paid on a per-registration basis by ACORN and their motive in submitting the fake registrations was to obtain enhanced piecework fees for each fake registration generated. ACORN was the main victim, and it was ACORN that brought these offenses to our

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00118 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.017

attention. The alleged fraud involved registering to vote, not voting or counting ballots. Moreover, there were no voters to be interviewed, as the registration forms that underlay the charges were fakes. Thus the bringing of these cases did not implicate the core concerns of the consultation requirement.

Leahy 19 **Recently, I joined Senator Dodd in reintroducing the Emmett Till Unsolved Civil Rights Crime Act. This bill creates permanent unsolved civil rights crimes units within the FBI and the Civil Rights Division of the Justice Department to investigate and prosecute these crimes. This bill will also give law enforcement the resources to ensure that justice is served. Would you support the Emmett Till bill? Do you believe this bill gives the FBI the resources needed to thoroughly investigate unsolved civil rights murders?**

ANSWER: Last Congress, the Department submitted a views letter strongly supporting the important legislative goals of S. 2679, legislation substantially similar to that which was recently introduced. The Department believes that racially motivated murders from the civil rights era constitute some of the greatest blemishes upon our country's history. Earlier this year, the Attorney General and the FBI Director announced an initiative to investigate unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law. We will carefully review and consider the reintroduced version of the bill.

In June of 2006, the Criminal Section of DOJ's Civil Rights Division forwarded to Senator Specter a letter advising that DOJ and the FBI support the goals of S. 2679, but offered three recommendations to improve its effectiveness.

First, the bill should establish an "Unsolved Crimes Unit" within the Criminal Section. The Criminal Section and the FBI have successfully handled numerous civil rights era murder investigations, including that of the Reverend Dr. Martin Luther King, Jr. The Criminal Section has developed the expertise to address complex issues raised by these historical cases, and the separate, stand-alone "Unsolved Crimes Section" that would be created by subsection 4(a) would duplicate the work now performed by the Criminal Section and would risk draining some of the expertise and experience that currently resides in the Criminal Section. In our view, creating a discrete "Unsolved Crimes Unit" within the Criminal Section would be more efficient and more economical. Similarly, rather than creating a new FBI "Unsolved Civil Rights Crime Investigative Office" at FBIHQ, resources could be more efficiently used if the FBI were provided the flexibility to allocate Special Agent (SA) and intelligence analyst positions in the localities where these cases place a burden on investigative resources.

Second, the FBI and DOJ agree that S. 2679 should include a five-year sunset provision, at which time DOJ could report, and the Congress could consider, the status of this work. A finite number of "violations of criminal civil rights statutes . . . result[ing] in death" occurred before 1970, and the advanced age of potential defendants and witnesses should be considered when calculating the window of time available to address these matters. Under

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00119 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.018

these circumstances, the creation of a permanent unit to investigate these crimes may not be warranted. Five years would provide adequate time to evaluate the number of these potential crimes, coordinate with state law enforcement officials, conduct investigations, review the available evidence, and report to Congress on DOJ's ability to resolve these crimes.

Third, the FBI appreciates the authorization of funds in S. 2679. Full appropriation of these funds will be necessary to provide the FBI and DOJ with sufficient resources to accomplish the goals of S. 2679. Given the Federal government's limited jurisdiction in these cases, the FBI also believes the Attorney General or his designee should be authorized to use these funds to provide grants to state and local officials to assist in the state prosecutions of civil rights era murders, because these complex investigations and prosecutions are often prohibitively costly for the budgets of state and local law enforcement officials.

Leahy 20 **The Federal Rules of Criminal Procedure – in particular Federal Rule of Criminal Procedure 6(e) – forbid prosecutors, with few exceptions, from discussing ongoing criminal investigations. When he appeared before this Committee in March 2007, former New Mexico US Attorney David Iglesias testified under oath that he received two telephone calls right before the November 2006 elections from members of Congress, regarding an ongoing grand jury investigation into public corruption allegations against prominent Democrats in New Mexico. Mr. Iglesias also testified that when asked about that ongoing investigation, he refused to provide any information. Would you agree that if asked to reveal information about an ongoing grand jury investigation, a federal prosecutor must refuse to answer any questions, and to do otherwise would be to risk engaging in prosecutorial misconduct?**

ANSWER: In the absence of a court order, Rule 6(e) generally prohibits an "attorney for the government" from disclosing a "matter occurring before the grand jury" to an individual who is not assisting the attorney in the performance of his duty to enforce the federal criminal law. In determining whether the secrecy rule applies to a particular piece of information, the courts consider whether disclosure of the information would reveal something of substance about the grand jury's investigation, including the identity of witnesses, targets, or subjects, the substance of grand jury testimony, or the identity of physical or documentary evidence sought by or presented to the grand jury. The grand jury secrecy rule does not reach evidence gathered in a parallel investigation. Further, the rule does not bar the disclosure of internal Department of Justice deliberations on whether to seek an indictment except to the extent that those deliberations reveal what has actually transpired in the grand jury room. In re Sealed Case No. 99-3091, 192 F.3d 995, 1003-04 (D.C. Cir. 1999).

A knowing violation of Rule 6(e) is punishable as a contempt of court. Fed. R. Crim. P. 6(e)(7). Accordingly, by disclosing to an unauthorized person a matter covered by the grand jury secrecy rule, a prosecutor risks engaging in prosecutorial misconduct. See also United States Attorney's Manual Section 1-7.530 (prosecutors "shall not respond to questions about the existence of an ongoing investigation or comment on its nature or

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00120 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.019

progress" except in "unusual circumstances," such as where the matter has "already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare").

Leahy 22 **I am very concerned about the authority granted under the PATRIOT Act that gives the Department the ability to secretly obtain Americans' library records. During a recent hearing that the Committee held on National Security Letters, Connecticut librarian George Christian testified about his experience after the FBI issued NSLs seeking library records to four Connecticut librarians, and he testified that this kind of NSL in particular raises serious privacy and civil liberties concerns. Particularly troubling to me is the fact that the NSL involved in that case prohibited the librarians from even disclosing the fact that they had received the NSL or its contents pursuant to the so-called "gag order" under the PATRIOT Act. Did the Justice Department and FBI abuse their authority in this case?**

ANSWER: The report that NSLs were served on four Connecticut librarians is erroneous. The FBI served one NSL on the Executive Director of Library Connections, Inc., a non-profit cooperative that provides technological services, such as Internet access, to certain libraries. No library was served. Three directors of Library Connections, Inc., have apparently each described him or herself as an NSL recipient, but the case agent who served the NSL on one official had no contact with the other three. This one NSL was issued in connection with an international terrorism case to obtain subscriber information, billing information, and access logs of individuals related to the use of a specific IP address on a specific date and for a specific 45-minute of time. The NSL was as narrowly tailored to the threat being investigated as was feasible under the circumstances.

The non-disclosure requirement that was imposed on the recipient was a function of the statute as it existed at that time. Since then, the NSL statutes have been amended to require a case-by-case evaluation of whether non-disclosure is required. In the case of Library Connections, promptly after the law was changed, the FBI agreed that the NSL could be disclosed.

Leahy 23 **What are you doing to make sure that Americans' privacy rights and civil liberties will be protected when the government issues NSLs to libraries and educational institutions?**

ANSWER: The FBI's national security investigations are conducted pursuant to the Attorney General's 10/31/03 Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSI Guidelines). Those Guidelines were designed to ensure the privacy of Americans while permitting the FBI to use lawful investigative techniques to protect the United States from threats to the national security. All FBI investigative activities must be consistent with the U.S. Constitution and all applicable statutes, executive orders, and regulations.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00121 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.020

The NSI Guidelines authorize three levels of FBI investigative activity (threat assessments, preliminary investigations, and full investigations) and provide clear and concise predicates required for each level of investigative activity. Those specific predicates are articulated in classified portions of the NSI Guidelines because they relate to intelligence activities, sources, or methods.

NSLs are an important tool in FBI national security investigations and are accompanied by significant safeguards. The FBI's Office of the General Counsel has issued FBI-wide guidance to explain the standards, procedures, and forms for issuing NSLs. That guidance makes it clear that NSLs may be issued only when the information sought is relevant to a national security investigation and that NSLs may not be used in investigations that are unrelated to international terrorism or clandestine intelligence activities. Moreover, NSLs are only available to request narrow categories of records from a limited set of institutions, such as electronic communications records from electronic communications providers. An NSL must be approved by a senior FBI official; this person is always an SES official and is typically the Special Agent in Charge of a field office.

The FBI also reports improper activities, as appropriate, to the Intelligence Oversight Board (IOB) and has internal processes in place to review such activities and take necessary action. The Attorney General has recently ordered the National Security Division to review FBI referrals to the IOB in order to identify recurring problems and to assess the FBI's response to such violations. This review will focus on whether the IOB referrals suggest that a change in policy, training, or oversight mechanisms is required. The Attorney General has instructed the NSD to report to him semiannually on such referrals and to inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues.

Finally, the FBI is subject to oversight within the Justice Department, as well as Congressional oversight. For example, all of the FBI's terrorism and counterintelligence related cases are subject to in-progress review by the National Security Division and the Attorney General has recently ordered additional reviews to be conducted with respect to the use of national security authorities, including NSLs. The FBI is also subject to statutory reporting requirements and is in the process of improving its mechanism for tracking NSLs.

These mechanisms, as well as the actions that the Department of Justice, including the FBI, is taking with respect to the FBI's use of national security authorities as discussed in the response to Question 2, above, are designed to ensure that the privacy and civil liberties of Americans are protected.

Leahy 24 **Pursuant to a little noticed provision in the Violence Against Women Act reauthorization bill, the Department of Justice is currently developing new guidelines that would greatly expand the Government's ability to collect DNA samples – which reveal the most sensitive genetic information about an individual – from most individuals who are arrested or detained by federal authorities. Under this policy, the**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00122 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.021

Government will store this sensitive biological information in a federal data base known as the National DNA Index System. I am very concerned about the privacy implications of this new policy because, unlike fingerprinting -- which is commonly used as a means of identification -- DNA profiles reveal all kinds of sensitive biological information about a person, including the presence of physical diseases or mental disorders.
a) What privacy protections are in place under the Department's new guidelines to ensure that sensitive DNA data contained in the National DNA Index System will not be misused or improperly disclosed by the Justice Department?

ANSWER: While the Department of Justice is working to finalize the regulations relating to DNA sample collection for federal arrestees and detainees, there are already a number of protections in place and they are vigorously enforced. When arrestee and detainee DNA samples are collected, the resulting DNA profiles are placed in the National DNA Index System (NDIS) offender database. The offender and crime scene databases are populated by profiles from Federal, state, and local law enforcement agencies. The profiles within the database use only genetic markers that provide identification; no other genetic information, such as medical status, can be gleaned from these markers, and NDIS, which is in essence a pointer system, does not contain any names or personally identifying information. Instead, each profile is associated with a unique identifier that traces back to the laboratory that developed that particular profile and placed it in the database. Once a "hit" occurs and is confirmed, then the two laboratories involved will exchange information regarding the individual involved.

Although all states participate in NDIS, they do not have direct access to the national database. NDIS is searched once a week at the FBI and a hit report is generated. If an individual laboratory (generally the lab that contributed the forensic sample) desires to follow up on a particular hit, it contacts the laboratory that provided the offender information and a confirmation process begins. During that process, the laboratories follow written procedures to ensure the hit is related to the correct offender; these procedures include re-working a portion of the remaining sample and re-comparing results. Under procedures established by the NDIS Board, no names or other personally identifying information may be reported until the confirmation process is complete.

Federal law also provides privacy protections, including criminal penalties. Under 42 U.S.C. § 14132(b)(3), NDIS may only include DNA information that is:

> Maintained by Federal, State, and local criminal justice agencies (or the Secretary of Defense in accordance with section 1565 of Title 10) pursuant to rules that allow disclosure of stored DNA samples and DNA analyses only--
> (A) to criminal justice agencies for law enforcement identification purposes;
> (B) in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
> (C) for criminal defense purposes, to a defendant, who shall have access to samples and analyses performed in connection with the case in which such defendant is charged; or

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00123 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.022

(D) if personally identifiable information is removed, for a population statistics database, for identification research and protocol and development purposes, or for quality control purposes.

These protections are further bolstered by provisions that reiterate these protections and provide criminal penalties for individuals who knowingly disclose DNA information from the database to a person or agency not authorized to receive it. (*See*, for examplee.g., 42 U.S.C. §§ 14133(c), and 42 U.S.C. § 14135e(c).)

Leahy 25 **Another concern that I have about this policy is that it will just add to the already notorious backlog at the FBI's laboratory. According to press reports, the FBI acknowledges that this new policy will result in an increase of as many as one million additional DNA samples a year. Is the Bureau's laboratory equipped to handle this additional workload?**

ANSWER: The FBI's Federal Convicted Offender (FCO) Program is responsible for collecting and processing DNA samples collected from those convicted of Federal felonies for the purpose of retention and cataloging in the FBI's National DNA Database. The FCO Program supplies collection kits and receives samples from over 500 collection sites across the country. Since the program's inception in June 2001, over 225,000 samples have been received. The FCO Program currently receives 7,000 to 8,000 samples monthly. To date, the FCO Program has uploaded over 34,000 samples into the National DNA Database, which has resulted in over 600 hits. The volume of sample submissions to the FCO Program has increased dramatically since 2001.

While much of the DNA analysis process has been automated, a bottleneck continues to exist at the DNA data review stage, which is currently conducted manually. To alleviate this bottleneck, the FBI is evaluating data analysis software packages and expert systems to automate this part of the process. Once implemented, the resulting system would be able to assess 85% to 90% of the convicted offender data without manual intervention, reducing data analysis time per 80 samples from approximately 60 minutes to less than 15 minutes (a four-fold increase in efficiency).

Leahy 27 **In written questions following the January 18 oversight hearing, I asked whether you were considering an apology to Mr. Arar or any compensation for the ordeal he went through, as Canada has seen fit to do. You did not completely answer my question. Accordingly, I ask again: Is the Department or the Administration considering any form of apology or compensation for Mr. Arar?**

ANSWER: As you may know, in January 2004, Mr. Arar filed suit in the Eastern District of New York, in *Arar v. Ashcroft, et al.*, 0249-CV-04, asserting a complaint under the Torture Victim Protection Act and the Fifth Amendment of the United States Constitution. Mr. Arar named as defendants in the lawsuit the former Attorney General, the former Deputy

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00124 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.023

Attorney General, the Director of the Federal Bureau of Investigation, the Secretary of Homeland Security, the former Commissioner of the Immigration and Naturalization Service (INS), and other officials from the former INS. The lawsuit sought unspecified declaratory relief against the United States and compensatory and punitive damages from some of the defendants in their individual capacity. On February 16, 2006, the district court dismissed Mr. Arar's suit. Mr. Arar appealed the dismissal to the United States Court of Appeals for the Second Circuit. The appeal has been fully briefed but has not yet been argued. Pursuant to long-standing Department policy, we cannot offer further comments while Mr. Arar's case is pending in the courts.

Leahy 28 **You similarly failed to answer a question that I asked about steps taken to avoid repeating the mistakes made in this case by referring to the classified briefing. So I ask again, what steps has the Department of Justice taken to ensure that it will not participate in sending other people to places where they will be tortured in the future?**

ANSWER: In January 2004, the United States and Canada exchanged letters providing that, when a national of one country is subject to involuntary removal from the other country to a third country, the United States and Canada will so advise each other. I wish to emphasize, however, that at the present time, the Department of Justice's role in determining where to send individuals deemed inadmissible to the United States is in support of other agencies that have the direct responsibility for ensuring that removals comport with the relevant laws and treaties. This was not the case at the time of Mr. Arar's removal, when the Immigration and Naturalization Service (INS), which was responsible for determining whether Mr. Arar was inadmissible to the United States, and whether he could be removed to Syria in accordance with the Convention on Torture and applicable U.S. laws, was a part of the Department of Justice. The Homeland Security Act of 2002 transferred most of the functions of the INS, including its investigative and enforcement functions, to the Department of Homeland Security. Accordingly, the direct responsibility for developing and implementing policies and procedures to address potential torture concerns in the context of removal now falls to the Department of Homeland Security and not the Department of Justice.

Leahy 29 **Despite having been cleared of all terrorism allegations by Canada, Mr. Arar remains on a United States terror watch list. In fact, the Washington Post reported last month that our watch lists keep growing, with the Terrorist Identities Datamart Environment ("TIDE") – the master list from which other lists, like the No Fly list, are taken – now numbering about 435,000 people. Doesn't such a large and constantly growing list actually make it harder for the Department of Justice, the FBI, and others to use the information and identify actual terrorists?**

ANSWER: The FBI's counterterrorism watchlisting strategy is designed to enable law enforcement and screening personnel to effectively detect, disrupt, and/or assist national security components in tracking those suspected of involvement in terrorist networks. This effort begins with the FBI's watchlisting policy, which requires that the subjects of both

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00125 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.024

preliminary and full-field investigations be watchlisted. Part of this watchlisting obligation is the removal of those determined not to pose terrorism threats. This strategy empowers Federal, state, local, and tribal security and law enforcement officials who serve as "first preventors" in the global war on terrorism. Critical to success is the inclusion of all suspected and known terrorist subjects.

The circumstances in which a preliminary or full-field counterterrorism investigation may be initiated are dictated by the 10/31/03 NSI Guidelines. Because the subjects of these investigations are automatically nominated for inclusion on the watchlist, the value and accuracy of the watchlist depend on the FBI's compliance with these AG Guidelines in initiating counterterrorism investigations. Other United States agencies that submit watchlist nominations are similarly required to ensure their nominations are made pursuant to appropriate guidelines. The Terrorist Screening Center (TSC) reviews all watchlist nominations to ensure they are adequately supported and meet Terrorist Screening Database (TSDB) criteria. The TSC also works hard to ensure that individuals are promptly removed from the watchlist as soon as it receives information indicating removal is appropriate.

It continues to be imperative that TSDB nominations be properly supported and that entries be promptly removed when errors occur or other circumstances warrant deletion. It is accuracy, far more than volume, that defines the value of the TSDB, and the FBI is committed to ensuring that our policies and practices ensure the greatest possible accuracy.

Leahy 30 **The Washington Post article also noted the difficulties that people on the list, or with names similar to people on the list, have in getting off of government lists -- which restrict their travel and their lives. The Government Accountability Office issued a report last year setting out some of the failures throughout the government in allowing individuals effective redress if they are wrongly placed on these lists. In light of the Arar situation, Senator Specter and I asked the Government Accountability Office to update their review. What steps has the Department of Justice taken to allow individuals who may be wrongly on watch lists to challenge and correct those designations?**

ANSWER: In January 2005, the TSC established a formal watchlist redress process. That process allows agencies using TSDB data during a terrorism screening process (screening agencies) to refer individuals' complaints to the TSC when it appears those complaints are watchlist related. The goals of the redress process are to provide for timely and fair review of individuals' complaints and to identify and correct any data errors, including errors in the TSDB itself.

The TSC has worked closely with screening agencies to develop a redress procedure that receives, tracks, and researches watchlist-related complaints and corrects TSDB or other TSC data that is causing an individual unwarranted hardship or difficulty during the screening process. While the terrorist watchlist is an effective counterterrorism tool in large part because its contents are not revealed, and the redress process consequently does not inform individuals whether they are on the terrorist watchlist, the TSC's inability to provide

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00126 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.025

transparency to affected individuals means the burden is on the government to perform a critical, in-depth review of the information supporting a person's inclusion in the TSDB to ensure it meets the watchlisting criteria. If sufficient information does not exist to justify a person's inclusion in the TSDB or its subsets (such as the No Fly List), the person will be removed. An enhanced redress process for individuals on the No Fly List provides for an administrative appeal of any adverse redress decision, the ability to request any releasable information, and the complainant's ability to submit information for consideration during the appeal.

Those who are misidentified as watchlisted can experience varying levels of difficulty when they fly or attempt to cross national borders. When these misidentified persons file redress complaints, review and any corrective actions are accomplished by the screening agency.

As you noted, the Government Accountability Office (GAO) recently completed a comprehensive review of the ongoing interagency efforts to improve the experience of misidentified persons (GAO Report 06-1031), including efforts by DHS to annotate their record systems to distinguish those persons more quickly in the future. The GAO Report highlights the TSC's significant efforts to improve the redress process and to assist misidentified persons, including a procedure for maintaining records of encounters with misidentified persons and for reviewing records when new encounters occur so the TSC can rapidly identify and clear known misidentified persons during screening. Information regarding the watchlist redress process and how to file a complaint with a screening agency is available to the public on the TSC's website at www.fbi.gov. Other agencies that use TSDB data for screening, including the TSA, also provide redress information on their websites.

Finally, the Department's Office of the Inspector General is in the final stages of a follow-up audit of the TSC that is examining whether accurate and complete records are disseminated from the watchlist database in a timely fashion and whether TSC has developed procedures to minimize the impact of individuals incorrectly identified as watchlist suspects.

Leahy 31 **Earlier this month, the Seattle Post-Intelligencer reported that, since September 11, the number of criminal investigations conducted by the FBI has declined significantly, and white collar investigations in particular have dropped precipitously. Many cases that would have been pursued in the past are simply going unsolved. I have asked you and the FBI Director in the past about declining prosecutions of civil rights cases and public corruption cases, and last week's study shows that the problem is even broader than was previously known. While it is crucial that the FBI devote all necessary resources to protecting the country from terrorism, that effort should not be at the expense of protecting the country from crime. Americans count on the FBI to aggressively investigate crime, particularly those types of crime that cannot always be adequately addressed by the states, like corruption, fraud, civil rights offenses, and the most serious violent crime. The FBI's apparent retreat from fulfilling these core duties**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00127 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.026

comes at a time of rising violent crime rates in the country and dwindling public confidence in the Department's objective handling of corruption cases.
a) Are the Department of Justice and the FBI capable of handling the dual tasks of protecting the country from terrorism and aggressively enforcing the Nation's criminal laws at the same time?

ANSWER: 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 250 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 since 2001, 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 continued to combat drug-related crime by leveraging resources through the Organized Crime Drug Enforcement Task Force and High Intensity Drug Trafficking Area initiatives. In addition, 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), over 100 indictments, and the identification, location, and/or recovery of over 200 children. To address violent crime, the FBI has partnered with other state and local law enforcement agencies to create Violent Crime Task Forces throughout the U.S. The FBI also funds and operates Safe Trails Task Forces to address violent crime in Indian Country.

In addition to the above initiatives, the FBI has continuously worked to use technology, intelligence analysis, and enhanced response capability to leverage criminal program resources. In October 2005, the National Crime Information Center (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 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.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00128 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.027

In the past two years, the Department has created intelligence, investigative and prosecutorial entities to attack gang-related crime in the United States. Since 2005, the FBI's National Gang Intelligence Unit (NGIC) has worked to support law enforcement agencies through timely information sharing and analysis of federal, state and local law enforcement intelligence, focusing on the growth, migration, criminal activity, and association of gangs that pose a significant threat to communities throughout the United States. The FBI has also addressed violent street gang matters though its Violent Gang Safe Streets Task Force program, which leverages Federal, state, and local law enforcement resources to investigate violent gangs in urban and suburban communities.

In 2006, the Departments of Justice and Homeland Security established a multi-agency National Gang Targeting, Enforcement and Coordination Center (GangTECC) with participation from DOJ's Criminal Division, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Bureau of Prisons (BOP), the Drug Enforcement Administration (DEA), the Federal Bureau of Investigation (FBI), the U.S. Immigration and Customs Enforcement (ICE), and the U.S. Marshal's Service (USMS). Through collaborative efforts of the participating agencies, GangTECC serves as a catalyst in a unified, federal effort to disrupt and dismantle the most violent gangs in the United States as they implicate national security, border protection and public safety.

In 2006, the Department also created a new office within the Criminal Division, the Gang Squad, to target significant gang-related crime. The Gang Squad is a specialized group of federal prosecutors charged with developing and implementing strategies to attack the most significant regional, national and international gangs operating in the United States. The Gang Squad prosecutes select gang cases of national importance, but also helps formulate policy, assists and coordinates with United States Attorneys Offices on legal and multi-district cases, and works with numerous domestic and foreign law enforcement agencies to construct effective and coordinated prevention and enforcement strategies.

Leahy 32 **What steps is the Department taking to ensure that the FBI and the Department do not sacrifice crucial criminal investigations and prosecutions as a result of increased emphasis on terrorism?**

ANSWER: Please see the response to Question 31, above.

Leahy 33 **Congress has always been willing to support both of these core missions. We have up to now been given the impression that the Department and the FBI were getting sufficient resources to do these jobs effectively. What more does the Department need to live up to its responsibilities?**

ANSWER: The FBI has allocated its resources to ensure priorities are addressed in all its programs, including the criminal programs. We have established policies regarding resource allocation, we monitor resource use within each program to ensure that the most serious crime problems are addressed, and we ensure valid reasons exist for the diversion of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00129 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.028

resources from lower priority programs to higher priorities. The FBI remains committed to working alongside our Federal, state, and local law enforcement and intelligence partners to effectively and aggressively investigate violent crime and address national security threats. The FBI and DOJ will continue to work with OMB and the Congress to ensure that the President's budget request adequately addresses our needs in these critical programs.

Leahy 34 **The Department of Justice Inspector General found in another recent report that the FBI failed to accurately report eight of the ten terrorism statistics that it reviewed for this report – that is an 80% failure rate. Among other things, the FBI overstated the number of terrorism-related convictions for 2004, because it included cases where no terrorism link was actually found. This is no small matter. The Congress relies upon these statistics to conduct oversight and to make funding and operational decisions regarding the Bureau. What steps have you taken to address the problems with the reporting of terrorism statistics?**

ANSWER: The FBI has modified and substantially improved the systems and internal controls related to terrorism reporting. Following the attacks of 9/11/01, the FBI underwent a substantial reorganization and restructuring. Many of the apparent weaknesses in statistical reporting discussed in the OIG report entitled, "The Department of Justice's Internal Controls over Terrorism Reporting" occurred during, and were a result of, that reorganization and restructuring. The backbone of the FBI's statistical reporting system is the case management system, along with its supporting information technology systems. These systems were not originally designed to capture or report on the enhanced requirements developed as part of the FBI's post-9/11 reorganization and restructuring. The FBI recognized this challenge in 2002 and began a concentrated effort to build supporting systems that include additional internal controls to ensure that we accurately capture and report on the activities involved in our post-9/11 intelligence mission. The FBI has made significant progress in the development and implementation of these systems, which are being upgraded as part of the FBI's Sentinel project.

Also, since the time period examined by the OIG Report, the FBI has made significant strides in the development of a new central management information system known as the Comprehensive Operational Management Plan Advancing Specific Strategies (COMPASS). COMPASS accumulates statistical accomplishments from various stand-alone systems and presents the information in a unified format available to all senior managers both at FBIHQ and in FBI Field Offices. The bulk of the information captured in COMPASS is used internally to identify trends and evaluate progress against the FBI's defined strategic objectives. The FBI continues to make extensive efforts to redefine performance metrics that measure the FBI's achievements against strategic outcomes.

For a more detailed discussion of steps taken by the FBI and the Department to ensure accuracy in statistical reporting, please see the Department's comments to the OIG report, which appear therein.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00130 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.029

Leahy 35 **I am deeply concerned about the chilling effect that the recent firing of eight U.S. Attorneys will have throughout the nation. I worry that even a perception that decisions in specific corruption cases affected decisions whether or not to fire prosecutors could play into how future corruption cases are handled. In your written testimony, you state that public corruption prosecutions are a priority for the Department of Justice and an example of what the Department is doing right. Earlier this year, Senator Pryor and I introduced S. 118, the "Effective Corruption Prosecutions Act of 2007," and you said in answer to my written question that this bill "contains several provisions that would assist investigators and prosecutors" in combating corruption and that "[w]e welcome the opportunity to work with your Committee on anti-corruption legislation that would provide additional tools for investigators and fill gaps in existing corruption law." Will you support this legislation and commit to work with the Judiciary Committee to pass this meaningful anti-corruption legislation?**

ANSWER: The Department will review the proposal and work with Congress on anti-corruption legislation.

Leahy 36 **In connection with your appearance before this Committee on January 18, 2007, I asked your view on the propriety of FBI intelligence-gathering on witnesses in connection with hearings for Supreme Court nominees in the 1970's and 1980's. In written responses you provided to this Committee on April 5, 2007, you stated categorically that "political use of the FBI is never appropriate." (Tr. 2, 69). Do you also agree that it is never appropriate to use the Department of Justice for political purposes?**

ANSWER: The Department of Justice must investigate violations of the nation's laws and prosecute the perpetrators of those violations in a neutral and dispassionate manner. We agree that it would be improper to interfere with or influence a particular prosecution for partisan political gain.

Leahy 37 **If so, please explain your views on this issue and describe the dangers of using the Department for political purposes?**

ANSWER: The Department of Justice is the nation's principal law enforcement agency. As such it bears a special responsibility for vindicating the rule of law. The Department's mission statement thus concludes with the objective of "ensur[ing] fair and impartial administration of justice for all Americans." That essential goal means first and foremost that neither investigations of offenses nor prosecutions of offenders should be motivated by partisan affiliation or the prospect of political advantage.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00131 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.030

Politicizing the enforcement of the nation's laws would undermine them completely. The perception that some Americans are insulated from prosecution—while others are targeted for it—because of a partisan affiliation or political connection would engender cynical disregard for the law itself.

Of course, Americans obey the law even when they know that they will not be punished for violating it. But even voluntary compliance would be undermined by the politicization of law enforcement. Americans obey the law irrespective of punishment because they recognize the moral imperative of obeying the law and conforming to the societal values that it represents. If the law is seen to be a political tool rather than a neutral statement of democratic will, however, it loses the power to inspire compliance without punishment.

Leahy 38 **The Attorney General's Honors Program has been the Department of Justice's entry-level hiring program since the Eisenhower administration. Hiring for this prestigious and competitive program was done by career Department officials until 2002 when Attorney General Ashcroft placed the program under the control of the Deputy Attorney General and political officials. Hiring for the Department's Summer Law Intern program was also moved under the control of political officials. In the years since, press reports, anecdotal accounts, and an anonymous letter sent to me and to other members of Congress by career Department officials have all suggested that the hiring for the Honors Program and the internship program has become highly political. These accounts have suggested that applicants with Republican and conservative credentials have been preferentially interviewed and hired, and applicants from law schools known to be conservative have been favored. These complaints have been particularly frequent in the Department's Civil Rights Division, but have arisen elsewhere as well. The recent anonymous letter said that this past year, political officials eliminated from the interview list proposed by career employees many applicants with liberal or Democratic experience on their resumes.**
In the wake of these charges, the Department announced on April 27 that hiring for the Honors Program and the Summer Law Intern Program will be returned to career Department employees. Why was this policy changed?

ANSWER: In 1981, the Deputy Attorney General (DAG) was assigned the responsibility for the administration of the Attorney General's recruitment program for honor law graduates and judicial law clerks and for the employment of law students. (*See* Order No. 960-81, 46 FR 52340, October 27, 1981, which amended Parts 0 through 60, Title 28 of the Code of Federal Regulations to reflect a reorganization of the Department of Justice. This reorganization restructured the focus of authorities and responsibilities vested in the Deputy Attorney General and the Associate Attorney General.) Oversight of the Honors Program (HP) and the Summer Law Intern Program (SLIP) has remained unchanged over the past 26 years through six amendments to the responsibilities of the Deputy Attorney General (*See* 28 CFR §§ 0.15(b)(1)(i) and (2)). The Deputy Attorney General has, in turn, charged the Office of Attorney Recruitment and Management (OARM) with administrative responsibility for the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00132 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.031

programs. OARM is a career office that administers matters relating to career attorneys and law students within the Department.

Since 1953, adjustments to the mechanics of the hiring process have been routine. For example, immediately prior to 2002, the Department accepted paper applications that only allowed candidates to apply to two components. Interviews were conducted in 14 regional locations and required interviewers, and often candidates, to travel extensively. In 2002, pursuant to government-wide mandates and in response to competitive changes in the legal market, the Department instituted changes to the operating procedures of the HP/SLIP to make it e-Gov compliant and to make it accessible and responsive to the needs of the broadest possible pool of well-qualified candidates. Key changes included the conversion of applications to paperless e-submissions, a modification of the Honors Program interview process that eliminated financial burdens on candidates selected for interview, and a renewed emphasis on excellence that included a Department-level review of candidates selected for interview.

During the past five years, a staff member from either the Office of the Deputy Attorney General (ODAG) or the Office of Associate Attorney General (OASG) has been responsible for assembling an *ad hoc* working group to conduct the Department-level review of candidates. In addition to Honors qualifications, they consider the amount of money allocated to pay for candidates' travel to interviews and the hiring needs of the components in determining the number of candidates who can be interviewed.

In 2006, the Department-level review was subject to considerable delay and processing issues. Individuals conducting the review were from leadership staff with other responsibilities connected to other mission requirements. In December 2006, at the end of the interview cycle, in light of these delays and questions related to qualifications and review process, the ODAG hosted a meeting with OARM and component representatives to discuss a number of processing issues, including the reasons component candidates were removed from consideration. At the meeting, the components were informed that candidates were deselected for three reasons: 1) the applicants came from lower-ranked schools and/or had inferior grades; 2) applications demonstrated poor writing or grammar skills; or 3) applicants posted inappropriate material on the internet. At the conclusion of the meeting, ODAG asked the components to submit suggestions on how to improve the process to OARM by mid-January. In turn, OARM consolidated the comments, reviewed the suggestions, and provided recommendations to ODAG regarding their implementation. As a result of suggestions made during the meeting and in subsequent component recommendations, ODAG approved a number of recommended procedural changes, as reflected in an April 26, 2007, memorandum (attached).

The changes in the April 26, 2007, memorandum are designed to facilitate and expedite the review and other related processes. The new procedures further encourage quality review throughout the process and will increase understanding of the basis of the review at all levels.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00133 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.032

Leahy 39 **How is the Department implementing the announced plan to return hiring for these two programs to career employees?**

ANSWER: As reflected in the attached April 26, 2007, memorandum the 2007 Honors Program review will be directly administered by OARM with the ad hoc working group composed of representatives of the hiring components. Components will have increased opportunity to articulate any additional component-specific qualifications used in making interview selections, and will be provided with specific reasons for the proposed removal of any individual from their candidate pool. An appeals process will afford components the ability to request a second level review. Review of SLIP selections will be significantly reduced.

Leahy 40 **What steps are being taken to ensure that political influence is not exercised in the hiring process?**

ANSWER: The Honors Program attracts applicants from diverse backgrounds attending law schools throughout the nation. Historically, each year it hires about 140-150 entry-level attorneys from 70 to 80 law schools. In 2006, 75 law schools were represented in the incoming Honors Program class, most with 1 to 2 hires. Law schools represented by higher numbers of entry-level hires are: Harvard (16), George Washington University (10), Georgetown University (7), American University (5), New York University (4), Stanford University (4), University of Texas (3), Washington University in St. Louis (4), and Yale University (4). The modifications outlined in the responses to Questions 38 and 39 reflect additional steps to ensure the continued selection of highly qualified candidates from the broadest applicant pool on a fair and impartial basis.

Honors Program hires, like experienced hires made by the components, are subject to a full field FBI background investigation, a suitability adjudication by OARM and, when necessary for the position, a national security clearance by the Security and Emergency Preparedness Staff (SEPS).

Leahy 42 **Would you be willing to make career Department employees who are involved in the hiring process available on occasion to answer questions about how the process is proceeding?**

ANSWER: As with all Congressional requests, the Office of Legislative Affairs will work with you to provide an appropriate responder on behalf of the Department. Normally, career employees are not expected to testify, but do assist Department representatives in providing appropriate responses.

Leahy 70 **Are you aware of reports that Mr. Griffin was involved in an effort during the 2004 election to challenge voting by primarily African-American voters serving in the Armed Forces overseas?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00134 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.033

ANSWER: We are unaware of reports that Mr. Griffin was involved in an effort during the 2004 election to challenge voting by primarily African-American voters serving in the Armed Forces overseas.

It is important to note, however, that during this Administration the Civil Rights Division has continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Division has enforcement responsibility for the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), which ensures that overseas citizens and members of the military, and their household dependents, are able to request, receive, and cast a ballot for Federal offices in a timely manner for Federal elections.

As a result of our efforts, in Fiscal Year 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. In Calendar Year 2006, we filed successful UOCAVA suits in Alabama, Connecticut, and North Carolina and reached a voluntary legislative solution without the need for litigation in South Carolina. In Alabama and North Carolina, we obtained relief for military and overseas voters in the form of State legislation. In response to the lawsuit, the Alabama General Assembly enacted legislation that extends the period between the primary and run-off elections to six weeks and allows ballots cast by military and overseas voters to be counted if they are received within seven days after the election. In North Carolina, the legislation expanded the time between primary and run-off elections from 4 to 7 weeks and extended voters' opportunity to send and receive absentee ballots via facsimile to all categories of voters protected by UOCAVA. The South Carolina legislature passed legislation requiring an absentee instant runoff ballot, to be mailed simultaneously with primary ballots at least 45 days before the primary election, and extending provisions allowing electronic transmission of applications and absentee ballots to all UOCAVA covered voters. We also obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004; the Pennsylvania legislation extends the deadline for receiving absentee ballots from UOCAVA voters to seven days after an election All of these accomplishments prompted an award from the Department of Defense to the Deputy who supervised all of these cases. The Division also filed a second UOCAVA suit in 2004 and two UOCAVA suits in 2002. The Civil Rights Division will continue to make every effort to ensure that our citizens abroad and the brave men and women of our military are afforded a full opportunity to participate in Federal elections.

Specter 120 **A report submitted to Congress by DOJ's Inspector General on the FBI's use of National Security Letters (NSLs) reveals flagrant misuse of NSLs. The Report "found widespread and serious misuse of the FBI's national security letter authorities." It also "found that the FBI did not provide adequate guidance, adequate controls, or adequate training on the use of these sensitive authorities." And, it concluded "the FBI's oversight of the use of NSL authorities expanded by the Patriot Act was inconsistent and insufficient." Director Mueller testified about the actions that he is taking to remedy the FBI's misuse of NSLs. As Attorney General, you have responsibility over the FBI. What have you done to see that the FBI complies with the law and discontinues its flagrant abuse of NSLs?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00135 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.034

ANSWER: Please see the response to Question 2, above.

Specter 121 **In your letter dated January 17th, 2007 to Chairman Leahy and Ranking Member Specter, you explained that on January 10th, the FISA 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." You further said that in light of this order, "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." You also stated that the President had determined not to reauthorize the Terrorist Surveillance Program because the FISA Court orders will "allow the necessary speed and agility." What are the factors for establishing "probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization"?**

ANSWER: As you know, the Attorney General wrote a letter to you and Chairman Leahy on January 17, 2007, informing 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. The Attorney General also explained in his letter that, as a result of these orders, any electronic surveillance that was being conducted pursuant to the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court. Further details concerning these orders—including the information you seek in this question—cannot meaningfully be provided in this format without exposing highly classified operational details. However, we have briefed you and the Intelligence Committees on the operational details of these orders and also made exceptionally sensitive documents concerning these orders available to you. We would be pleased to answer this or any other questions you may have concerning the orders, to the extent our briefings to date have not fully addressed those questions.

Specter 122 **What are the factors required to establish probable cause on the communications coming from outside the United States into the United States?**

ANSWER: Please see the response to Question 121, above.

Specter 123 **Your January 17th letter referenced above suggest that the current framework (i.e., FISA together with the new FISA Courts orders) provides sufficient flexibility for the Administration to conduct foreign intelligence surveillance as needed.**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00136 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.035

ANSWER: We note that our January 17th letter discussed a need for "speed and agility" to protect the Nation from the threat posed by al Qaeda and associated terrorist organizations. For the reasons set forth in our answer to question 124, there remains a need to modernize FISA to reflect the new threats and technologies of the 21st century.

Specter 124 **Given this backdrop, why is there a need for the FISA Modernization bill that the Administration submitted to the Congress on Friday, April 13th, 2007?**

ANSWER: The existence of the FISA Court orders does not alter the Administration's position that FISA needs to be modernized to reflect the new threats and technologies of the 21st Century. The Administration's FISA Modernization proposal incorporates many provisions supported by members of Congress last year--including several proposals made in the bill you introduced last summer, S.2453. FISA still needs to be modernized to account for sweeping changes in telecommunications technology that have occurred since FISA was drafted in 1978. These changes have resulted in FISA requiring in a significant number of cases the Government to obtain court orders to intercept the communications of foreign persons overseas -- a result that hampers our intelligence capabilities in a manner that we believe was not intended by FISA's drafters and that does not advance the privacy interests of Americans. We also feel strongly that companies alleged to have cooperated with authorized communications intelligence activities in the wake of the September 11 attacks should be protected from liability. The Department of Justice looks forward to working with the Congress and with this Committee on this important issue.

Kennedy 165 **You stated in your written testimony that you had "asked the Justice Department's Office of Professional Responsibility to further investigate this matter." You said, "Working with the department's Office of Inspector General, these nonpartisan professionals will complete their own independent investigation so that Congress and the American people can be 100 percent assured of what I believed and what the investigation thus far has shown: that nothing improper occurred."**

Recent events, however, have demonstrated that this Administration does not respect the Office of Professional Responsibility as an independent organization to find and report the truth. We know, for example, that OPR was not permitted to investigate the involvement of Department attorneys in the unlawful warrantless wiretapping conducted by the National Security Agency. OPR's investigating attorneys were denied security clearances to conduct the investigation, even though many other attorneys in the Department were granted clearances. Recently, the career attorney leading the lawsuit against the tobacco companies charged that OPR engaged in a whitewash in its investigation of allegations that political interference produced a $100 billion reduction in the remedy the government requested.

An OPR investigation into allegations that the head of the Civil Rights Division's Voting Section engaged in unprofessional conduct and procedural irregularities in approving a Georgia photo ID law that disadvantaged minority voters has been

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00137 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.036

pending for 18 months with no resolution. Unfortunately, we simply cannot be certain that the politicization of the Department of Justice has not spread to OPR. What is the precise matter being referred. In other words, what will be the scope of the investigation?

ANSWER: The Attorney General initially requested that the Office of Professional Responsibility (OPR) conduct an investigation to examine issues related to the recent removals of United States Attorneys. When the Office of the Inspector General (OIG) learned of the request, the OIG discussed with OPR the OIG's belief that, within the Department, the OIG was the entity that should conduct such an investigation. OPR disagreed because it believed that it had jurisdiction to conduct the investigation. The interim Chief of Staff to the Attorney General discussed the matter with OPR and the OIG, and he asked OPR and the OIG to jointly conduct the investigation, which they are doing currently. The Attorney General, the Deputy Attorney General, and their respective Offices are recused from this matter. As the Department has advised the Committee previously, the findings in the final OIG and OPR report will be made public upon completion of the joint investigation. Additional requests for responses should await release of this final report.

Kennedy 166 **Please provide any and all written material that discusses the scope or nature of the referral to OPR.**

ANSWER: Please see the response to Question 165, above.

Kennedy 167 **Can you give us any assurance that the investigation will be completed in a reasonable amount of time? 30 days? 60 days? 90 days?**

ANSWER: Please see the response to Question 165, above.

Kennedy 168 **Will the results of the report be made public?**

ANSWER: Please see the response to Question 165, above.

Kennedy 169 **To whom does the head of OPR report?**

ANSWER: Please see the response to Question 165, above.

Kennedy 170 **Is an OPR report subject to review in the Department before it is finalized? Can it be changed? Can it be delayed? Do you have the authority to stop an investigation?**

ANSWER: Please see the response to Question 165, above.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00138 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.037

Kennedy 171 **Can you assure us that neither you nor the President will interfere with the OPR investigation?**

ANSWER: Please see the response to Question 165, above.

Kennedy 172 **Will OPR investigators be given complete access to Department of Justice and White House communications and witnesses?**

ANSWER: Please see the response to Question 165, above.

Kennedy 173 **During your confirmation hearings, you pledged to "commit the Department to investigating and prosecuting bias-motivated crimes at the federal level to the fullest extent of the law." Those were your words. Yet, there has been a steady decline in hate crime prosecutions and convictions. In 1999, the Department charged 45 individuals with hate crimes and convicted 38. In 2006, the Department charged 20 individuals with hate crimes and convicted 19. Hate crime prosecutions have essentially been cut in half under this Administration even though official data say more than 8,000 hate crimes occur every year. The largest decrease in prosecutions occurred after you took office. The number of hate crime charges dropped from 38 in 2004 to 16 in 2005 and hate crime convictions dropped from 26 to13. The 2005 edition of the FBI crime data compendium, Crime in the United States, was published without a summary of hate crime data for the first time since 1996. Hate crimes have obviously become less of a priority in your time at the Department. The numbers suggest a serious shift in the Department's priorities away from hate crimes. Why is that?**

ANSWER: Violent crime motivated by prejudice or animus against a particular class or group of citizens should never be tolerated. Prosecuting bias-motivated crimes to the fullest extent of federal law remains a priority of the Department.

Generally speaking, with respect to bias-motivated crimes and other criminal civil rights matters, the Department initially determines whether the local law enforcement authorities intend to proceed with a prosecution. Not only are bias-motivated crimes prosecutable as violent crimes under existing laws in every state, but they are specifically prohibited by the vast majority of states. The Department will prosecute such cases if the state either fails to prosecute the matter or a state prosecution does not vindicate the underlying federal interest that is at stake.

The Civil Rights Division has brought a number of high profile bias-motivated crime cases in recent years. In fact, Criminal Section Deputy Chief Barbara Bernstein was selected earlier this year to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League. As one of the select few in law enforcement to receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00139 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.038

Examples of recent prosecutions include:

- *United States v. Coombs* (M.D. Fla.): 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. Laskey,* (D. Or.): In April 2007, defendant Jacob Laskey, a member of the Volksfront white supremacist group, was sentenced to 11 years and three months in federal prison for conspiring to vandalize the Temple Beth Israel by throwing rocks with swastikas etched in them through the closed windows during an evening service.

- *U.S. v. Walker.* (D. Utah): Three members of the National Alliance, a white supremacist organization, were charged with assaulting a Mexican-American bartender in the Salt Lake City bar where he was working. Less than three months later, the defendants assaulted an individual of Native-American heritage outside a different bar in Salt Lake City. In 2007, all three defendants were convicted at trial. The ADL praised the Department for its successful prosecution of this case.

- *United States v. Saldana,* (C.D. Cal.): In August 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 during the commission of a conspiracy and hate crime. All four defendants received life sentences.

- *United States v. Oakley* (D.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. Ark.): 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.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00140 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.039

- *United States v. Nix* (N.D. Ill.): In March 2006, the defendant entered a guilty plea to interference with an Arab-American family's housing rights by igniting an explosive device inside the family's van that was parked near their home.

- *United States v. Baalman.* (D. Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pleaded 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* (N.D. Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pleaded 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 family in an attempt to force the family out of their Ohio home.

- *United States v. Hobbs* (E.D.N.C.): 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.* (W.D. Mo.): 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* (W.D.N.C.): 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.

An additional bias-motivated murder case is set for trial later this year. In *United States v. Eye and Sandstrom*, attorneys from the Civil Rights Division and the United States Attorney's Office for the Western District of Missouri are prosecuting two men who, according to the indictment, fatally shot an African-American man as he was walking to work in downtown Kansas City. If convicted, the government will seek the death penalty.

The Division also has a strong and ongoing commitment to reexamining and investigating unsolved Civil Rights-era murders and other crimes. In February 2007, the Attorney General, the Assistant Attorney General for the Civil Rights Division, and the FBI

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00141 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.040

Director announced an initiative to investigate Civil Rights-era crimes and a new partnership with non-governmental organizations.

James Ford Seale was indicted on January 25, 2007, by a federal grand jury for two counts of kidnapping resulting in death and one count of conspiracy for his participation in the abductions and murder of two nineteen-year-old African-American men, Henry Dee and Charles Moore, in 1964. According to the allegations in the indictment, the victims in this case were kidnapped by a group of White Knights of the Ku Klux Klan that included James Seale. Dee and Moore were beaten by their captors, then transported and finally forcibly drowned by being thrown into the Old Mississippi River. They were tied to heavy objects alleged to have included an engine block, iron weights, and railroad ties. A federal jury returned guilty verdicts against Seale on all three counts on June 14, 2007.

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.

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 were acquitted in state court four weeks after the murder. Subsequent to the trial, the defendants admitted their guilt. Both men are now deceased. The investigation showed that there was no federal jurisdiction. Thus, on March 16, 2006, the Justice Department reported the results of its investigation to the district attorney for Greenville, Mississippi, for her consideration. A state grand jury in Mississippi declined to indict the case.

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, resulting in serious injuries, 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.]

Durbin 195 **Defense Secretary Robert Gates has argued that the detention facility at Guantanamo Bay should be closed. According to recent media reports, Secretary of State Condoleeza Rice agrees with Secretary Gates, but you have objected. Is it true that you have objected to closing the Guantanamo Bay detention facility?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00142 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.041

ANSWER: It would be inappropriate to discuss the internal deliberations of the Executive Branch. The President, however, has made the position of the Administration clear. As the President explained on September 6, 2006, the United States is continuing "to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer. But one of the reasons we have not been able to close Guantanamo is that many countries have refused to take back their nationals held at the facility. Other countries have not provided adequate assurances that their nationals will not be mistreated -- or that they will not return to the battlefield, as more than a dozen people released from Guantanamo already have. We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay."

Durbin 196 **If so, why do you believe that Guantanamo Bay should remain open?**

ANSWER: The Guantanamo Bay detention facility currently serves a vital national purpose, namely, preventing members of al Qaeda and other enemy combatants from attacking the United States and its allies. As explained above, the United States is working with other nations to transfer detainees from Guantanamo to the custody of other nations under conditions where they will not pose an unacceptable threat to the United States and where they will be treated humanely. This process presents a number of practical difficulties, and it will not occur overnight.

For those awaiting transfer to their home countries, for those whose transfer would pose an unacceptable risk to the security of the United States, and for those who will be tried by military commission, closing the Guantanamo Bay detention facility and incarcerating large numbers of alien enemy combatants on United States soil is not the solution. Many of these detainees are hardened terrorists. They include terrorist trainers, bomb makers, terrorist financiers, body guards for Osama bin Laden, potential suicide bombers—and the mastermind of the September 11th attacks. Bringing them closer to the American people would not make this country more secure. Holding these members of al Qaeda and affiliated organizations on United States soil also would present a variety of legal difficulties, including barriers to transferring them back to their home countries when circumstances warrant. In any event, there is simply no reason to immediately close the professional and secure detention facility that the United States operates at Guantanamo Bay. The unlawful enemy combatants detained at Guantanamo Bay have received extensive procedural protections, including access to our Nation's own domestic courts. Such measures are not required by domestic or international law, and they are unprecedented in the history of war. The Guantanamo Bay detention facility serves an important purpose of securing dangerous enemies of the United States and preventing them from retuning to the battlefield, all the while providing the detainees with generous procedural safeguards that exceed the requirements of the law of war.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00143 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.042

Durbin 197 **In a December 2005 Washington Post op-ed, you said, "There have been no verified abuses in the four years of the [Patriot] act's existence." However, a recent investigation by the Justice Department's Inspector General concluded that the FBI was guilty of "serious misuses" of the National Security Letter authority. Will you now acknowledge that there have been verified abuses of the Patriot Act?**

ANSWER: The statutory authorization for the issuance of NSLs predated the USA PATRIOT Act. While the USA PATRIOT Act and its reauthorizing legislation made significant changes to the NSL authorities in order to better protect the national security, the problems identified by the Inspector General with respect to the FBI's use of NSL authorities relate to the failure to have sufficient internal controls, the failure to provide adequate training, and in some instances, the failure to follow FBI's own policies and the Attorney General's Guidelines. We note that the Inspector General did not find intentional or deliberate violations of the national security letter statutes, Attorney General Guidelines, or internal FBI policies with respect to the issuance of NSLs. However, the Attorney General recognizes that the deficiencies identified by the Inspector General are serious, and has ordered substantial and significant corrective actions to address those problems. Those measures are detailed in response to Question 2, above.

Durbin 198 **In April 2005, in testimony to this Committee, you stated that, "The government should not be obtaining the library records of law-abiding Americans, and I will do everything within my power to ensure that this will not happen on my watch." According to recent testimony before Senator Feingold's Constitution Subcommittee, the FBI issued an NSL for the records of every patron at a Connecticut library. Surely the vast majority of these library patrons are innocent American citizens. Will you now acknowledge that the Justice Department has sought the library records of law-abiding Americans?**

ANSWER: The question appears to relate to an NSL that was served on Library Connection, Inc. on May 19, 2005. The NSL at issue was not issued to a library and it did not seek the "library records" of "every patron at a Connecticut library." To the contrary, the NSL at issue was sent to a non-profit cooperative that provides technological services, such as Internet access, to certain libraries. The NSL at issue sought subscriber information, billing information, and access logs related to the use of a specific IP address on a specific date and for a specific 45-minute period of time. The NSL therefore, did not seek any information about books checked out by any individual, but sought information about the use of a specific IP address for a particular period of time. The NSL was issued as part of a counterterrorism investigation and was as narrowly tailored as possible, given the underlying facts.

Durbin 199 **How can you assure law-abiding Americans that the government will not obtain their library records on your watch when the law allows government agents to obtain these records without your approval and without any connection to a suspected terrorist?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00144 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.043

ANSWER: The NSL authorities permit the government to seek only certain records that are relevant to the conduct of authorized investigations of international terrorism or clandestine intelligence activities. The NSL statutes also permit judicial review of NSLs and applicable nondisclosure provisions. Moreover, as discussed above, in the response to Question 2, the Department of Justice is undertaking significant efforts to ensure that the legal requirements applicable to national security investigations are fully met.

Durbin 200 **In your written testimony you noted that the FBI has prohibited the use of exigent letters. However, there is a crucial area of disagreement between the FBI and the Inspector General. The Inspector General found that the use of exigent letters violates the law. FBI Director Mueller has said that "the FBI does not believe that the use of exigent letters is improper in itself." What is your view? Is the use of exigent letters illegal?**

ANSWER: The IG identified four problems with the so-called exigent letters as they were used by the FBI's Communications Analysis Unit (CAU): 1) although the letter asserted there were exigent circumstances, that was not always the case; 2) the CAU maintained no records supporting the claimed emergency; 3) although many of the letters asserted that a Federal grand jury subpoena had been requested, in fact, in most circumstances a grand jury subpoena had not been requested and the intent was to provide the carrier with an NSL; and 4) in many cases, although subsequent legal process had been promised to the carrier, no process (neither a grand jury subpoena nor an NSL) was delivered in a timely fashion.

It was not until the FBI received the IG's draft report that executive leadership became aware of the full scope of the problems with the use of the so-called exigent letters. Upon learning of this matter, the FBI worked quickly to develop guidance that would address the shortcomings identified in the IG's report, while ensuring that the policy did not undermine the Bureau's ability to receive information under 18 U.S.C. § 2702(c)(4), a critical provision allowing communications service providers to give the government information in certain emergency circumstances. That policy, which was issued on March 1, 2007, discontinues the use of "exigent letters" of the sort described in the IG's report, but affirms that the Bureau may continue to receive information pursuant to section 2702. The new form 2702 letter makes it very clear that: production of the records is at the carrier's discretion; no other legal process is promised; and, by policy, the emergency justifying this requirement must be documented. Accordingly, the FBI believes the new policy deals precisely with the problems identified by the IG and appropriately balances privacy concerns with investigative needs in case of dire, life-threatening emergencies.

Durbin 201 **Why was Cho Seung-Hui, who was found by a court to be mentally ill, permitted to buy guns and ammunition?**

ANSWER: The Gun Control Act makes it unlawful for any person who has been "adjudicated as a mental defective" or who has been "committed to a mental institution" to

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00145 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.044

receive or possess firearms. ATF regulations published in 1997 (27 C.F.R. § 478.11) define those terms as follows:

> **Adjudicated as a mental defective.**
> (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
> (1) Is a danger to himself or to others; or
> (2) Lacks the mental capacity to contract or manage his own affairs.
> (b) The term shall include—
> (1) A finding of insanity by a court in a criminal case; and
> (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.
>
> **Committed to a mental institution**. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Documents obtained by the Department from the Commonwealth of Virginia show that Cho Seung-Hui was found by a Virginia Special Justice to present an imminent danger to himself as a result of mental illness. The court also found that a less restrictive alternative to involuntary hospitalization and treatment was suitable in his case and, instead, ordered Cho to receive out-patient treatment. The court's determination made Cho prohibited under the "adjudicated as a mental defect" portion of the Federal firearm prohibitions.

The State of Virginia is one of the few states to develop a system by which information about orders by courts or other lawful authorities relating to persons with disqualifying mental illness are reported to state authorities that conduct background checks on prospective firearm purchasers. Virginia is also one of only a handful of states that makes significant amounts of information about the existence of such disqualifying state records available at the national level for purposes of firearms checks by the National Instant Criminal Background Check System (NICS) established under the Brady Act. However, the Virginia law requiring the sharing of this information for this purpose was limited to cases involving involuntary commitments. Thus, a case in which a person has been adjudicated to have a mental defect, as defined in the ATF regulations, but was not involuntarily committed, was not reportable to the NICS under the Virginia law. As a result of this legal limitation, the information about the court's order finding that Cho was a danger to himself because of mental illness was not available to the Virginia State Police when the NICS check was performed at the time Cho purchased the firearms he used in the shootings at Virginia Tech. However, Virginia Governor Kaine has recently issued an Executive Order requiring

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00146 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.045

agencies to report any mental health adjudication making a determination of dangerousness and ordering involuntary treatment, whether or not the treatment is to be received in an inpatient or outpatient setting.

Durbin 202 **Please describe the steps that the Department of Justice was taking prior to April 16, 2007, to ensure that mentally ill persons were prevented from purchasing guns or ammunition.**

ANSWER: The effectiveness of the NICS in preventing gun transfers to prohibited persons depends directly on the availability to the system of automated information about which individuals are prohibited from receiving a firearm. The NICS is a computerized system that queries several national databases simultaneously in order to process a name-based background check. The databases checked include (1) the Interstate Identification Index (III or "Triple I"), a database of criminal history records, (2) the National Crime Information Center (NCIC), which includes files of protection orders and wanted persons relevant to gun background checks, and (3) the NICS Index, which includes records collected by the FBI relevant to gun background checks that are not in the III or NCIC.

The Brady Act requires Federal agencies to submit to the NICS upon the request of the Attorney General information on persons prohibited from receipt of a firearm under Federal or State law. The Brady Act does not require States to submit information on prohibited persons to the NICS. Thus, the States are under no obligation or requirement under the Brady Act or any other Federal law to submit information on disqualified persons to the NICS. To the extent that States submit information on prohibited persons to the NICS, they do so voluntarily. Similarly, States' submission to the FBI of criminal history and other information relied upon by NICS and generally used by law enforcement officials in the III and NCIC is not mandated by Federal law. States submit such information voluntarily in order to gain the mutual benefit of having ready access to criminal history and other information relevant to law enforcement activities on an individual arising in other States. Thus, all of the relevant State information available for NICS checks is provided voluntarily by the States to the FBI and entered into one of the three information systems checked by the NICS – the III, the NCIC, or the NICS Index.

The Brady Act established the NCHIP Federal funding program, administered by BJS, as the primary means to improve the automation and accessibility of State criminal records at the national level. NCHIP awards totaled just over $506 million between 1995 and 2006, and the States have spent approximately $30 million in matching funds since a matching requirement was imposed in 2000. In addition to providing funding to States through NCHIP, the FBI, in coordination with ATF, has been working to encourage the States to submit information on prohibited persons to the NICS. This outreach has included education on the Federal firearm prohibitions as well as technical support to facilitate the electronic submission of information. Despite the tremendous progress NCHIP and the Department's other efforts have made in creating a national system for automated access to criminal history records and other information used by law enforcement, significant shortcomings remain in the completeness of the records in the system and the availability of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00147 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.046

relevant records for NICS checks. The continuing need for record improvement as it relates to NICS checks was discussed in greater detail in a statement by Rachel L. Brand, Assistant Attorney General for Legal Policy, at a May 10, 2007 hearing before the Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, United States House of Representatives. A copy of Ms. Brand's statement is enclosed for your information.

There are two files in the NICS Index into which Federal agencies and the States can enter information about individuals who have a disqualifying mental health history – the Mental Defective File and the Denied Person File. The Mental Defective File contains only the names and other biographical information, such as date of birth or social security numbers, of the individuals with a disqualifying mental health history. The Denied Persons File contains the names and biographical information of individuals who are prohibited from receiving a firearm, but whose record is not entered into another system or file checked by the NICS. The FBI allows States to enter names about disqualifying mental health histories in the Denied Persons file. This allows a State to share this information for purposes of NICS checks without necessarily identifying the person whose name is entered as having a mental health history. Neither file contains information about medical records or the details of the mental health history. If a prospective firearm purchaser is found to match a name in the file, the proposed gun transfer is denied. If the individual wishes to challenge the denial, the agency that provided the name then becomes involved in the appeal and the review of the underlying facts.

The FBI NICS Section, in coordination with ATF, has made continuing efforts to encourage States to provide more mental health records to NICS. Examples of outreach efforts seeking relevant mental health information or history include a letter sent by the NICS in June 2001 to the heads of all State central records repositories urging the States to make submissions to the NICS Index, including mental health records. Letters specifically urging the submission of relevant mental health records also were sent on May 14, 2004, to all State attorneys general, all State governors, and to all State departments of mental health. A similar letter was sent on March 7, 2007, to the Attorneys General of all States and territories that are not yet making significant, or any, submissions of records to the Mental Defective File. Additional outreach by the NICS Section includes, for example, presentations on the topic of disqualifying mental health records to annual NICS User Conferences that have in attendance representatives from most States, State clerk of court and court manager conferences, the National Association of State Mental Health Program Directors, judicial conferences, and sheriff association meetings. Several of the NICS Operation Reports published by the FBI since the NICS began have also included information on this topic.

In addition to these efforts by the FBI to encourage State submission of mental health records to the NICS, the Bureau of Justice Statistics has included in all National Criminal History Improvement Program (NCHIP) program announcements as an allowable cost funding for providing disqualifying mental health information for gun background checks. Every NCHIP program announcement since 2002 has identified the submission of such information to the NICS Index as a "program priority."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00148 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.047

The FBI has obtained 138,766 disqualifying mental health records from the Veterans Administration and one such record from the Department of Defense, all of which are entered into the Mental Defective file. The following is a list of States that submit mental health information directly to the Mental Defective File. The totals represent the number of records submitted as of April 30, 2007.

Alabama	24	Missouri	401
Arkansas	51	North Carolina	330
Arizona	1	New Hampshire	1
California	27	New York	1
Colorado	9,269	Ohio	2
Florida	1,530	South Carolina	1
Iowa	47	Tennessee	15
Kentucky	1	Utah	12
Kansas	1,506	Virginia	81,233
Maryland	3	Washington	63
Michigan	73,382	Wyoming	3

States may, at their discretion, submit the names of persons disqualified on mental health grounds into the Denied Persons File instead of the Mental Defective File. When a State submits a name to the Denied Persons File, it does not indicate why the person is disqualified. Therefore, the NICS Section is unaware of how many of the records submitted to the Denied Persons File relate to mental health. A State may choose to submit information this way if, for example, it has privacy-related concerns about informing the Federal system which records relate to mental health. The States of Georgia and Washington have advised the NICS that they submit mental health information to the Denied Persons File, although they did not specify the number of mental health records entered. The total entries in the Denied Persons File by those States are:

Georgia	2,713
Washington	37,453

Some of the States that serve as NICS Points of Contact (i.e., States with designated agencies that perform all or some of the NICS checks for gun dealers in their state), including California, Oregon, Illinois, Nebraska, and Connecticut, check their own state mental health records when processing their gun eligibility background checks even though they have not submitted that information to the NICS Index. This ensures that a person disqualified on mental health grounds by a State agency in Illinois, for example, will not be allowed to purchase a gun from a dealer in that state. It does not, however, prevent such a person from purchasing a gun in another State to which he has moved because a check performed in that State will not have access to Illinois' records. Virginia began submitting its mental health information to the NICS Index in November 2003, and the hits on those records demonstrate the difference this can make. As of November 2006, the Virginia disqualifying mental health records had resulted in 438 denials, of which 60 of the attempts to purchase were in Virginia and 378 of the attempts were in other States.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00149 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.048

Some States that do not currently submit mental health information to the NICS Index have State statutes that require a court order to allow the sharing of mental health information. In some States, a change in law would be required to allow the sharing of such information with the NICS. Other States simply do not have the funding to support the gathering and submission of mental health information.

Some States already are working with the NICS to make the necessary changes in State law to authorize the submission of mental health records to the NICS Index. For example, in February 2007, based on a recent State law change, the State of Florida began the process of collecting and submitting information on current involuntary commitments to the Mental Defective File. FBI representatives testified before the Connecticut legislature on the submission of mental health records to the NICS and provided State officials with information on the definition of the Federal mental health prohibitor. On November 17, 2006, the NICS Section signed a memorandum of understanding with the Connecticut Department of Public Safety authorizing the submission of mental health information to the NICS Index. The NICS and the California Department of Justice have been working through the technical requirements that will enable California to soon submit to the NICS Index information on the existence of disqualifying mental health records held by California on over 300,000 individuals. In addition, the FBI's NICS Index Liaison Office has worked with officials in the States of Arkansas, New York, and Texas, where State legislative proposals recently were introduced to allow the submission of information about disqualifying mental records to the NICS Index. In Arkansas, the legislation was passed on March 23, 2007, and will become effective on July 1, 2007.

Durbin 203 **Prosecution of those who commit gun crimes is important, but for those who are mentally ill and suicidal, like Cho, the threat of prosecution is not a deterrent from committing gun crimes. In light of the terrible tragedy at Virginia Tech, what, if any, additional steps, will the Department of Justice take to prevent mentally ill individuals from obtaining guns and using them to commit crimes?**

ANSWER: At the direction of the President, the Attorney General is participating in a joint initiative with the Secretaries of Health and Human Services and Education involving consultation with educators, mental health experts and state and local officials in communities across the nation to identify and recommend to the President appropriate responses to the Virginia Tech tragedy. A report with findings and recommendations by that interdepartmental initiative is expected to be provided to the President soon. In addition, since the Virginia Tech tragedy, ATF has taken steps to increase its outreach efforts to communicate the law and regulations regarding the Gun Control Act's prohibitions. For example, ATF has (1) sent a May 9, 2007, letter from the ATF Director to all State attorneys general, providing additional guidance on the Federal mental health prohibitor and offering to work with the States in reviewing State laws to make relevant mental health records available for NICS checks, (2) begun the process of amending the ATF form 4473 (the firearms transaction record) to provide additional information to purchasers about the definitions of "adjudicated mentally defective" and "committed to a mental institution," and (3) issued an Open Letter to all federal firearms dealers clarifying the meaning of the Federal

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00150 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.049

prohibition relating to mental illness. ATF gave a presentation on the mental illness prohibitor to dozens of State and local law enforcement officials at the annual NICS User Conference held during the week of April 30, 2007. Finally, BJS is currently developing and expects to soon send to state NCHIP points of contact a request for information to identify States whose barriers to sharing this information are simply resource limitations, rather than issues of law or policy.

Durbin 204 **According to a recent Washington Post story, Timothy Flanigan assisted you with your preparations for this hearing. Mr. Flanigan was your deputy when you were White House Counsel and he was nominated to serve under you as Deputy Attorney General. The President withdrew Mr. Flanigan's nomination after concerns arose about his relationship with Jack Abramoff and his role in crafting the Administration's torture policies. In light of the Justice Department's ongoing Abramoff and detainee abuse investigations, why would you choose Mr. Flanigan to assist you with your preparations for this hearing?**

ANSWER: Mr. Flanigan did not assist the Attorney General in preparing for his April 19, 2007, appearance before the Committee. Mr. Flanigan did participate in sessions to help the Attorney General prepare for his March 26, 2007, NBC interview with Pete Williams.

Durbin 205 **How many times did you meet with Mr. Flanigan to prepare for this hearing?**

ANSWER: Mr. Flanigan did not assist the Attorney General in preparing for his April 19, 2007, hearing before the Committee.

Durbin 206 **Did you and Mr. Flanigan ever discuss Jack Abramoff or detainee abuses?**

ANSWER: The Attorney General did not discuss Jack Abramoff or detainee matters in either of his meetings with Mr. Flanigan to prepare for his March 26, 2007, NBC interview.

Durbin 207 **Who else assisted you with your preparations for this hearing?**

ANSWER: The Attorney General was assisted in preparing for the Committee's hearing on April 19, 2007, by the following Department employees: the U.S. Attorney for the Eastern District of Virginia; the Attorney General's Chief of Staff, Deputy Chief of Staff, and senior Counsels; Associate Deputy Attorneys General and Senior Counsels to the Deputy Attorney General; Assistant Attorneys General, Principal Deputy Assistant Attorneys General, and Deputy Assistant Attorneys General for the following Department components: Civil Rights Division, Office of Legislative Affairs, Office of Legal Counsel, Office of Legal Policy, Civil Division, National Security Division, Justice Management Division, and the Tax Division; the Director and Deputy Director for the Office of Public Affairs; and other senior officials from across the Department.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00151 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.050

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing April 19, 2007 (Part 1)

Answers #38 and 39 Attachment

38236.051

U.S. Department of Justice
Office of Attorney Recruitment and Management

Washington, D.C. 20530

MEMORANDUM

TO: Heads of Offices, Boards, Bureaus and Divisions

FROM: Louis DeFalaise, Director

SUBJECT: Changes to the Attorney General's Honors Program and Summer Law Intern Program

DATE: April 26, 2007

This memorandum outlines significant changes and highlights Component responsibilities for the 2007-2008 Attorney General's Honors Program (HP) and the Summer Law Intern Program (SLIP). At a meeting on December 5, 2006, Components were invited to submit recommendations to improve the selection process. Based on recommendations made by the participating Components and the review that followed, the Office of the Deputy Attorney General (ODAG) has authorized this office (OARM) to implement the changes outlined below to improve the selection process. Major changes include:

- Clarifying Program standards and providing process guidance for Component use during the initial review process;
- Modifying the AVUE system to allow reviewers to add comments indicating the component specific criteria for individual selections;
- Delegating the Departmental review process to OARM and the Components;
- Providing the reasons for nonconcurrence to the Components for the purpose of reconsideration; and,
- Exempting SLIP selections from Departmental review (subject to audit) and deferring the review to Funnel Offer candidates.

1. Component Level Review

Each Component will ensure that its internal selection process is focused on selecting highly qualified candidates with credentials that establish their eligibility to be considered as an Honors level hire by the Attorney General. Initial Component-level review must comply with the review standards guidance and include an internal quality review prior to forwarding the names of candidates for interviews to OARM.

38236.052

Component Review Standards Guidance

Candidates selected for interviews should have outstanding academic credentials. Reviewers should pay close attention to academic performance (as reflected by class rank, where available), grades, academic accolades, graduation honors and other achievements. Components that select a candidate with less than an outstanding academic record must provide a justification for the selection based on the candidate's skills, background, experience or training in a relevant field of the Component's practice. Suitable skills and experience include: judicial clerkships (particularly at the Supreme Court or Federal Circuit Court level); law review/journal positions and articles; competitive moot court experience demonstrating superior oral advocacy ability; or special education, skills or background directly relevant to the Department's and/or Component's priorities and missions. This list is not exhaustive. The justification should articulate the basis for selecting the candidate for interview, explain how the candidate would positively contribute to the component's mission, and should demonstrate the lack of suitable candidates possessing both the identified qualifications and a strong academic background.

Components should, as a matter of practice, check a candidate's references and review any information about the candidate that is easily accessible to the general public. When considering web-posted information, Components should exercise due caution to ensure correct identification and attribution.

It is also very important that a candidate's overall submission reflect the level of writing skills, organization, and persuasiveness commensurate with selection as an Honors level hire by the Attorney General. The quality of the candidate's overall submission, particularly the structure and content of responses in the "short answer questions" are critical factors that should be considered in assessing the candidate's character, judgment and maturity.

Finally, each Component's internal review should ensure that the selection process identifies candidates that meet Department and Component needs and that selected candidates, when compared objectively to those who were not selected, are, in fact, the best candidates for these positions.

2. Department Level Review

An ad hoc working group composed of representatives from the major participating Components will conduct a Department-level review to ensure that selections comply with the Component Review Standards and that the number of interviews does not exceed budgetary limitations. Each formally participating major Component should designate one individual to participate in this process full-time for approximately two working days. The reviews will be conducted on-site at OARM. After the review is completed, OARM will provide affected Components with a list of candidates that have been identified as noncompliant, as well as the basis for that conclusion. If, after further review, the Component still wishes to proceed with an interview, it may return a candidate's name to OARM with further explanation. If OARM

concurs, the interview can proceed; if not, the Component head can elect to request reconsideration of the candidate consistent with the practice in other career personnel matters.

3. SLIP and Funnel Offer Reviews

In order to reduce the burden on the Ad Hoc working group for Department level review and to ensure timely responses to the Components, OARM will instead randomly monitor SLIP selections for compliance with Component Review Standards and notify Components of any discrepancies along with the basis for that conclusion.

Funnel offers are subject to the same Component-level review standards and process that apply to the Honors Program. Components should forward proposed funnel offers to OARM for review and concurrence before issuing offers. OARM will provide the Component with the reason for the nonconcurrence of any proposed funnel offer. The nonconcurrence may be appealed, consistent with the practice in other career personnel matters.

The adoption of these changes, supported by the continued interest and dedication of Component personnel at all levels, should enhance one of the goals of the Attorney General's Honors Program – to continue to attract and hire highly qualified individuals from the broadest base possible.

Your personal involvement, interest in and support of the Attorney General's Honors Program is greatly appreciated. As with these and other past changes, OARM is interested in your comments and suggestions for improving the Honors Program and Summer Legal Intern Program and how we conduct them. Your further ideas and suggestions are always welcome. Thank you again.

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 22, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached Part Two of the Department's responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on April 19, 2007. The hearing concerned Department of Justice Oversight. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy 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 April 19, 2007
(Part 2)

***Leahy* 21: What actions would you take, if any, if you learned that a member of Congress or White House official contacted a U.S. Attorney to inquire about an ongoing criminal investigation?**

ANSWER: We would make contact with the member of Congress or White House and the U.S. Attorney in order to determine the reasons for such contact and to ensure that the Department's policy governing such contacts is followed. We would then determine the appropriate course of action.

***Leahy 45*: When Assistant United States Attorneys are hired in offices for which there is currently an interim or acting United States Attorney, those hires must be approved by the Executive Office of United States Attorneys. Testimony obtained in the ongoing investigation of the firing of U.S. Attorneys indicated that political officials within the Department have played a role in that process in the past. What role will political appointees and other political officials in the Department play in that hiring process going forward? What steps are being taken to make sure that political considerations are not taken into account in the hiring of Assistant United States Attorneys?**

ANSWER: It is the longstanding policy of the Department of Justice to limit an interim or Acting United States Attorney's authority to hire Assistant United States Attorneys and make other discretionary personnel changes. This policy exists because hiring decisions are usually made by the Presidentially-appointed, Senate-confirmed United States Attorney. It is a longstanding practice to allow interim or Acting United States Attorneys to request that the Executive Office for United States Attorneys (EOUSA) grant a waiver of this limitation due to turnover and workload demands during the time in which the nomination and confirmation process are conducted. EOUSA reviews the requests for waivers to ensure that funding is sufficient to support the hires and also to ensure that upon confirmation, at a minimum, the incoming United States Attorney will have the ability to hire a First Assistant United States Attorney and a Secretary. Career ladder promotions and all other routine personnel actions for support employees (e.g., within-grade increases) are excepted because they do not involve filling a different position.

These factors are evaluated by career personnel within EOUSA, who consult with non-career appointees involved in the nomination process to determine whether and when Senate confirmation of a pending nominee is expected. EOUSA continues to review waiver requests on a case-by-case basis and approves those requests where funding and employee turnover are sufficient to afford an incoming Presidentially-appointed and Senate-confirmed United States Attorney the opportunity to make additional hires, or where it is critical for an interim or Acting United States Attorney to fill vacancies to avoid a hardship.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00157 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.056

Leahy 46: **During your testimony on April 19, you said that you did not know or could not recall in your answers to well over 60 – and by some counts more than 100 –questions from Senators on both sides of the aisle. As a result, the Committee's efforts to learn the truth about why and how the United States Attorney dismissals took place, and the role you and other Department and White House officials had in them, has been hampered. Please search and refresh your recollection and supplement your testimony of April 19 with answers to those questions for which you responded that you could not recall or did not know.**

Answer: My previous testimony represents my best recollection on those issue.

Leahy 47: **Recently, the New York Times had two front page stories about the scant evidence of voter fraud. One of these articles is about the alteration of an Election Assistance Commission report to alter its conclusion that little voter fraud existed around the nation. The second article connected the EAC's report to the Justice Department's inability to demonstrate any organized efforts to skew federal elections. Despite your intense focus on criminally charging mostly Democratic voters and progressive organizations that help people register to vote, "scant evidence of voter fraud" was found. For example, in Milwaukee, an Assistant United States Attorney was quoted as saying "there was nothing that we uncovered that suggested some sort of concerted effort to tilt the election." What role did dissatisfaction with investigation and prosecution of so-called "voter fraud" play in the decisions to replace U.S. Attorneys?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy 48: **(a) Did you communicate with Harriet Miers, the White House Counsel, about replacing United States Attorneys?**

ANSWER: I was aware of Ms. Miers' interest in this subject through Mr. Sampson, but my best recollection is that I did not have any specific conversations with Ms. Miers about replacing the U.S. Attorneys we asked to step down in December 2006.

(b) When? How? How many times?

ANSWER: See answer to Leahy 48(a).

(c) What specifically do you recall about your communications with Harriet Miers on this topic?

ANSWER: See answer to Leahy 48(a).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00158 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.057

(d) Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?

ANSWER: See answer to Leahy 48(a).

***Leahy 49*: Did you communicate with Karl Rove about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Karl Rove on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

ANSWER: Karl Rove was a senior advisor to the President and sometimes provided input on presidential appointments. As a member of the Judicial Selection Committee where recommendations were made about U.S. Attorney appointments, Mr. Rove sometimes provided input relating to U.S. Attorney appointments. My best recollection as to his input regarding the dismissal of the eight U.S. Attorneys is reflected in my testimony.

***Leahy 50*: Did you communicate with Sara Taylor about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Sara Taylor on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

ANSWER: I may have had conversations with Ms. Taylor about whether to put Mr. Griffin's name forth as the U.S. Attorney nominee after Senator Pryor indicated to me that he would not support Mr. Griffin for the U.S. Attorney position. I do not recall discussing with Ms. Taylor the performance, dissatisfaction or complaints about the eight dismissed U.S. Attorneys.

***Leahy 51*: Did you communicate with Andrew Card, the White House Chief of Staff, about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Mr. Card on this topic?**

ANSWER: To the best of my recollection, I did not talk to Andrew Card about replacing the U.S. Attorneys we asked to step down in December 2006.

(b) Did you discuss the "performance" of U.S. Attorneys?

ANSWER: See answer to Leahy 51(a).

(c) Did you discuss dissatisfaction or complaints about U.S. Attorneys?

ANSWER: See answer to Leahy 51(a).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00159 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.058

Leahy 52: **Did you communicate with Joshua Bolton, the White House Chief of Staff, about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Joshua Bolton on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

ANSWER: To the best of my recollection, I did not talk to Joshua Bolton about replacing the U.S. Attorneys we asked to step down in December 2006.

Leahy 53: **Did you communicate with President Bush about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with President Bush on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy 55: **Did you communicate with Kyle Sampson about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Kyle Sampson on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy **56: What do you recall about communications you had with those working within the Administration about replacing United States Attorneys after the 2004 elections and before you became Attorney General? Do you recall discussing this matter with Mr. Sampson prior to January 9, 2005? What did you say to him during that discussion in 2004? What did he say to you?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy **64: In your written testimony for this hearing, you said, "the Department of Justice makes decisions based on the evidence." Where is the contemporaneous record of that evidence for the decisions to replace David Iglesias, John McKay, Daniel Bodgen, Paul Charlton, Margaret Chiara, Carol Lam, and Bud Cummins?**

ANSWER: In response to questions from Senator Brownback and others during the April 17 hearing, I set forth the reasons, as I understood them, for the requests for the resignation of each of the seven U.S. Attorneys asked to step down in December 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00160 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.059

***Leahy* 65: Do you wish to correct anything about your January 18th testimony under oath to this Committee in which you justified the decisions to replace these United States Attorneys and testified: "What we do, is we make an evaluation about the performance of individuals."?**

ANSWER: See answer to Leahy 64.

***Leahy* 66: Your former Chief of Staff, Mr. Sampson, has testified that in the course of putting together the list of U.S. Attorneys to fire, he never read an EARS evaluation and that you never asked for one. Mr. Battle testified that in his role as Director of the Executive Office of U.S. Attorneys, he would be aware of any significant management or performance problems, and such problems would be captured by EARS reports. Yet, he represented to Committee staff recently that he was not aware of performance problems for six of the dismissed U.S. Attorneys, and for a seventh, Carol Lam, he testified that he was aware of some complaints among some Washington staff, but nothing that he believed significant enough to merit dismissal. As to David Iglesias, John McKay, Paul Charlton, Daniel Bogden, Margaret Chiara, Carol Lam, and Bud Cummins, Mr. Battle said he was not aware of any significant performance problems. For each of these prosecutors, where no signs of significant performance or management problems had made their way to the top Department official specifically responsible for U.S. Attorneys, what do you say justified your determination to replace them?**

ANSWER: See answer to Leahy 64.

***Leahy* 67: What had each done to lose "your confidence?"**

ANSWER: See answer to Leahy 64.

***Leahy* 69: On January 18, you testified, "I have a responsibility to the people in your district that we have the best possible people in these positions" Do you believe Tim Griffin is the best possible person to be U.S. Attorney for the Eastern District of Arkansas?**

ANSWER: As I previously testified, I believe Mr. Griffin was well-qualified for the position.

***Leahy* 71: Mr. Attorney General, you said to me and others at a meeting on March 8th that you replaced these U.S. Attorneys in order to get better U.S. Attorneys. I have heard you use a sports analogy about "trading up." Yet there was no slate of candidates to take the places of those asked to leave, and according to the testimony of at least some senior staff of your Department, there were no replacements selected before the U.S. Attorneys were told to resign. How can you say that you were acting in order to improve the ranks of the U.S. Attorneys, when the U.S. Attorneys being replaced you acknowledge to be fine and**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00161 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.060

honorable people and good lawyers, and you did not have in mind who their replacements would be?

ANSWER: When I agreed in 2005 to a review of our sitting U.S. Attorneys, I did so with the understanding that to the extent some would be asked to resign, the purpose for doing so would be to seek within each district qualified individuals who could bring renewed energy and passion to the position. Where vacancies currently exist, we continue to search with recommendations and assistance from prominent local officials, for such candidates to fill these positions. I have every confidence that we will find the right person for every position, one who will bring renewed energy and talent to bear.

***Leahy* 72: In an August 9, 2006, email exchange between your former Chief of Staff, Kyle Sampson, and Debra Yang, U.S. Attorney for the Central District of California, Mr. Sampson agreed with Ms. Yang that John McKay had "really done good work" as U.S. Attorney for the Western District of Washington. Mr. Sampson wrote that "it's highly unlikely that we could do better in Seattle" in terms of finding a nominee for a judgeship. Mr. Sampson made those statements about Mr. McKay after having reviewed the performance of U.S. Attorneys all over the country as part of the process of thinking about whom to fire, and Ms. Yang was a highly-respected U.S. Attorney who headed your intellectual property task force. In a September 13, 2006 email to Harriet Miers recommending U.S. Attorneys that the Administration "now should consider pushing out," Mr. Sampson included John McKay for the first time – earlier lists he had circulated without listing Mr. McKay as a candidate for firing. Do you know how he made that fall, in only a month, from someone who had "really done good work" and was a good choice for a judgeship to someone the Administration "should consider pushing out"?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Leahy 73*: Did you have any communication with Harriet Miers about John McKay between August 9 and September 13, 2006, or at any other time?**

ANSWER: To the best of my recollection, I did not have any conversations with Ms. Miers regarding Mr. McKay's potential dismissal.

***Leahy 74*: Did you have discussions about John McKay with Karl Rove about John McKay? With anyone else at the White House? With anyone else at all?**

ANSWER: My best recollection is that I did not discuss Mr. McKay's dismissal as U.S. Attorney with Karl Rove. As Mr. McKay had sought to become a federal judge, his name may have come up at Judicial Selection Committee meetings which Mr. Rove may have attended.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00162 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.061

Leahy 75: **Who made the decision to add John McKay to the list? Why was he added?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy 76: **What was your role in the decision? When and how did he lose your confidence?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy 77: **Both Kyle Sampson, your former chief of staff, and Mike Battle, former Director of the Executive Office of U.S. Attorneys, have said that Deputy Attorney General Paul McNulty expressed reservations about replacing Daniel Bogden , the Nevada U.S. Attorney, and was not sure why he was on the list. Mr. Battle said he did not know of any performance issues with Mr. Bogden. Mr. Sampson testified that could not identify any complaint with Mr. Bogden's performance, had not reviewed his internal Department EARS evaluation, had not checked with Mr. Margolis, who reviewed EARS evaluations, or with local law enforcement about Mr. Bogden's performance, and knew of no communication with Mr. Bogden about an performance problems or opportunity given to Mr. Bogden to correct any perceived problems. Who made the decision to add Mr. Bogden to the list of U.S. Attorneys to be replaced? Why was he added?**

ANSWER: My previous testimony represents my best recollection on this issue.

Leahy 78: **What was your role in making the decision? When and how did he lose your confidence?**

ANSWER: See answer to Leahy 64.

Leahy 79: You have not produced e-mails from the Republican National Committee or other political accounts to the Committee in connection with our investigation, is that correct?

ANSWER: The Department has produced or made available all emails identified as responsive to the Committees' requests and subpoenas, except in those limited instances where disclosure would be inconsistent with longstanding Executive Branch interests. The Department would produce, or would have produced, emails based on these standards without regard to whether any of the correspondents had a Republican National Committee email account. We are not aware, however, of any Department employees using a Republican National Committee email account for official business.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00163 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.062

Leahy 80: Why is that?

ANSWER: See the answer to Question 79.

Leahy 81: You served as White House Counsel from the beginning of this presidency until you were appointed Attorney General in 2005. During this Presidency, have officials or employees of the Department of Justice used Republican National Committee or other political e-mail accounts? Who, for what time periods, at what e-mail addresses, and for what purposes?

ANSWER: The Department is not aware of Department officials or employees using Republican National Committee or other political email accounts in the course of carrying out their duties.

Leahy 82 Specifically, did Monica Goodling use e-mail accounts, addresses, or equipment from the Republican National Committee?

ANSWER: See the answer to Question 81.

Leahy 83: Did Kyle Sampson?

ANSWER: See the answer to Question 81.

Leahy 84: Did Paul McNulty?

ANSWER: See the answer to Question 81.

Leahy 85: Did Will Moschella?

ANSWER: See the answer to Question 81.

Leahy 86: Did you?

ANSWER: See the answer to Question 81.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00164 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.063

Leahy 87: Have political e-mail accounts been used in connection with the development of plans to replace United States Attorneys, the implementation of those plans or the explanations of those actions?

ANSWER: The Department is not aware of Department officials or employees of the Department using Republican National Committee or other political email accounts in the course of developing, implementing, or explaining the plan to replace certain U.S. Attorneys.

Leahy 95: What is being done to avoid further spoilage of potentially relevant electronic data? Since the beginning of the investigation, have you or has anyone at the Department issued an order to preserve all documents, including relevant electronic data? When? Please provide the Committee with a copy of any court order(s) to preserve these electronic records.

ANSWER: The Department's Office of the Inspector General and Office of Professional Responsibility have issued multiple requests to relevant components of the Department to preserve any and all documents and information (including all electronically stored documents and information) relating in any way to the removal of the United States Attorneys. The first of those requests was issued on March 14, 2007.

Leahy 96: The Committee is awaiting your response to numerous letters sent to you regarding the Department's production of documents. Please answer the following questions regarding that production, which have been asked previously in letters, but not answered. What has been the precise scope of the document productions that have occurred thus far?

ANSWER: The Department provided a full discussion of our search methodology in our May 8, 2007, letter and subsequent briefing to the staff of the House and Senate Committees on the Judiciary. In addition, the Department's cover letters accompanying our productions have provided relevant information concerning the searches that led to the identification and production of the documents in question.

Leahy 97: Have all requested documents been produced, including all documents related to the Administration's evaluation of, and decisions to remove and replace, U.S. Attorneys since President Bush's re-election, as well as the selection, discussion and evaluation of possible replacements and interim appointments?

ANSWER: To date, the Department has produced or made available for review approximately 8,500 pages of documents. The Department is continuing its efforts to identify materials responsive to the Committee's initial and subsequent requests, and we will produce such documents as they are identified, consistent with our prior correspondence to the Committees.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00165 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.064

Leahy 98: What was included, and what was excluded?

ANSWER: We would refer you to our May 8, 2007, letter to the House and Senate Committees on the Judiciary, and our various cover letters to the Committees, which discusses our search methodology and production efforts. We would specifically refer you to our March 19, 2007, letter to the Subcommittee on Administrative Oversight and the Courts, and our April 13, 2007, letter to the House and Senate Committees on the Judiciary, in which we discuss the categories of documents that the Department, based on longstanding Executive practice, has not produced or made available to the Committees.

Leahy 99: According to an April 2, 2007, article in The American Spectator, "a series of files and documents that could prove critical to the congressional investigation into the firings of eight U.S. Attorneys remain in the office of the Deputy Attorney General (DAG) and the Executive Office for the U.S. Attorneys (EOUSA), but have not been produced by the Department." According to the article, these "files include overviews and evaluations of at least a dozen current and now-former U.S. Attorneys," and briefing materials provided to you and the Deputy Attorney General for a meeting early last December. These materials are reported to contain information about the status of each U.S. Attorney for an early December meeting in Washington, D.C., including material about why particular U.S. Attorneys "might be on his or her way out." Have the documents relevant to the Committee's investigation cited in these articles that are in the custody, possession, or control of the Department of Justice been produced in full to the Judiciary Committee? If not, why not?

ANSWER: The Department agrees that overviews and evaluations of the eight U.S. Attorneys would be responsive to the Committees' requests and subsequent subpoena. To the best of our knowledge, these materials have been made available or produced to the Committees, and we are not aware of documents fitting the description of the *American Spectator* article that have been withheld from the Committees. To the extent the article is referring to EARS reports, those documents have already been provided or made available to the Committees.

In response to the *American Spectator* article, we contacted the Office of the Attorney General, the Office of the Deputy Attorney General and the Executive Office for United States Attorneys, to ask whether the article described any materials that had previously been overlooked. The only other document potentially meeting that description was a briefing binder prepared for the Deputy Attorney General's attendance at the Project Safe Childhood Conference in December 2006. This binder contains documents relevant to the conference, including the public bios of speakers at the Conference (who do not include any of the U.S. Attorneys who were removed). The binder does not contain any material evaluating the performance of any U.S. Attorney, and it therefore is not responsive to the Committees' requests. The Department would be willing to make the binder available for review by Committee staff, however, if you wished to review it.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00166 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.065

Leahy 100: How has the precise scope of the Department's production been determined?

ANSWER: We again would refer you to our May 8, 2007, letter to the House and Senate Committees on the Judiciary, and our various cover letters to the Committees, which discusses our search methodology and production efforts.

Leahy 101: What precise directions have been given to staff to locate, identify, and preserve relevant documents?

ANSWER: See answer to Question 100.

Leahy 102: Please identify the person or persons responsible for making that determination with respect to scope and who has been responsible for issuing instructions to staff. Please provide all instructions given to staff.

ANSWER: See answer to Question 100.

Leahy 103: What process has the Department followed for determining that all relevant documents have been located and produced, including e-mails from governmental and non-governmental accounts and documents stored in electronic archives?

ANSWER: See answer to Question 100.

Leahy 104: What, if any, documents remain that may be relevant to the Committees' investigations?

ANSWER: The Department has made an extraordinary effort to produce all responsive documents to the Committees' request, consistent with longstanding Executive Branch interests. The Department's efforts to identify material responsive to the Committees' initial and subsequent requests continue, and we will produce such documents as they are identified, consistent with our prior correspondence to the Committees.

Leahy 105: Why have those documents not been produced?

ANSWER: Consistent with its prior correspondence to the Committees, the Department's efforts to identify additional documents responsive to the Committees inquiry are continuing.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00167 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.066

Leahy 107: Have you provided all documents, as requested, related to the case brought by Stephen Biskupic, the United States Attorney based in Milwaukee, against Georgia Thompson, formerly an official in the administration of Wisconsin's Democratic governor, that the Seventh Circuit Court of reversed immediately after oral argument for insufficiency of evidence? If not, why not?

ANSWER: The Department produced documents responsive to this request on May 17, 2007, and we refer you to our letter accompanying that production.

Leahy 108: To date, numerous documents have been withheld from the Department's productions or produced to the Committee only in redacted form. Yet the Department has yet to provide or attempt to provide any legal basis for the redactions, for the limitations on production, or for the restrictions you have unilaterally imposed on the public disclosure of documents. Thus far, the Department has produced only a partial privilege log for a small set of the documents withheld or redacted that does not set forth a legal basis for the withholding of the documents listed on the privilege log or elsewhere. If you do not have a legal basis for the redactions, withholdings, and limitations, please produce those documents to the Judiciary Committee without delay. If you believe you have a legal basis for the redactions, withholdings, and limitations, please specify that basis and for what documents the basis applies so that the Committee may assess the claim and challenge it if appropriate.

ANSWER: We would refer you to our March 19, 2007, letter to the Subcommittee on Administrative Oversight and the Courts, and our April 13, 2007, letter to the House and Senate Committees on the Judiciary, in which we discuss the categories of responsive documents that have not been produced to the Committees.

***Specter* 109: Among the documents submitted to the Committee by the Department in connection with the Committee's investigation into the dismissal of eight U.S. Attorneys is an email sent on the morning of February 7, 2007, the day after DAG McNulty testified before the Committee, from Brian Roehrkasse to Tasia Scolinos and Kyle Sampson which reads, "The Attorney General is extremely upset with the stories on the U.S. Attys this morning. He also thought some of the DAG's statements were inaccurate" (OAG 0297). Do you recall which stories from February 7, 2007, left you "extremely upset?" What about the stories upset you?**

ANSWER: As I testified before the House Judiciary Committee, I was initially upset by the DAG's reference to the replacement of Mr. Cummins as not performance related because I had confused Mr. Cummins, who had been asked to step down in June 2006, with the 7 U.S. Attorneys who had been asked to step down in December 2006. It was my understanding that there were issues relating to the performance – as I defined performance in my testimony -- of the 7 individuals asked to resign on December 7th.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00168 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.067

***Specter* 110: Which of the DAG's statements did you find to be inaccurate?**

ANSWER: As I testified to in the House Judiciary Committee, I do not believe that the DAG's statements with regard to Mr. Cummins were inaccurate.

***Specter* 111: Did you express your concerns directly to DAG McNulty? If so, what was the substance of that conversation?**

ANSWER: No.

***Specter* 112: Was any consideration given to correcting the hearing record following DAG McNulty's testimony regarding any perceived inaccuracy?**

ANSWER: See answer to Specter 110 above.

***Specter* 115: Is your decision to stand by the firings based on the list of justifications compiled by Monica Goodling on or about February 12, 2007?**

ANSWER: As I previously testified, my decision to stand by the December requests to the U.S. Attorneys to step down is based on the reasons that I set forth in response to questions from Senator Brownback and others and on my conversation with the Deputy Attorney General about the decisions.

***Specter* 116: Did anyone brief you on the reasons why each of the U.S. Attorneys was asked to leave before the decision to seek resignation was made? If so, who told you the reasons, when did this occur, and was it done verbally or in writing?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Specter* 117: Putting aside the notion of the authority to terminate presidential appointees on an "at will" basis, do you feel that in each case, the right decision was made? If so, please explain the basis for each case where you believe the removal was correctly sought.**

ANSWER: See answer to Specter 115.

***Specter* 118: In his interview before the Committee on April 15, 2007, Kyle Sampson indicated that, although there had been one complaint about Mr. Bogden's willingness to pursue an obscenity case, at the time the decision was made to ask Mr. Bogden to resign, Mr. Sampson did not recall the decision being based on that case. He also**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00169 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.068

said that he did not recall the reasons why Mr. Bogden was ultimately placed on the list. When DAG McNulty was interviewed by the Committee on April 27, 2007, he explained in response to being asked whether that the case of Mr. Bogden "fell through the cracks" that Mr. Bogden's inclusion on the removal list did not receive the attention it probably should have. In light of this information, would you reconsider your decision to ask Mr. Bogden to resign?

ANSWER: As I previously testified, I stand by these decisions.

***Kennedy* 126: Please describe in detail the roles of Scott Jennings and Sarah Taylor, both of whom reported to Karl Rove, in the decision to dismiss eight U.S. Attorneys. Please provide any documents reflecting or relating to the participation by Mr. Jennings and/or Ms. Taylor in the recommendation or decision-making process that led to the firing of any U.S. Attorney.**

ANSWER: See answers to Leahy 50 and Kennedy 133.

***Kennedy* 127: Kyle Sampson, your former chief of staff, testified that Mr. Jennings participated in meetings at which the replacement of U.S. attorneys was discussed. Mr. Sampson also testified that "Sara Taylor and Scott Jennings had expressed interest in promoting Mr. Griffin for appointment to be U.S. attorney." He further stated that before Mr. Griffin was appointed to be U.S. Attorney in the Eastern District of Arkansas, Mr. Jennings and Ms. Taylor had discussed with Mr. Griffin the possibility of Mr. Griffin's taking that position. Why were these political advisors to Karl Rove so involved in discussions about the dismissal of U.S. Attorneys?**

ANSWER: See answers to Leahy 50 and Kennedy 133. Because the selection of USAs is a political appointment, I would expect the White House to be involved in such discussions.

***Kennedy* 128: Is it fair to say that on a daily basis, at least with respect to Mr. Cummins' replacement by Mr. Griffin, they were more involved in the process than you were?**

ANSWER: As indicated above, I do not recall being aware of any involvement in the process by Ms. Taylor or Mr. Jennings. As I testified, I had directed Mr. Sampson to consult with the appropriate Department officials and to collect the consensus recommendation of the Department's senior leadership. I also expected that Mr. Sampson would contact the appropriate White House personnel as part of this process.

***Kennedy* 129: Do you agree that the involvement of Mr. Jennings and Ms. Taylor adds to the appearance that the firings were politically motivated?**

ANSWER: See response to Kennedy 128.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00170 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.069

***Kennedy* 130: The press has reported that Sara Taylor recently resigned her position. What were the reasons for her resignation?**

ANSWER: I do not know.

***Kennedy* 131: The GOP website states that Scott Jennings, the Deputy White House Political Director and Special Assistant to the President, managed President Bush's campaign in New Mexico in 2004. What was Mr. Jennings' role in the firing of David Iglesias, the former U.S. Attorney for the District of New Mexico?**

ANSWER: See answer to Kennedy 133.

***Kennedy* 132: Did Mr. Jennings or Ms. Taylor ever suggest to anyone in the Department of Justice that Mr. Iglesias should be fired? If so, please describe in detail that suggestion or communication, and state to whom it was made. Please provide any documents reflecting or related to such a statement by Mr. Jennings.**

ANSWER: See answers to Leahy 50 and Kennedy 133.

***Kennedy 133*: Did Mr. Jennings or Ms. Taylor ever indicate to you that Mr. Iglesias had failed to pursue voter fraud? If so, please describe in detail those communications, and provide any documents reflecting or relating to this matter.**

ANSWER: My best recollection is that I did not have any such discussions with them. I only would have spoken to Mr. Jennings at Judicial Selection Meetings and my best recollection is that I did not discuss Mr. Iglesias with Mr. Jennings at any of those meetings.

***Kennedy* 134: It appears that Karl Rove may have been dictating the dismissal of U.S. Attorneys for political reasons. U.S. Attorney David Iglesias was fired after he refused to indict New Mexico Democrats in the weeks before last November's election. John McKay was fired after he refused to pursue baseless charges of voter fraud as a means of challenging a Democratic victory in Washington's 2004 governor's race. Deputy Attorney General Paul McNulty testified that U.S. Attorney Bud Cummins was pushed aside to clear the way for Karl Rove's protégé. Many of the states where U.S. Attorneys were removed -- New Mexico, Washington, Arkansas, and Nevada -- are key battleground states. At the same time you made interim appointments in other closely contested states, such as Florida, Missouri, Iowa and Minnesota. You sent political appointees from Washington to these states. California is not a battleground state, but the widening corruption probes by the U.S. Attorney in San Diego had gained such national prominence that they were considered a factor in close races outside California during 2006, and some of those investigations could have continued into the next election cycle. How do you respond to those who are concerned – and to the circumstantial evidence -- that the purge of U.S.**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00171 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.070

Attorneys was part of an effort to put partisans into key U.S. Attorney offices before the 2008 election season?

ANSWER: As I stated in my opening comments, I know that I did not, and would not, ask for the resignation of any individual in order to interfere with or influence a particular prosecution for partisan political gain. I also have no basis to believe that anyone involved in this process sought the removal of a U.S. Attorney for an improper purpose.

***Kennedy 137*: Did he mention any U.S. Attorneys' record on election fraud?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Kennedy 138*: Did President Bush himself ever ask you to fire any U.S. Attorney?**

ANSWER: As I stated in my previous testimony, I do not recall the President ever telling me specifically to fire an United States Attorney.

***Kennedy 139*: Did Karl Rove tell you he thought that David Iglesias should be fired? What exactly did Mr. Rove say about Mr. Igelsias? Did he mention Mr. Iglesias' record on election fraud?**

ANSWER: Mr. Rove did not tell me he thought Mr. Iglesias should be fired. As I previously testified, I do not recall Mr. Rove ever mentioning anything about Mr. Iglesias directly to me, rather he made a general comment about voter fraud in three districts, one of which was New Mexico.

***Kennedy 140*: Did you, as Mr. Bartlett stated, tell the President you knew about problems with some U.S. Attorneys and were looking into those problems? If so, what were the problems?**

ANSWER: I do not recall that conversation, but I have no reason to believe that Mr. Bartlett's recollection is incorrect.

***Kennedy* 141: Was the decision to fire Mr. Iglesias based, even in part, on voter fraud matters? If so, what were the specific concerns about Mr. Iglesias' record on voter fraud?**

ANSWER: See Answer to Leahy 64.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00172 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.071

***Kennedy* 143: Who was involved in the decision to fire Mr. Iglesias?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Kennedy 148*: Did Ms. Miers or anyone else who worked in the White House ever mention to you Mr. McKay's failure to bring charges of election fraud in connection with the 2004 election?**

ANSWER: My best recollection is that no one at the White House brought this allegation to my attention.

***Kennedy 150*: Did you discuss Mr. McKay with Karl Rove or anyone in his office? Did anyone else at the Justice Department?**

ANSWER: See answer above to Leahy 74.

***Kennedy 154*: Did you ever discuss the development or use of the Attorney General's interim replacement authority with anyone who was employed at the White House?**

ANSWER: To the best of my recollection, I did not talk about the Patriot Act's interim replacement authority with regard to the U.S. Attorneys we asked to step down in December 2006 with anyone at the White House.

***Kennedy 156*: Did you have discussions or communications regarding Mr. Graves' replacement with Bradley Schlozman? Describe those discussions and communications and any others of which you are aware.**

ANSWER: To the best of my recollection, I did not have any discussions with Mr. Schlozman about replacing Mr. Graves prior to the time that Mr. Schlozman was recommended as a temporary acting replacement.

***Kennedy* 157: Why was Mr. Schlozman chosen to serve as U.S. Attorney in the Western District of Missouri? When he was selected, had you reviewed his litigation experience? Please name all of the persons who were involved in Mr. Scholzman's selection for the position of U.S. Attorney.**

ANSWER: I do not recall who presented me with the recommendation that Mr. Schlozman be asked to serve as an interim U.S. Attorney nor do I recall any specific discussions on his qualifications. As a general matter, candidates for interim U.S. Attorneys do go through a recommendation process, during which the candidate's litigation experience would be one of the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00173 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.072

factors DOJ staff would consider in their evaluation. I have no reason to believe that the normal process was not followed here.

***Kennedy* 158: I'm concerned that some of the U.S. Attorneys appointed in recent months helped preside over the politicization of one of the Department's most important responsibilities -- protecting the right to vote. Bradley Scholzman, who previously worked in the Bush Civil Rights Division, was involved in approving Tom DeLay's Texas redistricting plan despite the unanimous objection of career attorneys that the plan was discriminatory. The plan was later struck down by the Supreme Court. Mr. Schlozman also oversaw approval of the Georgia photo identification requirement for voting, which clearly discriminated against minority voters. That requirement was later blocked by a federal district court as tantamount to a modern poll tax. The controversy over the Department's handling of the Georgia and Texas matters was widely reported in the press, and has been the subject of oversight by this Committee. Did you or anyone involved in selecting Mr. Schlozman to be the U.S. Attorney for the Western District of Missouri know of his record on voting rights in the Civil Rights Division?**

ANSWER: As described in the answer to Kennedy 157 above, I would expect that Mr. Schlozman's work in the Civil Rights Division was a factor DOJ staff would consider in the normal course in its evaluation of his candidacy for an interim U.S. Attorney appointment.

***Kennedy* 159: Did you discuss with or have communications with anyone regarding the use of the Attorney General's interim appointment authority to appoint Mr. Schlozman as U.S. Attorney? If so, please describe those discussions or communications, and provide any documents reflecting or relating to them.**

ANSWER: We did not use the Patriot Act's interim appointment authority for Mr. Schlozman. In fact, as soon as Mr. Schlozman was named interim U.S. Attorney, the Department began working to identify a permanent replacement. This process resulted in the nomination of John Wood and his unanimous confirmation by the Senate in April 2007.

***Kennedy* 160: When was the decision made to replace Mr. Schlozman? Why was the decision made?**

ANSWER: See answer to Kennedy 159 above.

***Kennedy* 161: Did the current controversy surrounding the replacement of U.S. Attorneys have anything to do with that decision?**

ANSWER: No.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00174 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.073

***Kennedy* 162: Was United States Attorney Heffelfinger encouraged or forced to resign? Describe all discussions and communications of which you are aware surrounding the resignation of Mr. Heffelfinger.**

ANSWER: No.

***Kennedy* 163: Describe any discussions or communications about which you are aware regarding the replacement of Mr. Heffelfinger with Rachel Paulose.**

ANSWER: Mr. Heffelfinger was not forced to resign. He left for family financial reasons after faithfully and effectively serving as U.S. Attorney for over 4 years. Ms. Paulose was subsequently nominated by the President and unanimously confirmed by the Senate.

***Kennedy* 164: To your knowledge, has any current or former employee of the Administration ever expressed concern that former U.S. Attorney Carol Lam's corruption investigations could -- or did -- affect the outcome of the 2006 elections? If so, who, and what did they say?**

ANSWER: No.

***Schumer* 174: You have stated that you recall making the decision to dismiss a group of U.S. attorneys, but you do not recall when you made that decision. How can you be so sure that you approved these dismissals if you have no recollection of the occasion on which you did so?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 175: You stated in your written testimony for April 19, 2007 that "the process that led to resignations was flawed," that it was "nowhere near as rigorous or structured as it should have been," and that "reasonable people might decide things differently[.]" You also stated during the course of the hearing that you made mistakes in managing this process and that, looking back, you should have done many things differently and given more direction to your staff. Please explain why you are standing by the results of such a flawed process.**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 176: On February 23, 2007, in response to an inquiry from the Democratic leadership of the Senate, the Department of Justice informed me and my colleagues that "The Department is not aware of Karl Rove playing any role in the decision to appoint Mr. [Tim] Griffin" as the interim U.S. Attorney in the Eastern District of Arkansas. Yet on**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00175 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.074

March 28, 2007, the Department informed the Committee that "certain statements in the February 23 letter are contradicted by Department documents included in our production in connection with the [Senate and House Judiciary] Committees' review of the resignations of U.S. Attorneys. We sincerely regret any inaccuracy." Given the Department's admission that inaccurate information was provided in response to the initial Congressional inquiry, I ask you to provide a full and accurate response to the original question: What role did Karl Rove, with whom Griffin was closely associated, play in the decision to appoint Griffin?

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 177: Do you have any plan to review the records of the dismissed U.S. attorneys or to consider reinstating them, given your admission that the dismissal process was flawed?**

ANSWER: No. As I previously testified, my decision to stand by the December requests to the U.S. Attorneys to step down is based on the reasons that I set forth in response to questions from Senator Brownback and others and on my conversation with the Deputy Attorney General about the decisions.

***Schumer* 180: John McKay and David Iglesias were both reportedly criticized for not pursuing election fraud allegations after the 2004 federal elections. Did the Public Integrity Section of the Justice Department concur with the decisions by Mr. McKay and Mr. Iglesias not to pursue criminal charges?**

ANSWER: Without getting into any specific law enforcement matters, the United States Attorneys Manual (9 U.S.A.M. 85.210) requires United States Attorneys and their Assistants to "consult" with the Criminal Division before opening a general investigation into alleged election frauds. This "consultation" requirement means that the Division's views must be sought and taken into account before an election fraud investigation is initiated. The "consultation" requirement does not, however, mandate or require that the USAO follow the views of the Public Integrity Section of the Criminal Division. With respect to election fraud matters arising out of the 2004 general election in the District of New Mexico and the Western District of Washington, the United States Attorney Offices in question complied fully with this "consultation" requirement.

***Schumer* 181: Document OAG297, produced by the Department of Justice, is an e-mail from Brian Roehrkasse to Tasia Scolinos and D. Kyle Sampson on February 7, 2007, the day after Deputy Attorney General ("DAG") Paul McNulty testified before the Senate Judiciary Committee. Mr. Roehrkasse wrote: "The Attorney General is extremely upset with the stories on the U.S. Attorneys this morning. He also thought some of the DAG's statements were inaccurate." What specific statements by Mr. McNulty at the hearing on February 6, 2007, did you think were inaccurate?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00176 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.075

ANSWER: See Answer to Specter 109 and 110.

***Schumer* 183: "On April 12, 2007, I wrote to advise you of ten key questions that would come up during your testimony before the Senate Judiciary Committee. I provided you with these questions ahead of time in order to give you an opportunity to gather information and refresh your recollection so that the Committee could obtain full information. Unfortunately, during the course of a lengthy hearing on April 19, 2007, you were still unable to provide full answers to any of these questions. I urge you to take this additional opportunity to provide full responses to the following key questions about the dismissal of eight U.S. attorneys. A February 23, 2007, letter written to me on your behalf stated that "[t]he Department is not aware of Karl Rove playing any role in the decision to appoint Mr. Griffin." This directly contradicts a statement by your former aide, D. Kyle Sampson, that Mr. Griffin's appointment was "important" to Mr. Rove. Please provide a full account of all communications regarding Tim Griffin between the Department of Justice and Mr. Rove or aides communicating on Mr. Rove's behalf.**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 184: You have not clarified the involvement of Mr. Rove in the process of dismissing a group of U.S. attorneys. Yet in response to my questioning at the Senate Judiciary Committee hearing on March 29, 2007, Mr. Sampson stated under oath that he remembered "learning from the Attorney General that Mr. Rove had complained to the Attorney General about U.S. Attorneys in three districts" who were not aggressively pursuing voter fraud. Please provide a full account of all your communications with Mr. Rove regarding the performance or possible dismissal of any United States attorney, and state whether Mr. Rove ever expressed the view that a particular U.S. attorney should be removed from office.**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 185: President Bush has personally confirmed that he passed complaints to you last fall about certain U.S. attorneys' handling of voter fraud cases, yet you stated on March 26, 2007, that you do not recall this conversation. Please provide a full account of all your communications with President Bush regarding the performance or possible dismissal of any United States attorney.**

ANSWER: See Answer to Kennedy 136.

***Schumer* 186: Although you reportedly do not recall speaking with President Bush about complaints regarding voter fraud cases in three jurisdictions, the White House has confirmed that one of the districts President Bush mentioned to you was New Mexico. (Washington Post, March 19, 2007) Department of Justice documents and Mr. Sampson's**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00177 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.076

testimony confirm that David Iglesias, formerly the U.S. Attorney for the District of New Mexico, was added to the list of prosecutors to be fired sometime between October 17, 2006 and November 7, 2006. On what precise date, why, and by whom was Mr. Iglesias placed on the list of U.S. attorneys to be fired?

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 187: Department officials have reported that you do not recall a November 27, 2006, meeting with your top advisors to discuss U.S. attorneys, but departmental documents support Mr. Sampson's testimony that you did attend that meeting. Please give a full account of the meeting about U.S. attorneys on November 27, 2006, including all of your statements at the meeting, and clarify whether you personally approved the dismissal of specific U.S. attorneys on that occasion.**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 188: At a press conference on March 13, 2007, you stated that you "never had a discussion about where things stood" in the process of removing certain U.S. attorneys. However, Mr. Sampson testified before the Senate Judiciary Committee that he spoke with you on at least five occasions about dismissing a group of U.S. attorneys. How many times, and when, did you discuss the plan or process to dismiss certain U.S. attorneys with any official at your Department, any official at the White House, or any other person?**

ANSWER: My previous testimony and answers represent my best recollection on this issue.

***Schumer* 189: Over what period of time did these discussions occur?**

ANSWER: My previous testimony and answers represent my best recollection on this issue.

***Schumer* 190: You have also stated that you "don't recall being involved in deliberations involving the question of whether or not a U.S. attorney should or should not be asked to resign." How many times, and when, did you discuss whether a specific U.S. attorney should be removed from office with any official at your Department, any official at the White House, or any other person?**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 191: Over what period of time did these discussions occur?**

ANSWER: My previous testimony represents my best recollection on this issue.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00178 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.077

***Schumer* 192: A Justice Department spokeswoman has stated: "The Attorney General has no recollection of any plan or discussion to replace U.S. attorneys while he was still White House counsel." (New York Times, March 16, 2007) However, Mr. Sampson wrote on January 9, 2005 – before you had taken office as Attorney General – that "Judge and I discussed briefly" the issue of removing and replacing U.S. attorneys. (OAG0180) Please describe any and all discussions, with Mr. Sampson or any other person, which you initiated or participated in while you were Counsel to the President regarding any plan to remove and replace U.S. attorneys during President Bush's second term.**

ANSWER: My previous testimony represents my best recollection on this issue.

***Schumer* 193: On March 26, regarding the role of the White House in removing U.S. attorneys, you stated: "As far as I know… they did not play a role in — in adding names or taking off names." Yet Mr. Sampson's testimony indicated that he discussed the names of specific U.S. attorneys who could be fired, including Patrick Fitzgerald, at meetings with White House Counsel Harriet Miers and her aides. Please provide a full account of communications between any member of the Department of Justice and the White House regarding which specific U.S. attorneys would be asked to resign.**

ANSWER: My previous testimony and answers represent my best recollection on this issue.

***Schumer* 194: Following the Deputy Attorney General's testimony to the Senate Judiciary Committee on February 6, 2007, your spokesman sent an e-mail to Mr. Sampson stating: "The Attorney General is upset with stories on the U.S. Attorneys this morning. He thought some of the DAG's [Deputy Attorney General's] statements were inaccurate." You also admitted at a press conference on March 13, 2007, that Department officials shared incomplete information with Congress. What specific statements to Congress by the Deputy Attorney General and other officials were inaccurate?**

ANSWER: See Answer to Specter 109 and 110.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00179 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.078

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 23, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached Part Three of the Department's responses to questions for the record, which were posed to Attorney General Alberto Gonzales following his appearance before the Committee on April 19, 2007. The hearing concerned Department of Justice Oversight. This letter, which completes our responses to the 207 questions the Committee submitted to the Department, supplements our submissions to the Committee, dated July 6, 2007, and July 22, 2007.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy 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 April 19, 2007
(Part 3)

Leahy 18 **Several weeks ago, a federal judge ruled in favor of the State of Missouri in a case Mr. Schlozman prosecuted against the State for alleged voter registration problems, and which he had approved as Acting Assistant Attorney General for Civil Rights several months before being named interim U.S. Attorney. The court found "no evidence" of major voter fraud in the state. Many have raised a concern at the effects of these attempts to purge voter lists on the ability of particularly poor or minority voters to register and vote. What steps has the Department taken to make sure that the Administration's political goals do not influence the filing of lawsuits targeting the registration of voters? Are you concerned that the increasing number of U.S. Attorneys appointed without Senate confirmation—currently there are only 2 nominations for 21 spots without a Senate confirmed nominee—threatens to erode whatever firewalls do exist to ensure prosecutorial independence in cases involving voter fraud and elections?**

ANSWER: Politics played no role in the filing of the National Voter Registration Act (NVRA) lawsuit in Missouri. The civil complaint (it was not a criminal prosecution) filed by the United States against Missouri involved two separate claims. First, the lawsuit alleged that the State had failed to assure that registered voters would be notified, as required by the NVRA, prior to their removal from the poll lists. Second, the lawsuit alleged that the State had failed to maintain a reasonable voter registration list maintenance system. Because the Government has appealed the District Court's decision, we cannot comment further on the case.

I am confident that all U.S. Attorneys - whether Senate confirmed or acting - exercise prosecutorial independence and bring cases based solely on the evidence.

Leahy 26 **During the Committee's January 18, 2007 oversight hearing, I asked you about Maher Arar, a Canadian citizen who when returning home from a vacation in 2002, was detained by federal agents at JFK Airport in New York City on suspicion of ties to terrorism, and was sent to Syria, where he was held for 10 months. A Canadian commission found no evidence that Mr. Arar had any terrorist connection or posed any threat, but concluded that he was tortured and held in abhorrent conditions in Syria. The Canadian government has apologized to Mr. Arar for its part in this debacle. In addition, the head of the Royal Canadian Mounted Police resigned, and the country has agreed to compensate Mr. Arar almost $10 million. This country, meanwhile, has not apologized or admitted any wrongdoing. After I pressed you about the Arar case at the hearing in January, Senator Specter and I were finally granted a classified briefing. Both of us said afterward that we emerged with as many questions as we had going in. We subsequently wrote to request a Justice Department investigation into the matter and we have since learned that the Department's Office of Professional Responsibility is looking into the**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00181 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.080

Department's legal decisions. Given that a past OPR investigation of a politically sensitive matter, specifically the NSA's warrantless wiretapping program, appears to have been blocked, will you commit to provide OPR with full access to all documents and personnel it needs for its investigation into the Department's handling of the Arar case?

ANSWER: It is my understanding that the investigation is still ongoing and that OPR has not encountered any issues with regard to access to documents or personnel.

Leahy 41 **How can Congress verify that political considerations are not a factor in the hiring of career employees?**

ANSWER: On July 6, 2007, in response to questions for the record we transmitted to the Committee a recent memo regarding process changes to the Honors Program. In addition, the Department has an internal website available to all employees addressing the Department's employee's rights and policies. The site contains full information on the Prohibited Personnel Practices. If a Department employee has reason to believe that a particular career hiring was based on any prohibited basis such as consideration of politics, the website provides links to the OSC website, which contains full information on how to properly report such a violation as well as an explanation of whistle blower rights. The Attorney General has also recently directed that all political appointees be briefed on both Merit System Principles and Prohibited Personnel Practices as they enter on duty in the Department. In addition, the Assistant Attorney General of the Civil Rights Division has already issued a reminder of those requirements to all attorneys within his Division. Further, OPR and OIG are conducting a review of the Honors Program /Summer Law Intern Program and other Departmental hiring issues at this time. Finally, GAO has conducted reviews of Department hiring issues and Congress through its Committees has, and continues to exercise, oversight of this and other Department issues.

Leahy 43 **What is the involvement of political appointees, officials in political offices within the Department, and other political officials in hiring processes aside from the Attorney General's Honors Program and the Summer Law Intern Program?**

ANSWER: The authority to make career attorney excepted service hires is vested in the Attorney General as the Head of Agency. The Attorney General largely delegates this authority to the Deputy Attorney General and the Associate Attorney General, who in turn delegate it to the Office Attorney Recruitment and Management (OARM). The OARM is directed and staffed by career employees. The actual appointment authority for career attorney positions is vested in the OARM subject to an appeal to the Deputy Attorney General. The OARM in turn delegates a portion of that authority to the various Assistant Attorneys General and other heads of Department components.

The role of component career employees and political appointees in the initial selection process is determined by the heads of the components, who are usually Presidential appointees and often subject to Senate Confirmation. Accordingly, political appointees participate in aspects of the hiring processes for career attorneys at the Department. Any such participation

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00182 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.081

should at all times be consistent with all applicable laws, rules, regulations, and Department policies. Set forth below is the Department's normal practice when engaging in hiring career attorneys.

When the component head authorizes a career attorney vacancy to be filled, the component's HR staff places an announcement on the Department's internet attorney web site. This has been required since 2003. The OARM maintains this website providing general information on attorney career opportunities in the Department. Applications are made directly to the Component or United States Attorneys office (USAO). Each component or USAO has broad discretion in the candidate review and selection process but it frequently involves recommendations by section chiefs or by some other review or initial screening process. The method of this screening and the ultimate selection of a proposed hire rests with the Assistant Attorney General, or other component head or United States Attorney.

Once a selection is made a hiring package is forwarded to the OARM for an initial suitability review. Such a review includes a check of, among other things, credit and tax history, arrest record, drug and alcohol use, associations, and other information contained in the security forms including professional credentials. If approved the applicant usually receives a temporary appointment of up to 18 months pending completion of the full field FBI Background Investigation (BI). Once the BI is completed a final adjudication is made before the applicant is converted to permanent employee status. If the OARM declines approval at either stage the component may appeal the refusal to the Deputy Attorney General for the final decision. The Department's Security and Emergency Planning Staff (SEPS) also evaluates the BI if necessary for the granting of National Security Clearances. Sometimes the OARM discovers past employment or other issues that do not rise to the level of immediate exclusion for suitability but may bear on a component management's decision to continue to support the candidate for employment. In those instances the matter or issues are brought to the component management's attention for their consideration.

Unlike other Department components, pursuant to 28 CFR § 0.15(h)(1), the Attorney General reserves hiring authority for career attorneys hired to serve in the Office of the Attorney General and the Office of the Deputy Attorney General.

Leahy 44 **For instance, what role do they play in the hiring of career attorneys on a lateral basis?**

ANSWER: See the answer to Leahy 43.

Leahy 54: **Did you communicate with Monica Goodling about replacing United States Attorneys? When? How? How many times? What specifically do you recall about your communications with Monica Goodling on this topic? Did you discuss the "performance" of U.S. Attorneys? Did you discuss dissatisfaction or complaints about U.S. Attorneys?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00183 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.082

ANSWER: In my previous testimony, I answered a number of questions concerning my discussions with Ms. Goodling about replacing United States Attorneys. That testimony represents my best recollection of my discussions with Ms. Goodling about replacing the eight U.S. Attorneys. I am now aware that Ms. Goodling has testified about a conversation with me in which she indicated that I mentioned the US Attorney matter. Ms. Goodling's testimony is accurate in that we did talk around March 15th. But the context of the conversation was not a factual inquiry into the US Attorney matter or an attempt to shape anybody's testimony. Ms. Goodling had asked to see me because she was emotionally distraught. My goal in the meeting was to console her because I was worried about her well being.

Leahy 57: **When and how did you become aware that the White House had signed off on the plan to replace U.S. Attorneys?**

ANSWER: At the time that I approved the recommendations to ask the seven U.S. Attorneys to step down, my understanding was that Mr. Sampson had kept the White House informed.

Leahy 58: **Deputy Attorney General Paul McNulty, the number two official at the Department, has direct supervisory authority over United States Attorneys. Mr. McNulty has testified to Committee investigators that he first learned of the plan to remove and replace multiple U.S. Attorneys in late October 2006, in communications from your Chief of Staff Kyle Sampson to his Chief of Staff, Michael Elston. Mr. McNulty also testified to investigators that he deferred to ""personnel"" people on the firings including yourself and Mr. Sampson and described himself as having had no knowledge of why any of the U.S. Attorneys were placed on the list or discussion with your or Mr. Sampson about those reasons. You testified on April 19 that when you received the recommendation of the list of U.S. Attorneys to fire, "what I presumed was that—most importantly, what I cared about is did this reflect the recommendation of the Deputy Attorney General. That would be the most important thing." Did you have any discussions with Mr. McNulty about the reasons these U.S. Attorneys were being asked for their resignations? Why or why not?**

ANSWER: I do not recall any direct discussions with Mr. McNulty prior to December 7th. As I have previously testified, documents show that Mr. McNulty was present, along with others, in November 2006 when the final list was approved. I did not have any other direct contact with Mr. McNulty prior to December 7th because I understood that he had been consulted and had offered his views and opinions. In other words, I believed that the final list incorporated the views of the Deputy Attorney General and that he did not object to any of the listed names. As I have also testified, if I had to do it over again, I would have had more direct contact with Mr. McNulty and may have asked him to lead the process.

Leahy 59: **What was the basis of your assertion and belief that the list reflected the recommendations of the Deputy Attorney General? How do you reconcile this assertion with Mr. McNulty's testimony that he did not know why the U.S. Attorneys were placed on the list and that he deferred to you and others?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00184 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.083

ANSWER: In my previous testimony, I explained that I had directed Mr. Sampson to consult with the senior officials in the department who would have the most relevant knowledge and information about the performance of United States Attorneys. I specifically asked Mr. Sampson to consult with the Deputy Attorney General, who was responsible for supervising U.S. attorneys and who was a former colleague. It was my understanding that such consultation occurred before the final list was presented to me.

Leahy 60: **Mr. McNulty testified before this Committee on February 6 that seven of the eight U.S. Attorneys were dismissed for "performance" reasons. He later briefed Committee members and staff about the dismissals, citing a variety of "performance" reasons for the dismissals based on a document assembled by Monica Goodling. Many of those reasons are not only contradicted by the Department's internal evaluations, but actually post-date the first appearance of many of those U.S. Attorneys on lists of possible U.S. Attorneys for firing. Are the "performance" reasons cited by Mr. McNulty in his Committee testimony and briefing the reasons those U.S. Attorneys were added to the list for firing? How do you know?**

ANSWER: My previous testimony, in which I discussed at various points my understanding of the reasons for each of the dismissals, represents my best recollection on this issue.

Leahy 61: **Mr. McNulty told the Committee in February that the process for dismissing the U.S. Attorneys began in October 2006. Yet documents produced by the Department and the testimony of your former Chief of Staff demonstrate that the process began nearly two years earlier and that you had knowledge of the process dating back to your time as White House Counsel. Why did Mr. McNulty tell the Committee that the process started in October 2006? What steps did you take to correct the inaccurate information he provided to the Committee?**

ANSWER: Although I can not speak for Mr. McNulty, I am aware that he recently testified to the Commercial and Administrative Law Subcommittee of the House Judiciary Committee that he was consulted toward the "end of what we now know to be the process" and that he subsequently learned "there was a process that extended over a two-year period of time…"

The Department has taken extraordinary steps to correct the information provided to the Committee. In fact, it is my understanding that Mr. McNulty has also clarified his testimony. We have provided many on-the-record interviews and thousands of pages of documents, including deliberative pre-decision material, because of the concern that Congress was provided with incomplete information. This information demonstrates there was no intentional attempt to mislead the Congress.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00185 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.084

Leahy 62: **Michael Battle, until recently your Director of the Executive Office of U.S. Attorneys, said that Kevin Ryan in San Francisco was the only one of the fired U.S. Attorneys for whom he was aware of major performance or management problems. Mr. Battle said he had heard about Mr. Ryan's issues even before they were documented in a standard Evaluation and Review Staff (EARS) report. Yet he granted Mr. Ryan an extension on the EARS evaluation, and when the report came back negative, he asked for a supplemental report to give Mr. Ryan another chance to "put his best foot forward." Even though that report also came back negative, Mr. Ryan was only added to the list of U.S. Attorneys to be fired at the last minute. In other words, for the one fired U.S. Attorney for whom everyone agrees there were real management and performance problems, those problems were well-documented, and Mr. Ryan was given every opportunity to address and fix the problems before he was fired. There is really no file produced on the firings of the other U.S. Attorneys, and the testimony of, among others, your former Chief of Staff who aggregated the list, shows that none of the others were told any reasons they might be fired or given any opportunity to correct purported problems. Given that the other U.S. Attorneys were not informed of performance-related problems or given a chance to address those problems, and that none of them had problems documented in any kind of systematic way, isn't it a fair inference that their firings were not really performance-related at all?**

ANSWER: With all due respect, I do not believe that it is a fair inference. After thousands of pages of documents have been produced and hours of witness testimony have been heard, both publicly and privately, there has been no evidence that the US Attorneys were asked to resign for improper political reasons.

Leahy 63: **Can you see why these after-the-fact explanations—like the one about David Iglesias being an absentee landlord—are not being accepted?**

ANSWER: I have testified about my understanding of the reasons for each decision. People can accept or reject the reasons that have been provided, but there is no evidence that anyone was asked to resign for an improper reason.

Leahy 68: **Mr. Battle told the Committee staff that, at the November 27, 2006 meeting to discuss U.S. Attorney firings, at which you approved the dismissals, you had no questions about the U.S. Attorneys on the list to be replaced, or about the reasons for the firings. Was that because you already knew why these people were on the list to be fired, or was it because you did not care, or some other reason? For example, why did you sign off on November 27 on replacing David Iglesias?**

ANSWER: As I stated in response to *Leahy 60*, my April testimony, in which I discussed at various points my understanding of the reasons for each of the dismissals, represents my best recollection on this issue.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00186 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.085

Leahy 88: **Millions of White House e-mails between 2003 and 2005 were accidentally lost, according to White House accounts, when e-mail accounts where converted from Lotus Notes to Microsoft Outlook. As White House Counsel, what was the policy and practice with regard to preserving and archiving emails?**

ANSWER: I respectfully suggest that you direct this question to the White House.

Leahy 89: **What was your role in establishing that policy and practice?**

ANSWER: See answer to Leahy 88.

Leahy 90: **Did you f ollow that policy and encourage others to do so?**

ANSWER: See answer to Leahy 88.

Leahy 91: **Did you conduct any audit or oversight of the preservation and archiving of White House emails?**

ANSWER: See answer to Leahy 88.

Leahy 92: **Did you ever as White House Counsel raise a concern about what appears to have been a widespread failure to comply with White House document preservation rules and the Presidential Records Act?**

ANSWER: See answer to Leahy 88.

Leahy 93: **The White House announced that millions of e-mails may have been lost from the Republican National Committee, and that they could not rule out the possibility that the lost e-mails could have included e-mails from Karl Rove and other political operatives in the White House relevant to this Committee's investigation into political influence into the firing and replacement of United States Attorneys. When did the Administration first become aware that e-mail records relevant to this Committee's investigation were not easily retrievable, were erased, or were otherwise deleted and not retained?**

ANSWER: See answer to Leahy 88.

Leahy 94: **Since that time, what has been done to secure the relevant services, equipment, software, elements, data, and documents stored in paper or electronic form from all e-mail systems, personal computers, workstations, PDAs, Blackberries, backup systems, or other electronic storage devices?**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00187 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.086

ANSWER: See answer to Leahy 88.

Leahy 106: **Have you provided the Committee with all documents you reviewed in preparation for your April 19, 2007 appearance before the Judiciary Committee, including the "thousands of pages of documents related to [your] upcoming testimony" you were reported to be reviewing in an April 5, 2007 article in The Washington Post? If not, please provide those documents to the Committee and please explain the reasons why they were withheld.**

ANSWER: In advance of my April 19, 2007 testimony, I reviewed copies of documents that the Department had produced to Congress, public testimony and summaries that my staff provided to me. It is my understanding that the Department has made available to the Committee the documents I reviewed that were responsive to the Committee's earlier requests.

Specter 113: **In your written statement before the Committee, you write, "Shortly after the 2004 election and soon after I became Attorney General, my then-deputy-chief-of-staff Kyle Sampson told me that then-Counsel to the President Harriet Miers had inquired about replacing all 93 U.S. Attorneys." An email sent from Kyle Sampson to David Leitch on January 9, 2005 suggests that you discussed such an idea with Sampson in late 2004, while you were still serving as Counsel to the President (OAG 0180). How do you rectify these conflicting timeframes?**

ANSWER: As I explained in both my previous Senate Judiciary Committee hearing and before the House Judiciary Committee I do not recall a conversation with Mr. Sampson during that period of time. But, in preparing for my testimony I did become aware that there was some email traffic about U.S. Attorneys shortly before I became Attorney General.

*Specter*114: **A number of Senators have encouraged you to reconsider the decision to ask certain U.S. Attorneys to resign, particularly Mr. Daniel Bogden and Mr. David Iglesias. It is acknowledged that after consulting with DAG McNulty and others, you have decided to stand by your decisions because U.S. Attorneys ultimately serve at the pleasure of the President. What steps have you taken to consider the merits of each decision to ask the individual U.S. Attorneys to resign?**

ANSWER: As I explained in my previous testimony, I've gone back and searched the record and I spoke with the Deputy Attorney General and asked him whether or not he stood by the decision. He concluded, and I agreed, that the decision should stand.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00188 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.087

*Specter*119: **Given the doubt expressed by both the man you tasked with running the process of targeting which U.S. Attorneys should be asked to resign and the man whose recommendation you testified you depended on with regard to the decision to stand by the decision, what degree of confidence do you now feel you have regarding the removal of Daniel Bogden?**

ANSWER: See answer to Specter 118.

Specter 125: **Recent reports as well as DOJ documents submitted to Congress have revealed that top White House officials have been using the RNC email system to conduct official business, and that such emails may have been permanently deleted. Disposal of official White House business email violates the Presidential Records Act (PRA). The White House has blamed the failure to comply with the PRA on inadequate guidance to White House staff on the PRA. White House spokesperson, Dana Perino, has said that the White House "has not done a good enough job overseeing staff using political e-mail accounts to assure compliance with the Presidential Records Act." She added that it did not "give enough guidance to staff on how to avoid violating the Hatch Act while following the Records Act." According to the LA Times, redacted copies of White House employee manuals were shown to reporters on Friday April 13th, 2007 at the White House press office on condition that they not be removed from the premises. The LA Times reports that the documents included a memorandum from you when you were White House General Counsel, which cautioned employees that "any e-mail relating to official business ... qualifies as a presidential record." The instructions also explain that all e-mail sent "to your official account is automatically archived as if it were a presidential record." The manual adds: "If you happen to receive an e-mail on a personal account which otherwise qualifies as a presidential record, it is your duty to insure that it is saved as such by printing it out and saving it or by forwarding it to your White House e-mail account." How can you reconcile the inconsistencies between these clear instructions with the Administration's statements that staff was not given sufficient guidance on how to comply with the PRA?**

ANSWER: I do not believe it is appropriate for me to comment on her statements.

Kennedy 135: **Do you acknowledge that the way in which the firing of U.S. Attorneys was handled created the appearance that U.S. Attorneys were being removed for partisan political reasons?**

ANSWER: As I have testified, the process by which the U.S. Attorneys were asked to resign should have been handled differently, but none of the U.S. Attorneys were dismissed for improper political reasons.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00189 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.088

Kennedy 136: **On March 13th, Dan Bartlett admitted that the White House had received complaints about U.S. Attorneys not doing enough on election fraud cases. According to Mr. Bartlett, President Bush specifically told you about such complaints involving David Iglesias in New Mexico. Mr. Bartlett said you told the President you'd already heard about the problem with the U.S. Attorneys in New Mexico, Philadelphia, and Milwaukee, and that you were looking into it. Did the President contact you about problems with any U.S. Attorneys?**

ANSWER: I do not recall any specific conversations with the President on the issue of the seven U.S. Attorneys.

Kennedy 142: **Did you or anyone else from the Department of Justice ever talk to Mr. Iglesias about his record on election fraud?**

ANSWER: I can only speak for myself, but I do not recall speaking with Mr. Iglesias about his record on election fraud. As I testified in April, I had heard concerns from Mr. Rove generally about voter fraud prosecutions, voter fraud cases in three districts, including New Mexico, and I believe that I communicated this information to Mr. Sampson.

Kennedy 144: **John McKay refused to pursue voter fraud charges as a means of challenging a Democrat's close victory in the 2004 election for governor of the State of Washington. We know that Mr. McKay's failure to indict anyone after the 2004 election was a concern to the White House. He testified that in the summer of 2006, he met with Harriet Miers and her deputy to discuss his possible nomination to a federal judgeship. She asked him to explain what why some Washington State Republicans thought he "mishandled" the 2004 governor's race. Who in the Administration knew that Washington state Republicans were concerned about Mr. McKay's failure to bring election fraud indictments in connection with the 2004 election?**

ANSWER: As I explained in my April testimony, I am not familiar with the conversation that occurred between Mr. McKay and Ms. Miers. Nor can I speak to what, if anything, others in the Administration knew about concerns allegedly held by Republicans in Washington State.

Kennedy 145: **Did the Attorney General know?**

ANSWER: As I testified before the House Judiciary Committee, my best recollection is that the voter fraud issues were not the reason I accepted the recommendation to seek Mr. McKay's resignation. Nevertheless, looking back through the documents and correspondence the Department has produced to Congress, there was concern about Mr. McKay's efforts with respect to voter fraud, because my office received some letters from outside groups and parties.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00190 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.089

Kennedy 146: **Did the President?**

ANSWER: I do not know.

Kennedy 147: **Were there any discussions in the Administration of the fact that Republicans were calling for Mr. McKay's dismissal because of his failure to bring charges related to the 2004 Washington Governor's race? If so, with whom?**

ANSWER: See answer to Kennedy 145.

Kennedy 149: **Did you or anyone else involved in the decision to fire Mr. McKay know that at least one Republican member of Congress, Rep. Hastings, was interested in election fraud investigations by Mr. McKay's office?**

ANSWER: To the best of my recollection, Representative Hastings' interest in election fraud was not a factor I considered at the time that I accepted the recommendation to seek Mr. McKay's resignation.

Kennedy 151: **Before the decision was made to fire Mr. McKay, did you or anyone else from the Department of Justice ever talk to him about concerns with his record? If so, what was Mr. McKay told? By whom?**

ANSWER: I do not recall speaking with Mr. McKay about his record.

Kennedy 152: **Please list all persons who were involved in any way in the recommendation or decision to fire Mr. McKay.**

ANSWER: My April testimony represents my best recollection about the process and decision to seek the resignation of Mr. McKay.

Kennedy 153: **The obvious conclusion is that Mr. McKay was fired because he refused to use the power of his office for partisan purposes. E-mails show that as late as August 2006, the Administration was considering Mr. McKay as a strong candidate for a lifetime appointment as a federal judge. Yet a month later, he was recommended for dismissal. What happened in that time to alter your view of him so drastically?**

ANSWER: With all due respect, I do not agree with the premise of the question. Nevertheless, my April testimony represents my best recollection about the process and decision to seek the resignation of Mr. McKay.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00191 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.090

Kennedy 155: **Why did Todd Graves leave his position as United States Attorney for the Western District of Missouri? Was United States Attorney Todd Graves of the Western District of Missouri encouraged or forced to resign? Describe all discussions or communications of which you are aware regarding the replacement or resignation of Mr. Graves.**

ANSWER: As Mr. Graves testified, he had made no secret of the fact that he had planned to leave office in 2006 to open his own practice. Nevertheless, as he also testified, he was asked to leave.

Schumer 178: **To the best of your knowledge, do you continue to enjoy the confidence of senior career officials at the Department of Justice? Please explain on what facts or evidence your response is based.**

ANSWER: I hope and believe that the senior officials at the Department have confidence in my commitment to the priorities I have outlined for the rest of my term, including protecting Americans from terrorists, safeguarding neighborhoods from violence, gangs, and guns, and ensuring that we are doing all we can to protect children from exploitation. I am taking steps to reinforce and, if necessary, strengthen that confidence, by increasing my communication with component heads, and by directly reaching out to the entire Department in a televised address that I delivered on July 20th. In addition, I have asked my staff to examine and, if necessary, revise any hiring procedures that may have contributed to allegations of improper politicization. For example, in April, we revised the process by which Immigration Judges are appointed. These revisions restored the significant role of career employees within the Executive Office for Immigration Review (EOIR) and the Office of the Chief Immigration Judge. We also recently changed the hiring process for the Honors Program and Summer Law Interns Program. These changes, which were made working through the Office of Attorney Recruitment and Management, also formalized the role of career employees in the hiring process. Additionally, I directed the Executive Office of U.S. Attorneys to reaffirm DOJ policy applicable to the vetting process for the hiring of AUSAs by Interim or Acting United States Attorneys. In conjunction with this, I have instructed EOUSA to ensure that this vetting process remains within EOUSA and not with political appointees in the senior management offices. Within the Civil Rights Division, we recently reminded each of the attorneys within that section that basing employment and personnel decisions on impermissible factors, such as political affiliation, will not be tolerated. Each of the actions I have taken to date were designed to safeguard the critical work of this department and to reinforce the public's confidence in the work and personnel of our Department.

Schumer 179: **To the best of your knowledge, do you continue to enjoy the confidence of a majority of the United States Attorneys still in office? Please explain on what facts or evidence your response is based.**

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00192 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.091

ANSWER: Yes. Many of the U.S. Attorneys support the steps I have taken to address the issues that have arisen and to improve communications with the U.S. Attorney community. Furthermore, I am confident that the U.S. Attorney community is focused on working with me to carry out the Department's priorities over the remaining 18 months of this administration.

Schumer 182: **Do you plan to continue the practice of asking U.S. attorneys to fill posts concurrently at the Department of Justice in Washington, D.C.? Please explain what specific steps you have taken to ensure that this practice of concurrent appointments is not diminishing the quality of justice provided in the districts of U.S. attorneys who have concurrent appointments at main Justice.**

ANSWER: There is a long tradition of U.S. Attorneys concurrently filling posts at the Department in Washington, D.C. In so doing, the U.S. Attorneys are making significant contributions to the cause of justice. I evaluate each concurrent appointment on its own merit. If I ever believe that a concurrent appointment is diminishing the quality of service to the Department of Justice or to the home district, I would revisit the arrangement.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00193 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.092

SUBMISSIONS FOR THE RECORD

Senator Biden's Statement at the Senate Judiciary Committee Hearing on DOJ Oversight

April 19, 2007

"Mr. Chairman, I have already made known my view that Attorney General Gonzales has failed to properly fulfill his duties as Attorney General of the United States, and that he should step down. Recent events have only confirmed that view.

"Over two years ago, I voted against then-White House Counsel Gonzales's nomination to be Attorney General because I believed he lacked the judgment to serve as the Nation's chief law enforcer and the independence to serve as the People's lawyer after so many years as the President's lawyer.

"Simply put, the Attorney General's record, both before assuming the duties of Attorney General and since, disqualifies him from continuing as our Attorney General. He has:

-Counseled the President to ignore the Geneva Conventions and the military's experience and values in the treatment of prisoners, and to set up the shadowy prison at Guantanamo Bay;

-Requested and endorsed the now-infamous torture memo, which led to terrible abuses such as the horrors of Abu Ghraib;

-Permitted the President's illegal wiretapping program that allows intelligence agencies to eavesdrop on the conversations of Americans without a judge's approval or Congressional authorization or oversight;

-Failed to protect the privacy of the American people when he allowed the FBI to flagrantly misuse National Security Letters to get the private financial, phone and Internet records of American citizens;

-Directed argument three times at the Supreme Court, losing all three, that the United States can hold people indefinitely without their day in court; and

-Fired some of America's best and brightest U.S. Attorneys for what appear to be crass political reasons, shattering the American people's faith that their laws will be enforced impartially, and with the integrity we expect from our prosecutors.

"Responsibility for the recent U.S. Attorney scandal, however, is not limited to Mr. Gonzales; nor, from what we have learned thus far, is it limited to the Department of Justice. The circle of influence involved in the decision to dismiss the U.S. Attorneys seems to grow daily, and clearly reached well into the White House and the Executive Office of the President. The mere fact of the White House's involvement is itself justification for relevant White House staff to provide testimony to this Committee.

38236.412

"Any White House officials with knowledge regarding the firings of the U.S. Attorneys should come before Congress and testify under oath. Thousands of Americans swear to tell the truth across the country every day - in courtrooms, before notaries public, and in testimony before Congress. This Administration should be treated no differently.

"From the NSA wiretaps, to Abu Ghraib, to Guantanamo Bay, to FBI abuse of the Patriot Act, to now the White House saying staff will only submit to unsworn, unrecorded testimony - this Administration has a deplorable pattern of abusing power and it must end.

"Mr. Chairman, I am hopeful that at today's hearing we can shed more light on exactly what happened with regard to the dismissal of the U.S. Attorneys. No more misleading answers; no more pointing of fingers at others to place the blame; no more attempts to protect the President at the expense of the American people. It's time for some straight answers. I hope we get them."

38236.413

Statement
United States Senate Committee on the Judiciary
Department of Justice Oversight
April 19, 2007

The Honorable Russ Feingold
United States Senator , Wisconsin

Statement of U.S. Senator Russell D. Feingold
Senate Committee on the Judiciary
Hearing on "Department of Justice Oversight"
April 19, 2007

Even the appearance of impropriety can harm our judicial system by undermining our citizens' confidence in its integrity. We are here today to discuss a Department of Justice so deeply compromised that Americans are losing faith in it.

According to a Washington Post/ABC poll released on April 16, sixty-seven percent of Americans believe—contrary to what the Attorney General and others from his agency have told Congress—that these U.S. Attorneys were not fired on the basis of their performance. That means that sixty-seven percent of Americans believe that the Attorney General has not been straight with the American people. We are here today to hear from an Attorney General whose failures are so great that I am compelled to conclude that there is no alternative for him but to step down.

I am particularly distressed by the recent events concerning the case of U.S. v. Thompson in my own state of Wisconsin. In that case, just a week and a half ago, the Seventh Circuit was so troubled by the insufficiency of the evidence against Georgia Thompson that it made the highly unusual decision immediately after oral argument to issue an order reversing the conviction and releasing Ms. Thompson from custody. Implicit in that decision, and explicit at the oral argument, was the three judge panel's view that this case should never have been brought at all. Many in my state have taken the further step of questioning the impartiality of the U.S. Attorney's office and the motivation for pursuing the prosecution. The very fact that Wisconsinites are expressing such concerns shows just how far reaching and toxic this U.S. Attorneys scandal is.

When questions were first raised about the firings of seven U.S. Attorneys, it appears that the Department of Justice purposely misled Congress and the public and attempted to delay the release of vital information. These tactics are disappointing coming from the federal agency whose first responsibility is to the rule of law and the interests of justice, not the self-interest of its leaders. The Department of Justice and the White House continue to refuse to be fully forthright in this matter. They are trying to limit the scope of this investigation and the manner in which it will take place. Each day brings a new revelation of missing emails, or new evidence of questionable behavior, or testimony that casts doubt on previous testimony. There seems to be a fundamental disregard for the integrity of the criminal justice system and for the legitimate oversight role of the legislative branch.

I join my colleagues in being dismayed at the manner in which the firings were handled, but that is not the only problem here. This situation should not have arisen at all. Simply put, it was the Attorney General's responsibility to prevent this. Once it happened, it was the Attorney General's responsibility to correct it. Instead, the Department of Justice gave inaccurate testimony to Congress to try to cover up its mistakes, or, as one public affairs officer put it, to "muddy the coverage up a bit."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00196 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.093

Even more astounding, as those untruths have come to light, the Attorney General has not taken steps to hold those involved accountable—least of all himself. Instead of owning up to the incredible damage he has done, he continues to repeat and recycle talking points that both shift accountability for the firings onto his subordinates and endorse the firings as appropriate. Instead of taking steps to protect the Department of Justice's reputation, the Attorney General has concentrated on protecting his own.

I voted against Alberto Gonzales to be the Attorney General because I was not convinced he would put the rule of law, and the interests of the country, above those of the President and the Administration. Unfortunately, those concerns have been realized over and over—not just in this scandal, but in the Department's handling of the NSA spying program and the Patriot Act reauthorization process. Whether this latest story is essentially one of improper, politically motivated firings and dishonesty, or is merely a story of incompetence and inattention, this Attorney General has not acted in a manner that upholds the best interests of law enforcement and the criminal justice system. This Attorney General does not have the confidence of Congress or the public. That is the "performance problem" of the biggest concern at the moment.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00197 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.094

Testimony
United States Senate Committee on the Judiciary
Department of Justice Oversight
April 19, 2007

The Honorable Alberto Gonzales
Attorney General of the United States , U.S. Department of Justice

STATEMENT OF
ALBERTO R. GONZALES
ATTORNEY GENERAL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
OVERSIGHT OF THE DEPARTMENT OF JUSTICE
PRESENTED
APRIL 17, 2007

STATEMENT OF
ALBERTO R. GONZALES
ATTORNEY GENERAL
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
CONCERNING
OVERSIGHT OF THE DEPARTMENT OF JUSTICE
APRIL 17, 2007

Good morning Chairman Leahy, Ranking Member Specter, and Members of the Committee. Thank you for the opportunity to appear here today to discuss some of the important work currently underway at the Department of Justice. I would like to share some of the Department's recent accomplishments and outline the priorities of the Department in the coming months. I also would like to address any concerns the Committee may have regarding the Department's varied responsibilities. I welcome the chance to enhance the dialogue between these two Branches of government.

Resignations of U.S. Attorneys

First, I will address the issue of the resignations of eight of 93 U.S. Attorneys. I know this is an issue of concern to the Committee, and I want you to know that I share your commitment to bringing all of the facts to light on this matter. I hope we can make great progress on that goal today.

I also want the Committee and those U.S. Attorneys to know how much I appreciate their public service. Each is a fine lawyer and dedicated professional who gave many years of service to the Department. I apologize to them and to their families for allowing this matter to become an unfortunate and undignified public spectacle, and I am sorry for my missteps that have helped to fuel the controversy.

The Justice Department has tried to be forthcoming with the Congress and the American people about the process that led to the resignations. The Department has provided thousands of pages of internal and deliberative documents to the Congress. I consistently and voluntarily have made Justice

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00198 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.095

Department officials available for interviews and hearings on this subject.

I have taken these important steps to provide information for two critical reasons: (1) I have nothing to hide, and (2) I am committed to assuring the Congress and the American public that nothing improper occurred here. The sooner that all the facts are known, the sooner we can all devote our exclusive attention to our important work –
work that includes protecting the American people from the dangers of terrorism, violent crime, illegal drugs, and sexual predators. I know that the Committee must be eager to focus on those issues of great importance to the American people as well.

At this point, we can all agree that U.S. Attorneys serve at the pleasure of the President. We further should agree on a definition of what an "improper" reason for the removal of a U.S. Attorney would be. As former Acting Solicitor General and Assistant Attorney General Walter Dellinger has stated, an improper reason would be: "The replacement of one or more U.S. attorneys in order to impede or speed along particular criminal investigations for illegitimate reasons."1

I agree with that. Stated differently, the Department of Justice makes decisions based on the evidence, not whether the target is a Republican or a Democrat.

For the benefit of the Committee as well as for the American people, I would like to be abundantly clear about the decision to request the resignations of eight (of the 93) United States Attorneys – each of whom had served his or her full four-year term of office:

I know that I did not, and would not, ask for a resignation of any individual in order to interfere with or influence a particular prosecution for partisan political gain.

I also have no basis to believe that anyone involved in this process sought the removal of a U.S. Attorney for an improper reason.

These facts have been made clear through the testimony of Justice Department officials who have appeared before the Congress, as well as by the thousands of pages of internal documents that the Department of Justice has released. Based upon the record as I know it, it is unfair and unfounded for anyone to conclude that any U.S. Attorney was removed for an improper reason. Our record in bringing aggressive prosecutions without fear or favor and irrespective of political affiliations – a record I am very proud of – is beyond reproach.

While reasonable people may dispute whether or not the actual reasons for these decisions were sufficient to justify a particular resignation, again, there is no factual basis to support the allegation, as many have made, that these resignations were motivated by improper reasons. As this Committee knows, however, to provide more certainty, I have asked the Justice Department's Office of Professional Responsibility (OPR) to investigate this matter. Working with the Department's Office of Inspector General (OIG), these non-partisan professionals will complete their own independent investigation so that the Congress and the American people can be 100 percent assured of the facts.

The Committee should also know that, to ensure the independence and integrity of these investigations, and the investigations of congressional committees, I have not spoken with nor reviewed the confidential transcripts of any of the Department of Justice employees interviewed by congressional staff. I state this because, as a result, I may be somewhat limited when it comes to providing you with all of the facts that you may desire. I hope you understand that, to me, it was absolutely essential that the investigative work proceeds in a manner free of any complications by my

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00199 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.096

efforts to prepare for this testimony.

While I firmly believe that these dismissals were appropriate, I have equal conviction that the process by which these U.S. Attorneys were asked to resign could have – and should have – been handled differently.

I made mistakes in not ensuring that these U.S. Attorneys received more dignified treatment. Others within the Department of Justice also made mistakes. As far as I know, these were honest mistakes of perception and judgment and not intentional acts of misconduct. The American public needs to know of the good faith and dedication of those who serve them at the Department of Justice.

As I have stated before, I want to be as crisp and clear as I can be with the Committee about the facts of my involvement in this matter as I recall them.

The Coordination Process

Shortly after the 2004 election and soon after I became Attorney General, my then-deputy-chief-of-staff Kyle Sampson told me that then-Counsel to the President Harriet Miers had inquired about replacing all 93 U.S. Attorneys. Mr. Sampson and I both agreed that replacing all 93 U.S. Attorneys would be disruptive and unwise. However, I believed it would be appropriate and a good management decision to evaluate the U.S. Attorneys and determine the districts where a change may be beneficial to the Department.

I delegated the task of coordinating a review to Mr. Sampson in early 2005. Mr. Sampson is a good man and was a dedicated public servant. I believed that he was the right person (1) to collect insight and opinions, including his own, from Department officials with the most knowledge of U.S. Attorneys and (2) to provide, based on that collective judgment, a consensus recommendation of the Department's senior leadership on districts that could benefit from a change.

I recall telling Mr. Sampson that I wanted him to consult with appropriate Justice Department senior officials who would have the most relevant knowledge and information about the performance of the U.S. Attorneys. It was to be a group of officials, including the Deputy Attorney General, who were much more knowledgeable than I about the performance of each U.S. Attorney. I also told him to make sure that the White House was kept informed since the U.S. Attorneys are presidential appointees.

Mr. Sampson periodically updated me on the review. As I recall, his updates were brief, relatively few in number, and focused primarily on the review process itself. During those updates, to my knowledge, I did not make decisions about who should or should not be asked to resign.

For instance, I recall two specific instances when Mr. Sampson mentioned to me that Harriet Miers had asked about the status of the Department's evaluation of U.S. Attorneys.

I also recall Mr. Sampson mentioning Assistant Attorney General Rachel Brand as a possible candidate to be U.S. Attorney if a vacancy were to occur. I am not sure he mentioned a specific district, but it may have been Michigan. I do not recall my response, nor when it happened. But I do recall thinking I did not want to lose Ms. Brand as head of Legal Policy. I also recall Mr. Sampson mentioning career prosecutor Deborah Rhodes for San Diego in the event of a vacancy. I do not recall my response or any other discussion. Nor do I recall the timing of when this was raised with me. Although these names were mentioned to me, I do not recall making any decision, either on or before

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00200 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.097

December 7, 2006, about who should replace the U.S. Attorneys who were asked to resign that day.

Near the end of the process, as I have said many times, Kyle Sampson presented me with the final recommendations, which I approved. I did so because I understood that the recommendations represented the consensus of senior Justice Department officials most knowledgeable about the performance of all 93 U.S. Attorneys. I also remember that, at some point in time, Mr. Sampson explained to me the plan to inform the U.S. Attorneys of my decision.

***

I believed the process that Mr. Sampson was coordinating would produce the best result by including those senior Justice Department officials with the most knowledge about this matter. As in other areas of the Department's work – whether creating a plan to combat terrorism or targeting dangerous drugs like methamphetamine – my goal was to improve the performance of the Justice Department. And as in other areas of the Department's work, I expected a process to be established that would lead to recommendations based on the collective judgment and opinions of those with the most knowledge within the Department.

In hindsight, I would have handled this differently. As a manager, I am aware that decisions involving personnel are some of the most difficult and challenging decisions one can make. United States Attorneys serve at the pleasure of the President, but looking back, it is clear to me that I should have done more personally to ensure that the review process was more rigorous, and that each U.S. Attorney was informed of this decision in a more personal and respectful way.

I also want to address suggestions that I intentionally made false statements about my involvement in this process. These suggestions have been personally very painful to me. I have always sought the truth. I never sought to mislead or deceive the Congress or the American people about my role in this matter. I do acknowledge however that at times I have been less than precise with my words when discussing the resignations.

For example, I misspoke at a press conference on March 13th when I said that I "was not involved in any discussions about what was going on." That statement was too broad. At that same press conference, I made clear that I was aware of the process; I said that "I knew my chief of staff was involved in the process of determining who were the weak performers. Where were the districts around the country where we could do better for the people in that district, and that's what I knew." Of course, I knew about the process because of, at a minimum, these discussions with Mr. Sampson. Thus, my statement about "discussions" was imprecise and overbroad, but it certainly was not in anyway an attempt to mislead the American people.

I certainly understand why these statements generated confusion, and I regret that. I have tried to clarify my words in later interviews with the media, and will be happy to answer any further questions the Committee may have today about those statements.

It is said that actions speak louder than words. And my actions in this matter do indeed show that I have endeavored to be forthcoming with the Congress and the American people.

I am dedicated to correcting both the management missteps and the ensuing public confusion that now surrounds what should have been a benign situation. For example:

In recent weeks I have met personally with more than 70 U.S. Attorneys around the country to hear

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00201 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.098

their concerns and discuss ways to improve communication and coordination between their offices and Main Justice.

These discussions have been frank, and good ideas are coming out, including ways to improve communication between the Department and their offices so that every United States Attorney can know whether their performance is at the level expected by the Attorney General and the Deputy Attorney General. Additionally, I have asked the members of the Attorney General's Advisory Committee of United States Attorneys to present to me recommendations on formal and informal steps that we can take to improve communication.

During these meetings I am also sharing with the U.S. Attorney community several key messages that I wish to also share with the Committee:

First, the process of selecting U.S. Attorneys to be asked to resign, while not improper, should have been more rigorous and should have been completed in a much shorter period of time.

Second, every U.S. Attorney who was asked to resign – Dan Bogden, Margaret Chiara, Paul Charlton, David Iglesias, Carol Lam, John McKay, Kevin Ryan, and Bud Cummins – served honorably, and they and their families made sacrifices in the name of public service. The Justice Department owes them more respect than they were shown. In some cases, Department leaders should have worked with them to make improvements where they were needed. In all cases, I should have communicated the concerns more effectively, and I should have informed them of my decisions in a more dignified manner. This process could have been handled much better and for that I want to apologize publicly.

And third, I am also telling our 93 U.S. Attorneys that I look forward to working with them to pursue the great goals of our Department in the weeks and months to come. I have told them that I expected all of them to continue to do their jobs in the way they deem best and without any improper interference from anyone. Likewise, in those offices where U.S. Attorneys have recently departed, I emphasized the need to continue to aggressively investigate and prosecute all matters – sensitive or otherwise – currently being handled by those offices.

I wish to extend that sentiment to the Committee as well. During the past two years, we have made great strides in securing our country from terrorism, protecting our neighborhoods from gangs and drugs, shielding our children from predators and pedophiles, and protecting the public trust by prosecuting public corruption. Recent events must not deter us from our mission. I ask the Committee to join me in that commitment and that re-dedication.

We must ensure that all the facts surrounding the situation are brought to full light. It is my sincere hope that today's hearing brings us closer to a clearing of the air on the eight resignations.

That is why I intend to stay here as long as it takes to answer all of the questions the Committee may have about my involvement in this matter. I want this Committee to be satisfied, to be fully reassured, that nothing improper was done. I want the American people to be reassured of the same.
National Security

As you well know, since the terror attacks of September 11, 2001, the Department's top priority has been to protect the Nation from the threat of terrorism. We are proud of our efforts to secure the Nation and are reaping the benefits of the momentous changes to the counterterrorism and counterintelligence programs we instituted during the last year with your support.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00202 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.099

National Security Division

First, I want to discuss the important role that the new National Security Division (NSD) has played in the six months since it was established. NSD's goal is to synchronize the Department's counterterrorism and counterespionage prosecutions and its intelligence and criminal national security programs, including its intelligence-related searches and surveillance. When we first created NSD, I directed the new Assistant Attorney General for National Security, Ken Wainstein, to build upon the oversight capacity within the Division to ensure that the Department's national security investigations are conducted efficiently and in an appropriate manner, with due regard for the civil rights and liberties of all Americans. The Department's Office of Intelligence Policy and Review, now a part of the NSD, has long played an important oversight role. As I will discuss shortly, we are enhancing that oversight capacity this month, as the Department begins a new effort to closely examine the use of National Security Letters and other national security authorities by the Federal Bureau of Investigation (FBI).

I also want to note that the agents at the FBI, working closely with our prosecutors in the National Security Division and in United States Attorney's Offices across the Nation, have been working tirelessly to pursue terrorists and their supporters and to bring them to justice. In just the past few months, we have announced noteworthy arrests and prosecutions such as those of Hassan Abujihaad, a former United States Navy seaman accused of providing information on United States naval battle group movements to terrorist supporters, and Daniel Maldonado, accused of fighting alongside extremist Islamic fighters in Somalia. We also have announced guilty pleas from individuals such as Tarik Shah, a former marital arts instructor from the Bronx who pleaded guilty to conspiring to support al Qaeda. Further, following a joint U.S. Immigration and Customs Enforcement (ICE) and Department of Commerce investigation, corporations such as Chiquita Brands, which made sizeable illegal payments to a terrorist organization, have learned that they are not immune from criminal prosecution. In addition, we have made significant strides in protecting classified information and preventing sensitive technology from being sent overseas. For example, following a joint ICE and Defense Criminal Investigative Service investigation, ITT Corporation recently pleaded guilty to violating the Arms Export Control Act and agreed to pay a $100 million in criminal fines and other penalties.

In order to continue to move forward on these efforts in FY 2008, we are requesting $6.6 million to fund critical NSD enhancements, including additional funding for crisis management preparation and policy development, and legal analysis and coordination. In addition, the FY 2008 budget includes resources to expand the FBI's national security initiatives, including $217 million to advance the FBI's counterterrorism and intelligence collection and analysis programs and to upgrade its information sharing tools that improve homeland security cohesion and efficiency. The FY 2008 budget provides approximately $12 million for the Drug Enforcement Administration's Office of National Security Intelligence (ONSI). ONSI was designated in February 2006 as a member of the Intelligence Community, in recognition of the contributions that the DEA makes to national and homeland security. ONSI facilitates full and appropriate

intelligence coordination and information sharing with other members of the Intelligence Community and with homeland security elements to enhance our Nation's efforts to reduce the supply of drugs, protect our national security, and combat global terrorism.

In addition to continuing to fund these important efforts, I believe it is also important that we continue to work together to modernize our national security laws. In particular, it is crucial that we work to update the Foreign Intelligence Surveillance Act (FISA). Sweeping and unanticipated advances in

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00203 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.100

telecommunications technology since 1978 have upset the delicate balance that the Congress originally struck when it enacted FISA. As a result, FISA now imposes a regime of court approval on a wide range intelligence activities that do not substantially implicate the privacy interests of Americans. This unintended expansion of FISA's scope has hampered our intelligence capabilities, and has resulted in the diversion of scarce Judicial and Executive Branch resources that could be better spent safeguarding the liberties of U.S. persons. I look forward to working with the Congress to modernize FISA to confront the very different technologies and threats of the 21st Century.

National Security Letters

I also want to take some time today to let you know that we are addressing an issue of great concern to me. About a year ago, the Congress reaffirmed the importance of critical law enforcement and intelligence tools – such as National Security Letters (NSLs) –when it passed the USA PATRIOT Improvement and Reauthorization Act. While NSLs have enhanced America's ability to detect and avert terrorist attacks, there have been instances in which their use has been unacceptable. I appreciate the Inspector General's important work identifying these shortcomings. Failure to properly use a critical authority such as NSLs can threaten to undermine the civil liberties of American citizens and erode public support for these vital antiterrorism measures. I want to assure you and the American people that I am dedicated to remedying these deficiencies and again pledge my commitment to protecting Americans from terrorist attacks while protecting the liberties that define us.

At my direction, and with the support of the FBI Director, the Department of Justice, including the FBI, has moved aggressively to address the issues raised by the Inspector General's report. Let me briefly highlight some of the steps that the Department is taking in this regard. First, I have ordered NSD and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing all of the recommendations made by the Inspector General, and to report directly to me on a regular basis and advise me whether any additional actions or efforts need to be taken. I also have asked the Inspector General to report back to me in June on the FBI's implementation of his recommendations.

Second, the FBI Director recently ordered a one-time, retrospective audit of the use of NSLs. While the Inspector General's audit covered a sample of four FBI field offices, the FBI-led effort will examine the use of NSLs in all 56 field offices nationwide. We expect results to be forthcoming soon and will brief the Congress on our findings. To follow up on this one-time audit, at my direction, NSD will begin regular NSL audits this month, working in conjunction with the Department's Privacy Office and the FBI. We expect these reviews to be conducted in 15 field offices and FBI headquarters components over the next year. These regular audits represent a substantial new level and type of oversight of national security investigations by career Justice Department lawyers with years of intelligence and law enforcement experience. As I noted earlier, when NSD was formed, I ordered the creation of an enhanced oversight capability within the division to evaluate FBI national security investigations and to ensure their compliance with applicable legal requirements and guidelines. The audits beginning this month are one component of this new focus of the division.

The FBI also issued a Bureau-wide directive prohibiting the use of the type of "exigent letters" described in the Inspector General's report. The FBI Director has also ordered the FBI Inspection Division to conduct an expedited review of the Headquarters unit that issued these letters, in order to assess management responsibility for this problem.

The FBI is also working to improve the accuracy of the reporting of NSL statistics to the Congress. The FBI began developing a new NSL tracking database last year and plans to deploy the system this

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00204 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.101

year. Until this new system is fully deployed, FBI field offices will conduct hand counts of NSLs. The FBI also has sampled a much larger number of entries than the Inspector General examined in order to attempt to better quantify the error rate of prior numbers reported to the Congress. Once this process is complete, the FBI will work with the Department and the Inspector General to determine the best course of action.

These steps, among many others that the Department is taking in response to the Inspector General's report, embody a recognition of the fact that while the authorities that the Congress has provided are critical to fighting the War on Terror, we must constantly work to ensure that we protect the precious liberties and rights that are vital to our way of life. This report tells me very clearly that we must do better, and I am personally committed to this effort.

We all recognize that we cannot afford to make progress in the War on Terror at the cost of eroding our bedrock civil liberties. Our Nation is, and always will be, dedicated to liberty for all, a value that we cannot and will not sacrifice, even in the name of winning this war. I will not accept failures in this regard. I look forward to working closely with the members of this Committee to address these important issues.

Protection of Children

As you know, protecting children against sexual predators is a key priority of my tenure. I am proud of the Department's efforts to combat these terrible crimes against children, and I appreciate the work of this Committee in safeguarding our children's innocence, including its support for the Adam Walsh Act, which included statutory
authorization for the Department's Project Safe Childhood. The Department has moved forward aggressively to implement key reforms of the Adam Walsh Act.

The Adam Walsh Act

The Adam Walsh Act adopted a comprehensive new set of national standards for sex offender registration and notification and directed the Department to issue guidelines and regulations to interpret and implement these requirements. As an initial matter, I issued an interim regulation on February 28, 2007, clarifying that the strengthened Adam Walsh Act registration requirements apply to all sex offenders, including those convicted prior to the enactment of the Act. The Adam Walsh Act created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART Office") in the Department's Office of Justice Programs, to administer these requirements. Last winter President Bush appointed Laura L. Rogers, a career prosecutor from California, to head the SMART Office. She is developing detailed guidelines to assist the States, territories, and Indian tribes in incorporating the Adam Walsh Act standards in their sex offender registration and notification programs. Extensive input has been obtained from interested government officials and others for this purpose, and publication of the guidelines for public comment will be forthcoming in the next few months.

In addition to strengthening the substantive standards for sex offender registration and notification, the Adam Walsh Act provides for increased Federal assistance to States and other jurisdictions in enforcing registration requirements and protecting the public from sex offenders. The Act directs the Department to use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who fail to register as required. As an initial step in this initiative, the Marshals Service, working with its State and local law enforcement partners, apprehended 1,659 sex offenders as part of the FALCON III fugitive roundup

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00205 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.102

in October. The Marshals Service has developed plans to strengthen its national coordination and leadership function in sex offender apprehension under the Adam Walsh Act. The President's budget request for FY 2008 includes substantial funding for this purpose, proposing $7.8 million for the Marshals Service's aggressive pursuit of sexual predators under the Adam Walsh Act's provisions.

The Adam Walsh Act also created an enhanced direct avenue for Federal enforcement of sex offender registration requirements. Under new section 2250 of title 18, sex offenders who knowingly violate the Adam Walsh Act registration requirements under circumstances supporting Federal jurisdiction, such as failure to register following relocation from one State to another, can be imprisoned for up to 10 years. The Department's Criminal Division and the United States Attorneys' Offices have developed policy and guidance for prosecutions under the new Federal failure to register offense and are moving forward aggressively in bringing Federal prosecutions in appropriate cases. Since Section 2250 was enacted, Marshals Service investigations have resulted in the issuance of 84 arrest warrants for fugitives in violation of the law. Marshals and other law enforcement officials have been able to arrest 66 of those fugitives.

Beyond the measures I have described relating to sex offender tracking, notification, investigation, apprehension, and prosecution, the Adam Walsh Act enacted important reforms affecting the correctional treatment of sex offenders. For example, the Act adopted new provisions for civil commitment of persons found to be sexually dangerous and subject to Federal jurisdiction. This means that court-ordered civil commitment can now be sought for a sex offender in the custody of the Bureau of Prisons, where it can be shown that his condition would make it seriously difficult for him to refrain from further acts of molestation if released. Pursuant to the Adam Walsh Act commitment provisions, the Bureau of Prisons has 30 inmates certified as sexually dangerous persons (not limited to those incarcerated for sex offenses) and the responsible United States Attorneys' Offices are now engaged in litigation to secure the judicial commitment of these individuals as authorized by the Adam Walsh Act. The Bureau of Prisons is institutionalizing the screening and certification of inmates who satisfy the statutory criteria as sexually dangerous persons, and civil commitment of such persons for the protection of the public and for their care and treatment will be sought in all appropriate cases.

The Adam Walsh Act further authorizes the expansion of the Bureau of Prisons' sex offender management and treatment efforts. The President's budget request for FY 2008 includes $5 million for the Bureau of Prisons to add treatment programs at six locations. This supports the Bureau of Prisons' objective to design, implement, and evaluate a comprehensive sex offender management program across all prison security levels. This program will address the security issues raised by a growing sex offender inmate population, and the need to reduce recidivism among such offenders following their release.

Project Safe Childhood

The Internet is one of the greatest technological advances of our time, but it also makes it alarmingly easy for sexual predators to find and contact children, as well as trade, collect, and even produce images of child sexual exploitation.

The problem is great, but we have stepped up to the challenge. Through Project Safe Childhood (PSC), which is the backbone of the Department's efforts to combat child exploitation, we have begun to marshal our collective resources and raise online exploitation and abuse of children as a matter of public concern. We have sought to do this both through enhanced coordination of our law enforcement efforts, especially with the Internet Crimes Against Children task forces and our other

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00206 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.103

State and local partners, and through cooperation with our non-governmental partners like the National Center for Missing and Exploited Children (NCMEC) to do effective outreach to parents and children about how to stay safe online.
Since I testified last, the Department has undertaken two important steps to reduce the incidence of child sexual exploitation and abuse facilitated by the Internet, and these steps have begun to show results for our enhanced law enforcement efforts.

The U.S. Department of Justice together with NCMEC and the Ad Council announced a new phase of their Online Sexual Exploitation public service advertising campaign, "Think Before You Post," designed to educate teenage girls about the potential dangers of posting and sharing personal information online.
Popular social networking sites such as MySpace, Facebook, and Sconex make it easier for children and teens to post and share personal information, pictures, and videos, which may make them more vulnerable to online predators. Girls are particularly at risk of online sexual exploitation—a recent study by University of New Hampshire researchers for NCMEC found that, of the approximately one in seven youths who received a sexual solicitation or approach over the Internet, 70 percent were girls.

The Think Before You Post campaign sends a strong reminder to children and their parents to be cautious when posting personal information online because, "[a]nything you post, anyone can see: family, friends, and even not-so-friendly people." The public service announcements were distributed to media outlets throughout the country, and can also be viewed at the Department's website www.usdoj.gov.

Coordination of our law enforcement efforts through our 93 U.S. Attorneys will also be advanced by the recent launch of the PSC Team Training program, involving teams from five judicial districts, which I kicked off at NCMEC's headquarters in February. The training program will create a platform from which Federal, State, and local law enforcement agencies and non-governmental organizations can effectively work together across State and even national borders. The next training session will be held in Miami in May, bringing together teams from five additional districts. We hope to reach every district by the end of 2008 through a series of regional training sessions.
The Department's enhanced law enforcement efforts have begun to show results. In the first quarter of the fiscal year, the Internet Crimes Against Children task forces increased the number of arrests for online child exploitation and abuse to 527, an increase of 22 percent over the same period in FY 2006. Likewise, the U.S. Attorneys have increased the number of cases filed. In the first five months of FY 2007, 761 cases have been filed. If this pace continues, it will result in as many as 1,826 cases for the fiscal year, a 13 percent increase over FY 2006. Moreover, we are working on the investigative side to support continuing progress in this area. In the first quarter of FY 2007, the FBI opened 555 investigations of online child exploitation cases, both child pornography and cyber-enticement, as compared to 438 investigations opened in the first quarter for FY 2006. Through these investigations and prosecutions our goal is to stop those who prey on our children, and also to deliver a general message of deterrence: when you target kids, we will target you.

We have the power to change the battlefield, and the victory of safe childhoods will be our legacy. I look forward to continued work with this Committee on this issue that I care deeply about.

Violent Crime

Due in large part to the hard work of law enforcement, the Nation's crime rates remain near historic lows. The Administration has funded numerous initiatives to give Federal, State, and local prosecutors

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00207 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.104

and law enforcement the tools needed to reduce violent crime, particularly gang- and firearm-related crime. 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.

Initiative for Safer Communities

Where localized increases in crime are being experienced, the Department is responding appropriately, working with our State and local partners to identify the problem and develop meaningful strategies to reduce and deter that crime. To that end, Department officials met with local law enforcement and community leaders from 18 jurisdictions across the country to investigate the factors contributing to the increase or decrease in violent crime in those jurisdictions. No one cause was reported as causing local spikes in crime; the problems varied by city and region.

To address these regional and localized crime challenges, the President's FY 2008 budget requests $200 million for the Violent Crime Partnership Initiative. The initiative will assist in responding to high rates of violent crime, including gang, drug, and gun violence, by forming and developing effective multi-jurisdictional law enforcement partnerships between Federal, State, local, and tribal law enforcement agencies. Through these multi-jurisdictional partnerships, we will disrupt criminal gang, firearm, and drug activities, particularly those with a multi-jurisdictional dimension.

Project Safe Neighborhoods

The Initiative for Safer Communities is a supplement to the existing Department-led programs aimed at reducing violent crime, such as the Project Safe Neighborhoods (PSN) initiative. PSN programs, led by the United States Attorney in each Federal judicial district, link Federal, State, and local law enforcement officials, prosecutors, and community leaders to implement a multi-faceted strategy to deter and punish gun criminals. In the past six years, as a result of PSN, the number of Federal firearms prosecutions is more than double the number of prosecutions brought during the six years prior to PSN's implementation.

With the support of the Congress, the Department has dedicated more than $1.5 billion to this important program. Those funds have provided necessary training, hired agents and prosecutors, and supported State and local partners working to combat gun crime. For 2008, the President's budget requests more than $400 million for PSN, including a $2.2 million enhancement to the Bureau of Alcohol, Tobacco, Firearms and Explosives to support increased anti-gang and firearms enforcement efforts, as well as a $6.3 million enhancement to establish firearms trafficking teams devoted to pursuing trafficking investigations along the Southwest Border and in areas of the country identified as concentrated firearms trafficking corridors.

Gangs

The Department is also applying the PSN model of collaboration to address the danger that violent gangs pose to our neighborhoods. The Department has developed a comprehensive strategy to combat gang violence that involves the coordination of enforcement and prevention resources to target the gangs who terrorize our communities. The Department's Anti-Gang Coordination Committee continues to organize the Department's wide-ranging efforts to combat the scourge of gangs, and the Anti-Gang Coordinators in each United States Attorney's Office continue to provide leadership and focus to our anti-gang efforts at the district level.

Last year, the Department expanded the successful Project Safe Neighborhoods initiative to include

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00208 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.105

new and enhanced anti-gang efforts, and launched 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.

The Department also created a new national Gang Targeting, Enforcement, and Coordination Center (GangTECC) this past year. GangTECC brings together all of the operational components of the Department, as well as other agencies within the Federal government to coordinate overlapping investigations and ensure that tactical and strategic intelligence is shared among law enforcement agencies. GangTECC works hand-in-hand with the new National Gang Intelligence Center, and the Criminal Division's Gang Squad. The President's FY 2008 budget requests resources to further support these anti-gang efforts.

While we have made significant enhancements to our anti-gang efforts at the national level, the Department understands that the lion's share of the work happens at the local and district level. On the prevention side, in accordance with my directive, each U.S. Attorney has convened a Gang Prevention Summit in his or her district to explore additional opportunities in the area of gang prevention. And on the enforcement side, to support the increased focus on anti-gang prosecutions at the Federal level, the President's FY 2008 budget requests an enhancement of $4.1 million for additional anti-gang Federal prosecutors.

Finally, as you know, the Department has worked closely with this Committee as well as the House Judiciary Committee to develop legislation to enhance the tools available to Federal law enforcement in its ongoing efforts to disrupt and dismantle gangs.

Drug Enforcement

The Department continues to devote substantial investigative and prosecutorial resources to addressing the problem of drug trafficking. In FY 2006, drug cases represented more than 25 percent of all cases filed by our U.S. Attorneys and 35 percent of Federal defendants.

The vast majority of illegal drugs sold in the United States are supplied by drug trafficking organizations (DTOs). The Department continues to believe that utilizing intelligence to target the highest priority DTOs and those entities and individuals linked to the DTOs, using the Drug Enforcement Administration (DEA) and the Organized Crime and Drug Enforcement Task Force program, is the most effective approach to fighting the global drug trade and its attendant threats. It is within this strategic framework that the Department generally organizes its efforts to reduce the supply of illegal drugs. These efforts combine the expertise of multiple Federal agencies with international, State, and local partners, to mount a comprehensive attack on major drug organizations and the financial infrastructures that support them. This approach has been successful. Just this past fall, the most significant drug traffickers ever to face justice in the United States – Miguel and Alberto Rodriguez-Orejuela – pleaded guilty in a Federal court in Miami to a charge of conspiracy to import cocaine into the United States.

The Department recognizes that the Southwest Border remains a critical front in our Nation's defense against both illegal drug trafficking and terrorism. Because a significant amount of drugs that enters the U.S. is trafficked by DTOs based in Mexico, the Department has been working closely with the Government of Mexico, including in joint cooperative efforts by law enforcement. In addition, the Department is continuing discussions with the Government of Mexico regarding extraditions of major drug traffickers.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00209 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.106

In addition to its continued efforts on drug trafficking organizations, over the past several years the Department has placed a special emphasis on reducing the demand for, and supply of, methamphetamine and controlled substance prescription drugs.
In support of the Administration's plan to combat methamphetamine, the Department established the Anti-Methamphetamine Coordination Committee to oversee the ongoing implementation of initiatives and to ensure the most effective coordination of its anti-methamphetamine efforts. The Department is enhancing the anti-methamphetamine trafficking and intelligence capabilities of law enforcement; assisting tribal, State, and local authorities with training, cleanup, and enforcement initiatives; and providing grants to State drug court programs that assist methamphetamine abusers. On the international front, the Department is working to cut off the illicit supply of precursor chemicals by working with our international partners.

The United States Government has established a strong partnership with Mexico to combat methamphetamine. In May 2005, the Attorney General of Mexico and I announced several anti-methamphetamine initiatives designed to address improved
enforcement, increased law enforcement training, improved information sharing, and increased public awareness. Most of those initiatives are now underway and our goals are being met.

This past year, the Congress enacted important legislation, the Combat Methamphetamine Epidemic Act, which regulates the sale of the legal ingredients used to make methamphetamine; strengthens criminal penalties; authorizes resources for State and local governments; enhances international enforcement of methamphetamine trafficking; and enhances the regulation of methamphetamine by-products, among other things. The Department is committed to enforcing rigorously these new provisions of the law in order to address the domestic production of methamphetamine. As State laws regulating methamphetamine precursors went into effect, along with the new Federal law, we have seen a decline in domestic methamphetamine labs.
The Department remains concerned about the non-medical use of controlled substance prescription drugs, which continues to be the fastest rising category of drug abuse in recent years. At the same time, the Department recognizes that it is critical that individuals who are prescribed controlled substance prescription drugs for a legitimate medical purpose have access to these important drugs. Rogue pharmacies operating illicitly through Internet increasingly have become a source for the illegal supply of controlled substances. This issue is a priority for the Department, and we are aggressively applying the full range of enforcement tools available to us to address this increasing problem. The Department looks forward to working with the Congress on additional enforcement tools that may be appropriate.

Civil Rights

I am pleased to report that the past year has been full of outstanding accomplishments in the Civil Rights Division, where we obtained record levels of enforcement. This year, the Division celebrates its 50th Anniversary. Since its inception in 1957, the Division has achieved a great deal, and we have much to be proud. Following are some of the Division's more notable recent accomplishments, beginning with two recent initiatives and the creation of a new unit within the Criminal Section.

New Initiatives

• On February 20, 2007, I announced The First Freedom Project and released a Report on Enforcement of Laws Protecting Religious Freedom to highlight and build upon the Division's role in enforcing the longstanding Federal laws that prohibit discrimination based on religion. This initiative

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00210 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.107

is particularly important to combat religious and cultural intolerance in the aftermath of the terrorist attacks of September 11, 2001.

• In January 2007, I announced the Federal indictment charging James Seale for his role in the abduction and murders of two African-American teenagers, Henry Dee and Charles Moore, in Mississippi in 1964. This case is being prosecuted by the Civil

Rights Division and the local U.S. Attorney's Office. Shortly thereafter, I announced an FBI initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal law – an effort in which the Civil Rights Division will play a key role.

• On January 31, 2007, I announced the creation of the new Human Trafficking Prosecution Unit within the Criminal Section of the Civil Rights Division. This new Unit is staffed by the Section's most seasoned human trafficking prosecutors, who will work with our partners in Federal and State law enforcement and non-government organizations to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases.

Enforcement

In addition to these recent advances, the Division has done much to further the enforcement of our Federal civil rights laws. In the past year:
• the Criminal Section set new records in several areas by charging and convicting a record number of defendants – obtaining an overall conviction rate of 98 percent, the highest such figure in the history of the Criminal Section;

• the Criminal Section obtained a record number of convictions in the prosecution of human trafficking crimes, deplorable offenses of fear, force, and violence that disproportionately affect women and minority immigrants;

• the Employment Litigation Section filed as many lawsuits challenging a pattern or practice of discrimination as during the last three years of the previous Administration combined;

• the Housing and Civil Enforcement Section filed more cases alleging discrimination based on sex than in any year in its history;

• the Housing and Civil Enforcement Section conducted significantly more tests to ensure compliance with the Fair Housing Act, pursuant to Operation Home Sweet Home, and we are working to achieve an all-time high number of such tests this year; and

• the Disability Rights Section obtained the highest success rate to date in mediating complaints brought under the Americans with Disabilities Act – 82 percent.

Just a few weeks ago, the Civil Rights Division secured the second largest damage award ever obtained by the Justice Department in a Fair Housing Act case against a former landlord in the Dayton, Ohio, area for discriminating against African Americans and families with children.

In the past six years, we have ensured the integrity of law enforcement by more than tripling the number of agreements reached with police departments and convicting 50 percent more law enforcement officials for willful misconduct, such as the use of excessive force, as compared to the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00211 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.108

previous six years.

In the past six years, the Disability Rights Section reached more than 80 percent of the agreements obtained with State and local governments under Project Civic Access, a program that has made cities across the country more accessible and made lives better for more than 3 million Americans with disabilities.

Protecting Voting Rights

Last year, the President and I strongly supported the Voting Rights Act Reauthorization and Amendments Act of 2006, appropriately named for three heroines of the Civil Rights movement, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King. This legislation renewed for another 25 years certain provisions of the Act that had been set to expire, including Section 5, under which all voting changes in certain jurisdictions must be "precleared" prior to implementation, sections relating to Federal observers and examiners, and Sections 4 and 203, relating to bilingual requirements.

The Voting Rights Act has proven to be one of the most successful pieces of civil rights legislation ever enacted. However, as long as all citizens do not have equal access to the polls, our work is not finished. As President Bush said, "In four decades since the Voting Rights Act was first passed, we've made progress toward equality, yet the work for a more perfect union is never ending."

At the White House signing ceremony for the 2006 reauthorization Act, President Bush said, "My administration will vigorously enforce the provisions of this law, and we will defend it in court." The Department of Justice is committed to carrying out the President's promise. In fact, the Civil Rights Division is currently vigorously defending the Act against a constitutional challenge in Federal court here in the District of Columbia.

A major component of the Division's work to protect voting rights is its election monitoring program. Our election monitoring efforts are among the most effective means of ensuring that Federal voting rights are respected on election day.

In 2006, we sent more than 1,500 Federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year. During the general election on November 7, 2006, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. In total, more than 800 Federal personnel monitored the polls in 69 political subdivisions in 22 States.

In addition to our presence at the polls, Department personnel here in Washington stood ready with numerous phone lines to handle calls from citizens with election complaints, as well as to monitor an Internet-based mechanism for reporting problems.

We had personnel at the call center who were fluent in Spanish and had the Division's language interpretation service to provide translators in other languages. The Department received more than 200 complaints through its phone and Internet-based system on election day. Many of these complaints were resolved on election day, and we are continuing to follow up on the rest.

Our commitment to protecting the right to vote is further demonstrated by our recent enforcement efforts. In 2006, the Voting Section filed 18 new lawsuits, which is more than twice the average number of lawsuits filed annually in the preceding 30 years. Moreover, during 2006, the Division filed the largest number of cases under the Uniformed and Overseas Citizens Absentee Voting Act,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00212 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.109

which ensures that overseas citizens and members of the military are able to participate in Federal elections. Finally, in 2006, the Voting Section processed the largest number of Section 5 submissions in its history, made two objections to submissions pursuant to Section 5, and filed its first Section 5 enforcement action since 1998.

Last year, we furthered our record of accomplishment during this Administration. During the past six years, the Civil Rights Division has litigated more cases on behalf of minority language voters than in all other years combined since 1975. Specifically, we have successfully litigated approximately 60 percent of all language minority cases in the history of the Voting Rights Act. Moreover, during the past six years, we have brought seven of the nine cases ever filed under Section 208 in the history of the Act, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

The work of the Civil Rights Division in recent years reflects the need for continued vigilance in the prosecution and enforcement of our Nation's civil rights laws. I am committed to building upon our accomplishments and continuing to create a record that reflects the profound significance of this right for all Americans.

In addition to its responsibility to protect access to the ballot box, the Department is responsible for combating Federal election crimes, such as election fraud and campaign financing offenses. In 2002, the Department launched the Ballot Access and Voting Integrity Initiative, and the investigation and prosecution of these crimes is a priority. With the assistance of the FBI, we have investigated over 300 election crime matters since the start of the Initiative, charged more than 180 individuals with election fraud or campaign financing offenses, and obtained over 130 convictions. At the present time, over 140 election crime investigations are pending throughout the country.

Every election crime prosecution and voting rights settlement puts would-be wrong-doers on notice: We will not tolerate attempts to corrupt the electoral process or the infringement of voting rights, period.

Border Security

Immigration offenses are the largest category of cases the Department files each year. Nearly one third of the 60,000 new cases filed each year are for immigration offenses.
Nevertheless, because immigration enforcement is such a high priority for the Department, I am committed to doing more. In the latter half of 2006, the Department sent 30 additional prosecutors to the southwest border districts to help them handle a greater number of immigration cases, as well as border narcotics cases. Since 2000, the overall number of Assistant U.S. Attorneys working in the southwest border districts has increased by about 29 percent. Increasing the number of prosecutors permits these districts to take in more cases of all types. Despite these increases, our prosecutors on the border still handle some of the largest caseloads in the Nation. To further augment our resources, the President has proposed in his 2008 budget $7.4 million for a Border and Immigration Prosecution Initiative to hire 55 additional prosecutors to handle more immigration cases. In addition, the budget requests $7.5 million to hire 40 Deputy U.S. Marshals to manage the increased workload as a result of increased immigration enforcement along the Southwest Border. This funding is needed so that we can continue to increase prosecutions and convictions to further deter illegal border crossings and achieve control over the border.

In addition to enhancing enforcement resources, I am eager to work with this Committee on creating workable comprehensive immigration reform legislation. Such reform, as described by the President,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00213 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.110

would relieve pressure on our borders by creating a temporary worker program to fill jobs that Americans do not want, would enhance tools for employers to verify that they are hiring only citizens and authorized foreigners, and would increase penalties for the employment of unauthorized workers and for other immigration offenses. I look forward to working with the Committee on comprehensive immigration reform in the coming weeks and months.

Intellectual Property Enforcement

Intellectual property ("IP") is a core component of U.S. economic health. IP theft undermines U.S. economic security and stifles the creative output central to U.S. economic vitality. The Department has made combating IP theft a priority.

The Department of Justice is dedicating more resources than ever before to the protection of U.S. intellectual property rights, with a special emphasis on prosecuting health and safety cases. Last June, the Department's Task Force on Intellectual Property announced that it had implemented all 31 of its recommendations to improve IP protection and enforcement in the United States and abroad, as described in detail in the Progress Report of the Department of Justice's Task Force on Intellectual Property (June 2006). In the past two years, we have significantly expanded the Computer Hacking and Intellectual Property (CHIP) network of Federal prosecutors dedicated to the prosecution of high-tech and IP crime. The total number of CHIP prosecutors has increased to 230 (with at least one in each U.S. Attorney's Office), and the number of specialized CHIP Units has nearly doubled to 25 cities nationwide.

The Task Force's unprecedented efforts to improve criminal IP enforcement have yielded, among other successes, substantial increases in Federal investigations and prosecutions of IP violations. For instance, the number of defendants prosecuted for IP offenses rose 98 percent from 2004 to 2005, and the number convicted of IP offenses increased more than 50 percent from 2005 to 2006 (from 124 to 187). Of those convicted, the number receiving substantial sentences (25 months or more) increased even more sharply – from 17 to 39, an increase of 130 percent. Last year also saw substantial increases in the FBI's tally of the number of defendants arrested (from 104 to 144, up 40 percent) and charged (from 145 to 191, up 30 percent) in criminal IP cases.

In February 2007, the Department obtained one of the first-ever extraditions for an intellectual property offense, bringing the leader of one of the oldest and most notorious Internet software piracy groups to the United States from Australia to face criminal copyright charges. The group is estimated to have caused the illegal distribution of more than $50 million worth of pirated software, movies, and music.

Recognizing that the effective protection of IP rights depends on strong international as well as domestic criminal enforcement regimes, the Department has placed special emphasis on improving its international outreach and capacity-building efforts. For instance, in 2006, the Department established the first-ever IP Law Enforcement Coordinator for Asia in Bangkok, Thailand. This IPLEC position is dedicated to advancing the Department's regional IP goals through training, outreach, and the coordination of investigations and operations against IP crime throughout the region. A second IPLEC for Eastern Europe has been established, and we will be sending a prosecutor to Sofia, Bulgaria, to fill that position this summer. Moreover, in 2006 alone, Criminal Division prosecutors provided training and technical assistance on IP enforcement to more than 3,300 foreign prosecutors, investigators, and judges from 107 countries.

State, Local, and Tribal Assistance

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00214 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.111

In addition to our own law enforcement efforts, the Department supports State, local, and tribal law enforcement. The Department's FY 2008 budget contains more than $1.2 billion in discretionary grant assistance to State, local, and tribal governments, and non-profit organizations, including funding for the creation of four new competitive grant programs: the Violent Crime Reduction Partnership; the Byrne Public Safety and Protection Program; the Child Safety and Juvenile Justice Program; and Violence Against Women Grants.

Violent Crime Reduction Partnership

The President's FY 2008 budget requests $200 million for the Violent Crime Reduction Partnership Initiative, which is one of the ways we are responding to the recent increase in violent crime. The funding will be used to help communities address high rates of violent crime by forming and developing effective multi-jurisdictional law enforcement partnerships between local, State, tribal, and Federal law enforcement agencies. Through these multi-jurisdictional partnerships, we will disrupt criminal gang, firearm, and drug activities, particularly those with a multi-jurisdictional dimension. Additionally, the Department will target this funding to respond to local crime surges it detects through its ongoing research.

Byrne Public Safety and Protection Program

In addition, the President's budget proposal includes $350 million for a simplified and streamlined grant program that would combine the funding streams of several programs into the new Byrne Public Safety and Protection Program. This initiative consolidates some of the Department's most successful State and local law enforcement assistance programs into a single, flexible, competitive discretionary grant program. This new approach will help State, local, and tribal governments develop programs appropriate to the particular needs of their jurisdictions. Through the competitive grant process, we will continue to assist communities in addressing a number of high-priority concerns, such as (1) reducing violent crime at the local levels through the Project Safe Neighborhood initiative; (2) addressing the criminal justice issues surrounding substance abuse through drug courts, residential treatment for prison inmates, prescription drug monitoring programs, met

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00215 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.112

Statement
United States Senate Committee on the Judiciary
Department of Justice Oversight
April 19, 2007

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Chairman Patrick Leahy,
Senate Judiciary Committee
Hearing On "Department Of Justice Oversight"
Witness: Attorney General Gonzales
April 19, 2007

This week we join in mourning the tragic killings at Virginia Tech on Monday. The innocent lives of students and professors are a terrible loss for their families and friends and for their community. It affects us all. We honor them and mourn their loss.

I expect that in the days ahead, as we learn more about what happened, how it happened and perhaps why it happened, we will have debate and discussion and perhaps legislative proposals to consider. I look forward to working with Department of Justice and specifically with Regina Schofield, the Assistant Attorney General for the Office of Justice Programs, and others to make improvements that can increase the safety and security of our children and grandchildren in schools and colleges.

Today, the Department of Justice is experiencing a crisis of leadership perhaps unrivaled during its 137-year history. There is the growing scandal swirling around the dismissal and replacement of several prosecutors, and persistent efforts to undermine and marginalize career lawyers in the Civil Rights Division and elsewhere in the Department.

We hear disturbing reports that politics may have played a role in a growing number of cases. I have warned for years against the lack of prosecutorial experience and judgment throughout the leadership ranks of the Department. We are seeing the results amid rising crime, rampant war profiteering, abandonment of civil rights and voting rights enforcement efforts, and lack of accountability. This Justice Department seems to have lost its way.

The Department of Justice must not be reduced to another political arm of the White House. The Department of Justice must be worthy of its name. The trust and confidence of the American people in federal law enforcement must be restored.

Since Attorney General Gonzales last appeared before this Committee on January 18th, we have heard sworn testimony from the former U.S. Attorneys forced from office and from his former Chief of Staff. Their testimony sharply contradicts the accounts of the plan to replace U.S. Attorneys that the Attorney General provided to this Committee under oath in January and to the American people during his March 13th press conference.

The Committee is still seeking documents, information and testimony so that we may know all of the facts, the whole truth, surrounding the replacement of these prosecutors who had been appointed by President Bush.

One thing already abundantly clear is that if the phrase Aperformance related@ is to retain any meaning, that rationale should be withdrawn as the justification for the firing of David Iglesias, John

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00216 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.113

McKay, Daniel Bogden, Paul Charlton, Carol Lam and perhaps others. Indeed, the apparent reason for these terminations has much more to do with politics than performance.

In his written testimony for this hearing and his newspaper columns, the Attorney General makes the conclusory statement that "nothing improper" occurred.

The truth is that these firings have yet to be explained and there is mounting evidence of improper considerations and actions resulting in these dismissals.

The dismissed U.S. Attorneys have testified under oath that they believe political influence resulted in their being replaced. If they are right, the mixing of partisan political goals into federal law enforcement is highly improper. The Attorney General's own former Chief of Staff testified under oath that Karl Rove complained to Attorney General Gonzales about David Iglesias not being aggressive enough against so-called Avoter fraud,@ which explains his being added to the list.

With respect to Mr. Iglesias, the former U.S. Attorney in New Mexico, the evidence shows that he was held in high regard, considered for promotion to the highest levels of the Department and chosen by the Department to train other U.S. attorneys in the investigation and prosecution of voter fraud.

Then as the election approached in 2006, Administration officials received calls from New Mexico Republicans complaining that Mr. Iglesias would not rush an investigation and indictments before the November election.

True accountability means being forthcoming, and true accountability requires consequences for bad actions. This hearing is such an opportunity.

Last November, the American people rejected this Administration's unilateral approach to government and to the President acting without constitutional checks and balances. Rather than heed that call, within days of that election, senior White House and Justice Department staff finalized plans to proceed with the simultaneous mass firings of a large number of top federal prosecutors.

By so doing, they sent the unmistakable message -- not only to those forced out but also to those who remained -- that traditional, independent law enforcement by U.S. Attorneys would no longer be tolerated by this Administration. Instead, partisan loyalty had become the yardstick by which all would be judged.

I cannot excuse the Attorney General=s actions and his failures from the outset to be forthright with us, with these prosecutors and with the American people.

The White House political operatives who helped spearhead this plan did not have effective and objective law enforcement as their principal goal. They would be happy to reduce United States Attorneys offices to another political arm of the Administration.

If nothing improper was done, people need to stop hiding the facts and need to tell the truth, the whole truth. If the White House did nothing wrong, then show us. Show us the documents and provide us with the sworn testimony of what was done – why, and by whom. If there is nothing to hide, then the White House should quit hiding it.

Quit claiming the e-mails cannot be produced and quit contending that the American people and their duly elected representatives cannot see and know the truth. I trust that after weeks of preparation for

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00217 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.114

this hearing, the Attorney General's past failures to give a complete and accurate explanation of these firings will not be repeated here today.

There has always been a tacit and carefully balanced intersection between politics and our law enforcement system, but it has been limited to the entrance ramp of the nomination and confirmation process. Instead of an entrance ramp, this Administration seems to have envisioned a political toll road.

Real oversight has returned to Capitol Hill, and the investigation of this affair already has pulled back the curtain to reveal unbridled political meddling, Katrina-style cronyism and unfettered White House unilateralism that has been directed at one of our most precious national assets, our law enforcement and legal system.

Earlier in this process, it seemed that the Administration was concluding that any answer will do, whether it was rooted in the facts, or not. Those days are behind us. Just any answer won't do anymore. We need the facts, and we will pursue the facts until we get to the truth.

Just as respect for the United States as a leader on human rights has been diminished during the last six years, the current actions have served to undercut confidence in United States Attorneys.

Just as Mr. Gonzales cannot claim immunity for the policies and practices regarding torture that were developed under his watch while White House counsel, he cannot escape accountability for signing off on this plan to undercut effective federal prosecutors and to infect federal law enforcement with narrow political goals.

His actions have served to undermine public confidence in federal law enforcement and the rule of law. By getting to the truth, we can take a step toward restoring that trust.

# # # # #

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00218 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.115

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 25, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The purpose of this letter is to correct the record for the oversight hearing of the Department of Justice held on April 19, 2007.

Since March 9, 2006, when the Attorney General's appointment authority for United States Attorneys was amended, the Administration has continued to nominate individuals, and has submitted sixteen nominations for United States Attorney vacancies. Thirteen of those nominations have been confirmed to date. Additionally, since the appointment authority was amended, twenty new vacancies have been created, and the Administration has nominated six candidates for those positions, and four of these six have been confirmed.

Please do not hesitate to contact the Department if we can be of assistance in other matters.

Sincerely,

Richard A. Hertling
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

APPOINTMENTS: **Since March 9, 2006, when the Congress amended the Attorney General's authority to appoint interim United States Attorneys, the President has nominated 16 individuals to serve as United States Attorney.**	**AG Appointed**	**Presidentially Nominated**	**Senate Confirmed**
Erik Peterson – Western District of Wisconsin	Yes	Yes	Yes
Charles Rosenberg – Eastern District of Virginia	Yes	Yes	Yes
Thomas Anderson – District of Vermont	Yes	Yes	Yes
Martin Jackley – District of South Dakota	Yes	Yes	Yes
Alexander Acosta – Southern District of Florida	Yes	Yes	Yes
Troy Eid – District of Colorado	Yes	Yes	Yes
Phillip Green – Southern District of Illinois	No	Yes	N/A*
George Holding – Eastern District of North Carolina	Yes	Yes	Yes
Sharon Potter – Northern District of West Virginia	Yes	Yes	Yes
Brett Tolman – District of Utah	Yes	Yes	Yes
Rodger Heaton – Central District of Illinois	Yes	Yes	Yes
Deborah Rhodes – Southern District of Alabama	Yes	Yes	Yes
Rachel Paulose – District of Minnesota	Yes	Yes	Yes
John Wood – Western District of Missouri	Yes	Yes	Yes
Rosa Rodriguez-Velez – District of Puerto Rico	Yes	Yes	**PENDING**
Jeff Taylor – District of Columbia	Yes	Yes	**PENDING**

* Nominated in the 109th Congress but not confirmed by the Senate.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00220 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.415

NOMINATIONS: **Since March 9, 2006, there have been 20 new U.S. Attorney vacancies.**	**App intment:**	**Presidential Appointment Status:**
District of Arizona	Dan Knauss was appointed interim United States Attorney when the incumbent United States Attorney resigned.	Candidates Under Review
Eastern District of Arkansas	Tim Griffin was appointed interim United States Attorney when the incumbent United States Attorney resigned.	Candidates Under Review
District of Columbia	Jeff Taylor was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Assistant Attorney General for the National Security Division.	Jeff Taylor was nominated to serve as United States Attorney by the President and awaits consideration by the U.S. Senate.
Central District of California	First Assistant United States Attorney George Cardona serves as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Candidates Under Review
Northern District of California	Scott Schools was appointed interim United States Attorney when incumbent United States Attorney resigned.	Candidates Under Review
Southern District of California	Karen Hewitt was appointed interim United States Attorney when incumbent United States Attorney resigned.	Candidates Under Review
Middle District of Florida	First Assistant United States Attorney James Klindt serves as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Candidates Under Review

Southern District of Georgia	First Assistant United States Attorney Edmund A. Booth, Jr. serves as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Candidates Under Review
Northern District of Iowa	First Assistant United States Attorney Judi Whetstine served as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1), until she retired. Matt Dummermuth has since been appointed interim United States Attorney.	Candidates Under Review
Western District of Michigan	Charles Gross was appointed interim United States Attorney in mid-April 2007, replacing Brain Delaney—who was appointed to serve until Mr. Gross returned from military duty—after the incumbent United States Attorney resigned.	Candidates Under Review
Western District of Missouri	Brad Schlozman was appointed interim United States Attorney when incumbent United States Attorney and First Assistant United States Attorney resigned at the same time.	John Wood was appointed United States Attorney by the President.
District of Nebraska	Joe Stecher was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Chief Justice of Nebraska Supreme Court.	Candidates Under Review
District of Nevada	First Assistant United States Attorney Steven W. Myhre serves as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Candidates Under Review

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00222 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.417

District of New Mexico	First Assistant United States Attorney Larry Gomez serves as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Candidates Under Review
Eastern District of North Carolina	Then First Assistant United States Attorney George Holding served as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	George Holding was appointed United States Attorney by the President.
District of Puerto Rico	Rosa Rodriguez-Velez was appointed interim United States Attorney when the incumbent United States Attorney resigned.	Rosa Rodriguez-Velez was nominated to serve as United States Attorney by the President and awaits consideration by the U.S. Senate.
Middle District of Tennessee	Craig Morford was appointed interim United States Attorney when incumbent United States Attorney resigned.	Candidates Under Review
Eastern District of Virginia	Chuck Rosenberg was appointed interim United States Attorney when incumbent United States Attorney resigned to be appointed Deputy Attorney General.	Chuck Rosenberg was appointed United States Attorney by the President.
Northern District of West Virginia	First Assistant United States Attorney Rita Valdrini served as Acting United States Attorney under the Vacancies Reform Act, *see* 5 U.S.C. § 3345(a)(1).	Sharon Potter was appointed United States Attorney by the President.
Western District of Washington	Jeff Sullivan was appointed interim United States Attorney when incumbent United States Attorney resigned.	Candidates Under Review

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

TUESDAY, JULY 24, 2007

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

The Committee met, pursuant to notice, at 9:32 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, Kyl, and Sessions.

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

Chairman LEAHY. Good morning. I would ask those who are standing in the back to show courtesy to the people who have stood in line to be here to sit down. Everybody is welcome here who is here, but I would expect all those who are here for the hearing to respect the rights of everybody who is here and to not stand and block those who are trying to watch the proceedings and who have a right to be here.

Three months ago, when Attorney General Gonzales last appeared before this Committee, I said that the Department of Justice was experiencing a crisis of leadership perhaps unrivaled during its history. Unfortunately, that crisis has not abated. Until there is independence, transparency, and accountability, the crisis will continue. The Attorney General has lost the confidence of the Congress and the American people. But through oversight we hope to restore balance and accountability to the executive branch. The Department of Justice must be restored to be worthy of its name. It should not be reduced to another political arm of the White House. It was never intended to be that. The trust and confidence of the American people in Federal law enforcement must be restored.

With the Department shrouded in scandal, the Deputy Attorney General has announced his resignation. The nominee to become Associate Attorney General requested that his nomination be withdrawn rather than testify under oath at a confirmation hearing. The Attorney General's Chief of Staff, the Deputy Attorney General's Chief of Staff, the Department's White House liaison, and the White House Political Director have all resigned, as have others. I would joke that the last one out the door should turn out the lights,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00225 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

but the Department of Justice is too important for that. We need to shine more light there, not less.

The investigation into the firing for partisan purposes of United States Attorneys, who had been appointed by this President, along with an ever-growing series of controversies and scandals, have revealed an administration driven by a vision of an all-powerful Executive over our constitutional system of checks and balances, one that values loyalty over judgment, secrecy over openness, and ideology over competence.

The accumulated and essentially uncontroverted evidence is that political considerations factored into the unprecedented firing of at least nine United States Attorneys last year. Testimony and documents show that the list was compiled based on input from the highest political ranks in the White House, that senior officials were apparently focused on the political impact of Federal prosecutions, on whether Federal prosecutors were doing enough to bring partisan voter fraud and corruption cases, and that the reasons given for these firings were contrived as part of a cover-up.

What the White House stonewalling is preventing is conclusive evidence of who made the decisions to fire these Federal prosecutors. We know from the testimony that it was not the President. Everyone who has testified has said that he was not involved. None of the senior officials at the Department of Justice could testify how people were added to the list or the real reasons that people were included among the Federal prosecutors to be replaced. Indeed, the evidence we have been able to collect points to Karl Rove and the political operatives at the White House. The stonewalling by the White House raises the question: What is it that the White House is so desperate to hide?

The White House has asserted blanket claims of executive privilege, despite officials' contentions that the President was not involved. They refuse to provide a factual basis for their blanket claims, have instructed former White House officials not to testify about what they know, and then instructed Harriet Miers to refuse even to appear as required by a House Judiciary Committee subpoena. Now, anonymous officials are claiming that the statutory mechanism to test White House assertions of executive privilege no longer governs. In essence, the White House asserts that its claim of privilege is the final word, that Congress may not review it, and, of course, that no court dare review it. Here again, this White House claims to be above the law.

My oath, unlike those who have apparently sworn their allegiance to this President, is to the United States Constitution. I believe in checks and balances and in the rule of law.

Despite the stonewalling and obstruction, we have learned that Todd Graves, U.S. Attorney in the Western District of Missouri, was fired after he expressed reservations about a lawsuit that would have stripped many African-American voters from the rolls in Missouri. When the Attorney General replaced Mr. Graves with Bradley Schlozman, the person pushing the lawsuit, that case was filed but ultimately, of course, was thrown out of court. Once in place in Missouri, though, Mr. Schlozman also brought indictments on the eve of a closely contested election, despite the Justice Department policy, longstanding policy not to do so. This is what hap-

pens when a responsible prosecutor is replaced by one considered a "loyal Bushie" for partisan, political purposes.

Mr. Schlozman also bragged about hiring ideological soulmates. Monica Goodling likewise admitted "crossing the line" when she used a political litmus test for career prosecutors and immigration judges. And rather than keep Federal law enforcement above politics, this administration is more intent on placing its actions above the law.

The Attorney General admitted recently in a video for Justice employees that injecting politics into the Department's hiring is unacceptable. But is he committed to corrective action and routing out the partisanship in Federal law enforcement? His lack of independence and tendency to act as if he were the President's lawyer rather than the Attorney General of the United States makes that doubtful. From the infamous torture memo, to Mr. Gonzales's attempt to prevail on a hospitalized Attorney General Ashcroft to certify an illegal eavesdropping program, to the recent opinion seeking to justify Harriet Miers's contemptuous refusal to appear before the House Judiciary Committee, the Justice Department has been reduced to the role of an enabler for this administration. What we need instead is genuine accountability and real independence.

We learned earlier this year of systematic misuse and abuse of National Security Letters, a powerful tool for the Government to obtain personal information without the approval of a court or prosecutor. The Attorney General has said he had no inkling of these or other problems with vastly expanded investigative powers. But now we know otherwise. Recent documents obtained through Freedom of Information Act lawsuits and reported in The Washington Post indicate that the Attorney General was receiving reports in 2005 and 2006 of violations in connection with the PATRIOT Act and abuses of National Security Letters. Yet, when the Attorney General testified under oath before the Senate Select Committee on Intelligence in April 2005, he said that "[t]he track record established over the past 3 years has demonstrated the effectiveness of the safeguards of civil liberties put in place when the Act was passed." Earlier this month, in responses to written questions I sent to the Attorney General about when he first learned of problems with National Security Letters, he once again failed to mention these reports of problems.

Only with the openness and honesty that brings true accountability will the Department begin to move forward and correct the problems of the last few years. Instead, we have leadership at the Department of Justice whose expressions of concern and admissions that mistakes were made only follow public revelations and amount to regrets really not that mistakes and excesses were made, but apparently regrets that somebody found out about those excesses.

In the wake of growing reports of abuses of National Security Letters, the Attorney General announced a new internal program. This supposed self-examination, with no involvement by the courts, no report to Congress, and no other outside check, essentially translates to "Trust us." Well, with a history of civil liberties abuses and cover ups, this administration has squandered our

trust. I am not willing to accept a simple statement of "Trust us." I don't trust you.

Earlier internal reviews, like the Intelligence Oversight Board and the Privacy and Civil Liberties Oversight Board, have been ineffective and inactive, failing to take action on the violations reported to them. Only with a real check from outside of the executive branch can we have any confidence that abuses will be curbed and balance restored.

A tragic dimension of the ongoing crisis of leadership at the Justice Department is the undermining of good people and the crucial work that the Department does. Thousands of honest, hard-working prosecutors, agents, and other civil servants labor every day to detect and prevent crime, uncover corruption, promote equality and justice, and keep all Americans safe from terrorism. But, sadly, prosecutions will now be questioned as politically motivated and evidence will be suspected of having been obtained in violation of laws and civil liberties. Once the Government shows a disregard for the independence of the justice system and the rule of law, it is very hard to restore the people's faith, and it is going to be very hard to restore my trust in what is going on.

This Committee will do its best to try to restore independence, accountability, and commitment to the rule of law to the operations of the Justice Department. That is something that both Republicans and Democrats could agree on.

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

Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Gonzales, I direct the remarks in my opening statement to you. Your photo appears in the morning press with the caption, "I accept full responsibility." Let me suggest to you that that is not enough. The question is whether the Department of Justice is functioning as it must in order to protect the vital interests of the American people.

Next to the Department of Defense, the Department of Justice has the major responsibility for protecting Americans' security—investigation of terrorism, dealing with drug sales, dealing with organized crime, violent crime. And the issues relating to the resignations of the U.S. Attorneys have placed a very heavy cloud over the Department. There is evidence of low morale, very low morale; lack of credibility; candidly, your personal credibility. The Department is dysfunctional, as so many items have arisen where there is a substantial basis to conclude that there is a preoccupation with the investigation on the resignations of the Attorneys. And I have asked you both formally in this room and in our private conversations to give us an explanation as to why each one of these U.S. Attorneys was asked to resign, and that has not been done.

We have sought an accommodation to question the remaining witnesses, and I believe that the administration has not had any significant degree of flexibility in trying to work it out with congressional oversight. I believe we are prepared to concede that

there will not be an oath because there are penalties otherwise; prepared to concede that it could be in private, although it ought to be public, it is the public's business; prepared to concede that both Houses wouldn't have to engage in the questioning of these witnesses, that a representative group from the House Judiciary Committee and the Senate Judiciary Committee, bipartisan, bicameral, would do the questioning. But not to have a transcript I think is patently unreasonable. But I am prepared even to do that if we could get on with this matter, reserving the right for Congress to come back if the informal interviews are unsatisfactory, then to proceed with our authorities under subpoenas. And we were met with the response, no, if you question these witnesses under our unilateral terms, you cannot come back later.

Well, that is simply going too far. I do not believe that the Congress has the right to give up our powers. We cannot delegate them, we cannot abrogate them. They are our responsibilities. We cannot give them up as part of an arrangement with the administration.

Now we have a very remarkable turn of events. We now have the invitation, announcement that the administration will preclude the U.S. Attorney for the District of Columbia from pursuing a contempt citation. Now, if that forecloses a determination of whether executive privilege has been properly imposed, then the President in that manner can stymie congressional oversight by simply saying there is executive privilege. Since we cannot take it to court, the President's word stands, and the constitutional authority and responsibility for congressional oversight is gone.

Now, that is carrying this controversy to really an incredible level. If that is to happen, the President can run the Government as he chooses, answer no questions, say it is executive privilege. He cannot go to court, and the President's word stands.

Now, we have been exploring some alternatives, and I will be asking you about them. The Attorney General has the authority to appoint a special prosecutor. You are recused, but somebody else could do it. You are recused because you know all of the principals. You have a conflict of interest. Your recusal is understandable. But doesn't the President have an identical conflict of interest? Can the President foreclose the Congress from moving ahead and making an effort at having a judicial determination as to the propriety of the claim of executive privilege?

We also have the alternative of convening the Senate and having a contempt citation and trying it in the Senate. That might be productive. We could use the precedent of the Alcee Hastings impeachment proceeding where a Committee took over, had it in this room—I was the Vice Chairman, Senator Bingaman was the Chairman—so we would not take up the full time of the Senate in moving for a contempt citation. But we are going to have to move ahead on that, Mr. Attorney General.

We have so many items that every week a new issue arises. And I sent you letters advising you that we would be pursuing these matters at this hearing. One is on the legality for the Terrorist Surveillance Program. You said categorically there has not been any serious disagreement about the program. And yet we know

from former Deputy Attorney General James Comey exactly the opposite is true. This is what he testified:

When you and the Chief of Staff went to extract from then-Attorney General Ashcroft, who was in the hospital under sedation, approval of the program, Mr. Comey: "I was very upset. I was angry. I thought I had just witnessed an effort to take advantage of a very sick man."

I will be asking you about that, giving you a chance to explain that, although it bedevils me to see any conceivable explanation for your saying no disagreement and your going to the hospital of the Attorney General, who is no longer in power, he has delegated his authority, and seek to extract approval from him. It seems to me that it is just decimating, Mr. Attorney General, as to both your judgment and your credibility.

But that is not all. The list goes on and on. I wrote to you about the death penalty case where U.S. Attorney Paul Charlton could only get 5 to 10 minutes of the time of the Deputy Attorney General, who talked to you. You would not talk to him. We will give you a chance to explain that.

On the PATRIOT Act, you testified repeatedly no problems, and there is a wealth of information about very serious incidents.

And then this OxyContin case, which has reached the newspapers, where there was malicious, deliberate falsification of the medicine; people died.

Is your Department functioning? Do you review these matters? How many matters are there which do not come to our attention because you do not tell us and the newspapers do not disclose them?

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you very much.

I might mention Senator Specter has requested a hearing on OxyContin, and I think he is absolutely right on that, and we will have one at your request.

Mr. Attorney General, please stand and raise your right hand. Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Attorney General GONZALES. I do.

Chairman LEAHY. Go ahead, Mr. Attorney General. And I should note before you start that there will be a series of votes around 10:20, and I will consult with Senator Specter how best to continue during that time. At most, we will try to limit the break.

Attorney General GONZALES. I understand, Mr. Chairman.

Chairman LEAHY. Go ahead.

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

Attorney General GONZALES. I do have the great pleasure to work with over 100,000 dedicated public servants at the Department of Justice. I admire the dedication to the pursuit of justice for all Americans. The Department's many accomplishments are, in reality, their accomplishments.

As Attorney General, I have worked with these fine men and women to keep our country safe from terrorists, our neighborhoods safe from violent crime, and our children safe from predators.

As my written statement explains in more detail, when it comes to keeping our neighborhoods safe and protecting our children, the Department has made great progress. In my brief remarks this morning, I want to focus on the Department's No. 1 priority of keeping our country safe from terrorists and the urgent need, quite frankly, for more help from Congress in this fight.

As the recent National Intelligence Estimate as well as the car bombings in London and Scotland demonstrate, the threat posed to America and its allies by al Qaeda and other terrorist groups remains very strong. To respond effectively to this threat, it is imperative that Congress modernize the Foreign Intelligence Surveillance Act of 1978, known as FISA. Doing so is critically important to intelligence gathering, and it really just makes plain sense.

When Congress drafted FISA in 1978, it defined the statute's key provisions in terms of telecommunications technologies that existed at that time. As we all know, there have been sweeping changes in the way that we communicate since FISA became law. And these changes have had unintended consequences on FISA's operation.

For example, without any change in FISA, technological advancements have actually made it more difficult to conduct surveillance on suspected terrorists and other subjects of foreign intelligence surveillance overseas.

In April, at the request of the Senate Select Committee on Intelligence, the Director of National Intelligence transmitted a comprehensive FISA modernization proposal to Congress. The proposal builds upon thoughtful bills introduced during the last Congress, and the bill would accomplish several key objectives. Most importantly, the administration's proposal restores FISA's original focus on protecting the privacy of U.S. persons in the United States. FISA generally should apply when conducting surveillance on those in the United States, but it should not apply when our intelligence community targets persons overseas. Indeed, it was advancements in technology and not any policy decision of Congress that resulted in wide-scale application of FISA and its requirements to go to court to overseas targets.

This unintended consequence clogs the FISA process and, quite frankly, hurts national security and civil liberties. As amended, FISA's scope would focus on the subject of the surveillance and the subject's location rather than on the means by which the subject transmits a communication or the location where the Government intercepts a communication. FISA would become technology neutral. Its scope would no longer be affected by changes in communications technologies.

The bill would also fill a gap in current law by permitting the Government to direct communications companies to assist in the conduct of lawful communications intelligence activities that do not constitute "electronic surveillance" under FISA. This is a critical provision that is a necessary companion to any change in FISA's scope. Importantly, the administration's proposal would provide a robust process of judicial review for companies that wish to challenge these directives.

The administration's proposal would also provide protections from liability to companies that are alleged to have assisted the Government in the wake of the September 11th terrorist attacks. The bill also streamlines the FISA application process to make FISA more efficient, while at the same time ensuring that the FISA Court has the information it needs to make the probable cause findings required.

Finally, the administration's proposal would amend the statutory definition of "agent of a foreign power" to ensure that it includes groups who are engaged in the international proliferation of weapons of mass destruction or who possess or are expect to transmit or receive foreign intelligence information while in the United States.

FISA modernization is critically important, and we urge the Senate to reform this critical statute as soon as possible. I am hopeful that this is an area we can work on together with the Congress and this Committee. I think we can find common ground on the central principles underpinning the administration's proposal and, in particular, on the fact that we should not extend FISA's protections to terrorist suspects located overseas.

We already have had several helpful sessions with the Intelligence Committees in the Senate and the House on this issue. We look forward to continuing to work with the Senate and this Committee on this important endeavor.

Thank you, Mr. Chairman.

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

Chairman LEAHY. Thank you, Mr. Attorney General, and your full statement, of course, will be made a part of the record.

We have documents that we have—not in answer to requests made by this and other committees, but obtained through Freedom of Information Act lawsuits. They indicate that you received reports in 2005 and 2006 of violations in connection with the PATRIOT Act abuses of National Security Letters. The violations apparently included unauthorized surveillance, illegal searches, and improper collection of data.

But when you testified before the Senate Select Committee on Intelligence in April 2005, you sought to create the impression that Americans' civil liberties and privacies were being effectively safeguarded and respected, and you said, and I quote: "The track record established over the past 3 years has demonstrated the effectiveness of the safeguards of civil liberties put in place when the Act was passed."

Then I sent you written questions, and earlier this month, you responded about when you first learned of problems with National Security Letters. But in those responses, you did not mention these earlier reports of problems.

So my question is this—as you know, I have written a number of these questions to you in advance so that you would be able to answer. Would you like to revise or correct your April 2005 testimony to the Senate Select Committee on Intelligence, which was misleading, or your July 6, 2007, response to this Committee's written questions? Do you care to revise either of them?

Attorney General GONZALES. Thank you for the question, Mr. Chairman, and I can understand the confusion or concern about my prior statements, which, of course, were made in connection with the discussions about reauthorization of the PATRIOT Act and were also made in the context of the IG's investigation of abuses under the PATRIOT Act, exercising his authority under the PATRIOT Act to investigate abuses.

My comments are similar to comments made by the Director of the FBI, and—

Chairman LEAHY. I do not care if they are similar to anybody else. They are your comments I am concerned about. I am not concerned about somebody's else comments. I am concerned about yours. They seem contradictory.

Attorney General GONZALES. And my comments reflected the understanding on my part, Mr. Chairman, that IOB violations—which is what I want to refer to these as, "IOB violations, referrals or violations made the Intelligence Oversight Board—that these do not reflect, as a general matter, intentional abuses of the PATRIOT Act, that any—

Chairman LEAHY. Are you saying they are not abuses if they are not committed without malice? Is that what you are saying?

Attorney General GONZALES. That's not what I'm saying. Obviously, they are very, very—and every such abuse, because it does constitute abuse, is, in fact, referred to the IOB and also is, in fact, referred to the Inspection Division at the FBI.

Now, the good news is that when a referral occurs, there is an examination and appropriate action is taken. The other bit of good news is that I have directed each IOB referral to the FBI also be made simultaneously to the National Security Division, and the National Security Division is going to study these IOBs, make a semiannual report to me, and identify whether or not there are any trends here that we identify.

Chairman LEAHY. Well, let me ask you about that, because I understand that approximately 500—and if you want to go back and elaborate on your answer, I will certainly give you time because I do not think you have answered the question I asked. But you keep talking about the Intelligence Oversight Board, these things are referred to it. I understand that approximately 500 incidents are annually referred to the Intelligence Oversight Board, but the General Counsel of the FBI has not received a single response from the Board. I thought I was the only one that did not get responses, but apparently 500 a year do not get back a single response. The Board is not sent forward a single report of potentially unlawful intelligence activities. But you are talking about an oversight system that reports to that same Board.

You know, is this, oh, gosh, we have a problem, we will not tell anybody about it, we will send it to somebody who will file it away and nothing will ever be heard again, so, therefore, we have no problems? It is almost an Alice in Wonderland situation.

Attorney General GONZALES. I think you have misunderstood my response, Mr. Chairman. What I said or certainly intended to say was the fact that it is referred to the IOB does not mean that it stops there. It is also sent to the Inspection Division, and appropriate action is taken. We have also instituted another check by in-

volving the National Security Division so that they can also identify any trends and make suggestions in policies or training so that we can address these kinds of issues.

Chairman LEAHY. Well, in April 2005, when you said the track record established in the past 3 years demonstrated the effectiveness of the safeguards, that basically there had not been any violations, was that correct or not? Had there been violations?

Attorney General GONZALES. What I can say is—

Chairman LEAHY. In the 3 years before you testified, had there been any violations?

Attorney General GONZALES. A violation—

Chairman LEAHY. Yes or no?

Attorney General GONZALES. A violation of IOB may not be a violation of the PATRIOT Act. In fact, the Inspector General I think has indicated that. And, Mr. Chairman, my view and the views of other leadership in the Department is, in fact, when we are talking about abuses of the PATRIOT Act, we are talking about intentional, deliberate misuse of the PATRIOT Act, not when some agent writes down the wrong phone number in a National Security Letter. And, of course, whenever a mistake like that happens, of course, we address it and appropriate action is taken.

Chairman LEAHY. Such as?

Attorney General GONZALES. We institute training for— additional training, if it is a question of providing additional guidance, providing additional training, or disciplinary action against the agent.

Chairman LEAHY. Incidentally, could I ask you this? We have 93 United States Attorneys. Only 70 have been confirmed by the Senate. Do you have any idea when we are going to get—six have just been sent up. When are we going to get the 17 remaining ones?

Attorney General GONZALES. We are working as hard as we can with the White House and with Members of Congress so that we can go through the vetting process, the evaluation process, so we can make recommendations to the President. The full intent is, as I have committed to this Committee, that we are going to have Senate-confirmed U.S. Attorneys in these positions.

Chairman LEAHY. I would hope so because you tried to do that back-door thing that you got inserted into the law, and the Congress has repealed that because of revulsion at the use of it. The President signed it.

My last question is this: As you know, if either the Senate or House finds somebody in contempt, they have to refer it to the U.S. Attorney for the District of Columbia, who has to then not necessarily prosecute, but at least present the contempt citation to a grand jury to determine whether criminal charges are appropriate. Last week, the administration said that the U.S. Attorney wouldn't be allowed to carry out that. So my question to you is: If a House of Congress certified a contempt citation against former or current officials for failing to appear or comply with a congressional subpoena, would you permit the U.S. Attorney to carry out the law and refer the matter to a grand jury, as required by 2 U.S.C. 194, and, therefore, fulfill the constitutional duty to faithfully execute the law? Or would you block the execution of the law?

Attorney General GONZALES. Mr. Chairman, your question relates to an ongoing controversy which I am recused from. I can't—I'm not going to answer that question.

Chairman LEAHY. Is there anybody left in the Department of Justice who could answer the question?

Attorney General GONZALES. Of course, there is.

Chairman LEAHY. Who?

Attorney General GONZALES. With respect to these kinds of decisions—

Chairman LEAHY. Who?

Attorney General GONZALES.—it would be made by the Solicitor General.

Chairman LEAHY. Well, then we may ask him why they are on this refusal to prosecute that the administration talked about, whether that extends to the executive branch lying to Congress or perjury or destruction of evidence or obstruction of justice, because, Mr. Attorney General, those are going to be real issues. They are not going to be just debating points. Thank you.

Senator Specter?

Senator SPECTER. Let me move quickly through a series of questions. There is a lot to cover, starting with the issue that Mr. Comey raises. You said, "There has not been any serious disagreement about the program." Mr. Comey's testimony was that, "Mr. Gonzales began to discuss why they were there to seek approval." And he then says, "I was very upset. I was angry. I thought I had just witnessed an effort to take advantage of a very sick man."

First of all, Mr. Attorney General, what credibility is left for you when you say there is no disagreement and you are a party to going to the hospital to see Attorney General Ashcroft under sedation to try to get him to approve the program?

Attorney General GONZALES. The disagreement that occurred and the reason for the visit to the hospital, Senator, was about other intelligence activities. It was not about the Terrorist Surveillance Program that the President announced to the American people.

Now, I would like the opportunity—

Senator SPECTER. Mr. Attorney General, do you expect us to believe that?

Attorney General GONZALES. Well, may I have the opportunity to talk about another very important meeting in connection with the hospital visit that puts it into context.

There was an emergency meeting in the White House Situation Room that afternoon. It involved senior members of the administration and the bipartisan leadership of the Congress, both House and Senate, as well as the bipartisan leadership of the House and Senate Intel Committees, the Gang of Eight.

The purpose of that meeting was for the White House to advise the Congress that Mr. Comey had advised us that he could not approve the continuation of vitally important intelligence activities despite the repeated approvals during the past 2 years of the same activities.

Senator SPECTER. Okay. Assuming you are leveling with us on this occasion—

Attorney General GONZALES. May I—

Senator SPECTER. No, I want to move to the point about how can you get approval from Ashcroft for anything when he is under sedation and incapacitated—for anything.

Attorney General GONZALES. May I continue the story, Senator—

Senator SPECTER. No. I want you to answer my question.

Attorney General GONZALES. Senator, obviously there was concern about General Ashcroft's condition, and we would not have sought, nor did we intend to get any approval from General Ashcroft if, in fact, he wasn't fully competent to make that decision. But General—there are no rules governing whether or not General Ashcroft can decide, "I am feeling well enough to make this decision."

Senator SPECTER. But, Attorney General Gonzales, he had already given up his authority as Attorney General. Ashcroft was no longer Attorney General.

Attorney General GONZALES. And he could always reclaim that. There are no rules about—

Senator SPECTER. While he is the hospital under sedation?

Attorney General GONZALES. Again, we didn't know—we know, of course, that he was—that he was—he was ill, that he had had surgery.

Senator SPECTER. I am not making any progress here. Let me go to another topic. Attorney General, I would not— and I would like to have a lot of time, but I have got 3 minutes and 43 seconds left, and seven topics to cover with you.

Mr. Attorney General, do you think constitutional government in the United States can survive if the President has the unilateral authority to reject congressional inquiries on grounds of executive privilege and the President then acts to bar the Congress from getting a judicial determination as to whether that executive privilege is properly invoked?

Attorney General GONZALES. Senator, you're asking me a question that is related to an ongoing controversy, which I am recused. I will say the President has tried very hard—

Senator SPECTER. No, no. I am not asking you a question about something you are recused of. I am asking you a question about constitutional law.

Attorney General GONZALES. You're asking me a question that's related—

Senator SPECTER. I am asking you whether you could have—

Attorney General GONZALES.—to an ongoing controversy.

Senator SPECTER.—a constitutional government with the Congress exercising its constitutional authority for oversight if, when the President claims executive privilege, the President then forecloses the Congress from getting a judicial determination of it. That is a constitutional law question.

Attorney General GONZALES. Senator, both the Congress and the President have constitutional authorities. Sometimes they clash. In most cases, accommodations are reached. In the very rare instances, they sometimes litigate it in the courts.

Senator SPECTER. Would you focus on my question for just a minute, please?

Attorney General GONZALES. Senator, I'm not going to answer this question because it does relate to an ongoing controversy in which I am recused.

[Audience comments.]

Chairman LEAHY. I would note, please, we will have decorum in here. Senator Specter has the right to ask all the questions he has. The Attorney General has the right to be heard. I have indicated to Senator Specter, especially that I am taking some of his time in saying this, that he has extra time. But, please, let us continue without comments.

Senator SPECTER. I am not going to pursue that question, Mr. Attorney General, because I see it is hopeless. It has got nothing to do with your recusal. You are the Attorney General. You are also a lawyer. And we are dealing with a very fundamental controversy where the President is exerting executive authority under executive privilege and the Congress is exerting constitutional authority for oversight, and we are trying to take it to court. The court decides when that conflict exists. It has got nothing to do with necessarily the U.S. Attorneys who were asked to resign.

Let me move ahead to another subject, see if I can get an answer here. Do you have a conflict of interest on the matter involving the resignations of the U.S. Attorneys?

Attorney General GONZALES. Yes. I am recused from that.

Senator SPECTER. Does the President have a conflict of interest in deciding whether or not to allow a contempt citation to go forward to former White House Counsel Harriet Miers?

Attorney General GONZALES. Senator, I am not going to answer that question. Again, you're talking about—asking me questions about a matter in which I am recused. I'm not going to answer that question.

Senator SPECTER. Well, let's see if somewhere somehow we can find a question you will answer. How about the death penalty case? I wrote you about this. We had a man who was convicted of murder. The victim's body was never recovered. There was no forensic evidence directly linking the defendant to the victim's death. The U.S. Attorney, a man named Paul Charlton, contacted your office and said, "I don't think this is a proper case for the death penalty."

Deputy Attorney General Paul McNulty had a conversation with Mr. Charlton and had a conversation with you, and then McNulty's Chief of Staff, Mike Elston, called Charlton—and this is Charlton's testimony: "Elston indicated that McNulty had spoken to the Attorney General and that McNulty wanted me to be aware of two things: first, that McNulty had spent a significant amount of time on this issue with the Attorney General, perhaps as much as 5 or 10 minutes."

Is that accurate factually? Will you answer a question as to a fact, as to whether you talked to McNulty about this case for as much as 5 or 10 minutes?

Attorney General GONZALES. I have no specific recollection as to this particular case, but I can tell you we have a very detailed process where hours are spent by lawyers, including the U.S. Attorney, our Capital Case Review Unit, who then make recommendations to the Deputy Attorney General.

Senator SPECTER. I am not interested in that. I am interested in an answer to my question. If you don't know, if you don't remember—

Attorney General GONZALES. I don't—I—

Senator SPECTER. Wait a minute. I'm not finished asking you the question. If you don't know or you don't remember what happened when you stood on a decision to have a man executed—that is what you are saying.

Attorney General GONZALES. I have no specific recollection about the amount of time that I talked with Paul McNulty on this particular issue.

Senator SPECTER. Well, would you disagree with McNulty that it was 5 to 10 minutes?

Attorney General GONZALES. I can't agree with that if I don't recall, Senator.

Senator SPECTER. Okay. You can't agree with it. I didn't ask you that. I asked if you disagreed with it.

Attorney General GONZALES. I can't agree or disagree with it.

Senator SPECTER. Would you say that 5 to 10 minutes would be a "significant amount of time" for you to spend on a case involving the death penalty?

Attorney General GONZALES. It would depend on the circumstances of the case and the recommendations coming up and the facts. Those would all dictate how much time I would spend personally on a particular case, because we have a very extensive review process within the Department where hours are spent analyzing what is the appropriate course of action for the Department of Justice.

Senator SPECTER. Well, Mr. Attorney General, I am not totally unfamiliar with this sort of thing. When I was district attorney of Philadelphia, I had 500 homicides a year. I did not allow any assistant to ask for the death penalty that I had not personally approved. And when I asked for the death penalty, I remembered the case.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, the detention center at Guantanamo Bay continues to harm our image around the world. There is growing consensus on this. Secretary of Defense Robert Gates told the House Committee, "I came to this job thinking that Guantanamo Bay should be closed."

According to press reports, Secretary of State Rice has also supported efforts within the administration to close Guantanamo. And former Secretary of State Colin Powell said, "If it was up to me, I would close Guantanamo, not tomorrow but this afternoon." Last year, even the President himself recognized that Guantanamo has been the focus of international criticism, and he said, "I'd like to close Guantanamo."

Recent press reports have disclosed that efforts are underway in the administration to do that. According to the New York Times, however, these efforts "were rejected after Attorney General

Gonzales and some other Government lawyers expressed strong objections."

So where are you on this? Do you think that we should close Guantanamo?

Attorney General GONZALES. I wish we could close Guantanamo. I am with everyone else. We should close Guantanamo. However, a need remains, and there are legitimate questions about what do you do with these individuals. I guess we could turn them loose, Senator, and they could end up fighting against us again. We could bring them into the United States, although I understand the Senate recently rejected that overwhelmingly. Bringing them into the United States raises some serious legal issues. And as the Attorney General, my job was to make sure that all of the policymakers were aware that there were serious legal issues that would arise if, in fact, they were brought into the United States.

But if your question is would I support closing Guantanamo, absolutely, but not at the risk of the lives of our men and women who are fighting overseas and not at the risk of the national security of our country.

Senator KOHL. But we can put them into the American justice system, and the American justice system, as you know, has worked very effectively, even with respect to dealing with terrorists and members of al Qaeda. There are ways in which we can restrict classified information, important information. So if you support closing Guantanamo, then why don't you put into motion the kinds of things that will result in just that?

Attorney General GONZALES. Senator, I do believe there are legitimate risks involved in bringing people into the United States and putting them into our system, quite frankly. Let's say—

Senator KOHL. What are the risks?

Attorney General GONZALES. Let's say that the evidence that we have is not evidence that we want to compromise in order to bring someone to trial. Once they're into the United States, if they come from a country where, if we send them back, they may be tortured, they will have the right to ask for asylum. And so we may not have the ability to either hold them or to throw them out of the United States and we have to let them go.

And so those are sort of the nightmare scenarios that we worry about in bringing people into the United States.

Senator KOHL. Are you saying, therefore, that you do not support closing Guantanamo?

Attorney General GONZALES. I support closing Guantanamo, Senator, but I think we need to do it with our eyes wide open. I think we probably would come to the Congress and ask for legislation in order to ensure that we can protect this country.

Senator KOHL. Well, why don't we do that?

Attorney General GONZALES. That is totally something that is a serious discussion and debate.

Senator KOHL. So you may—

Attorney General GONZALES. In the administration.

Senator KOHL. You may, in fact, decide to close Guantanamo and come to Congress for authorization.

Attorney General GONZALES. Again, there's been no decision made by the President. My judgment is the President, like you,

wants to close Guantanamo. But like you, he doesn't want to do so if it means jeopardizing the security of our country.

And so we're trying to work through these, and you're right, it will ultimately, in my judgment, require additional consultation with the Congress.

Senator KOHL. Mr. Attorney General, consumers today, as you know, are suffering from near record high gas prices, and most of this is due to the high price of crude oil. Despite this, the administration has threatened to veto our NOPEC legislation, which would enable the Justice Department and only the Justice Department to sue OPEC member nations for violating U.S. antitrust law when they conspire to fix the price of oil, which they do. This bill passed both the House and the Senate with overwhelming margins. Under this bill, the Justice Department and only the Justice Department could institute this kind of a proceeding.

So why do you not want this authority?

Attorney General GONZALES. I think cartels are bad, and we ought to prosecute them and go after them. I agree with that. The question is whether or not going after this cartel in this way, through litigation, is the right approach because you implicate questions of sovereignty and state action and, you know, calls into question the fact that, you know, we have a presence overseas and does that mean that either the American Government or American businesses are going to be subject to litigation, the jurisdiction of other countries overseas. I think that's the concern that we have, is the downstream impact or the result, the impetus that's going to arise as a result of this legislation.

We think that a better approach is to continue to try to work through this, through the Department of Energy and the Department of State, through diplomatic means, and that's the concern that we have, Senator. Again, cartels are bad. We'd like to deal with it. I just—we're concerned that this may not be the best approach.

Senator KOHL. But you don't have to use, if you don't—you know that the only way in which the legislation can be effected is through the President and the Department of Justice. So if you think it is legislation that should not be used, you won't use it.

Attorney General GONZALES. But once Congress passes legislation and puts it on the books, what is going to be the response of another country who sees this action taken by the Congress? And are they going to take some kind of action in response to simply the legislation passing?

It's hard to predict. I would simply urge the Congress to consider giving the Department of State and the Department of Energy additional time to try to work through this.

Senator KOHL. Mr. Attorney General, since our last oversight hearing, it seems that very little has improved at the Justice Department. Many of the people in senior positions have resigned, as you know, and according to press reports, these positions have not been filled, in many cases because people have turned down these jobs. The American public has lost confidence in you, according to recent polls. Morale at the Justice Department remains low.

The integrity of the Office of the Attorney General as an institution is obviously more important, I am sure you would agree, than

the person sitting in it. In other words, Mr. Attorney General, this cannot be just all about you.

And so would you please explain to us why the administration of justice and the American people would not be better served by somebody sitting in the office who does not have all of the problems that you possess with respect to believability, credibility, confidence, trust? What keeps you in the job, Mr. Attorney General?

Attorney General GONZALES. That's a very good question, Senator. Ultimately I have to decide whether or not is it better for me to leave or to stay and try to fix the problems. I've decided to stay and fix the problems, and that's what I have been doing.

You talked about vacancies. We're at a time in the administration where there are going to be vacancies in agencies. It's just natural. Obviously, there have been changes in personnel at the leadership of the Department. In many ways, that is a good thing. We've just identified a new interim Deputy Attorney General. He's a career prosecutor. I think he will do a great job. I've got a Chief of Staff who is also a United States Attorney, and so we're bringing in good, experienced people into these positions because we want to address the question about lack of leadership. I think we have some strong leadership in the Department of Justice. We have changed policies. We have been made aware of some issues relating to some of our policies with respect to hiring of immigration judges, with respect to the Honors Program, with respect to hiring Assistant United States Attorneys, with respect to hiring in the Civil Rights Division. And so we have implemented policies to address each and every one of these.

We've also worked very hard to improve communication, not with just the U.S. Attorney community but also with respect to every employee at the Department of Justice. I think the way you measure morale is you measure output. And I think if you look at the output at the Department these past 6 months, it's been outstanding.

Sure, we've had to deal with these issues. They're my responsibility. I've accepted responsibility for it. But the wonderful career people at the Department continue doing their job day in and day out, and justice is being served in this country.

Senator KOHL. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

Well, I want to make it clear that having gone there and one of the earliest ones to go there, I do not agree with closing Guantanamo. The big issue is, even if we did, what do we do with them? What is the alternative?

I have heard a lot of the Senators around here bemoaning the fact they sure don't want these terrorists in their State. The fact of the matter is it is a separate place where they can be contained, and appropriately so.

So I am opposed to closing Guantanamo. I think it is ridiculous. I think the arguments have been ridiculous. And I hope you will consider changing your mind on that because I just think it is wrong.

But now, you may not have had—having said that, I just thought I would make that point.

You may not have had a full opportunity to explain what happened the day of your hospital visit to Attorney General Ashcroft, so if you would, please finish your description of those events so we can all understand just what happened there.

Attorney General GONZALES. The meeting that I was referring to occurred on the afternoon of March 10th, just hours before Andy Card and I went to the hospital. And the purpose of that meeting was to advise the Gang of Eight, the leadership of the Congress, that Mr. Comey had informed us that he would not approve the continuation of a very important intelligence activity despite the fact the Department had repeatedly approved those activities over a period of over 2 years.

We informed the leadership that Mr. Comey felt the President did not have the authority to authorize these activities, and we were there asking for help, to ask for emergency legislation—

Senator HATCH. Was Mr. Comey there during those 2 years?

Attorney General GONZALES. He was not there during the entire time, no, sir.

Senator HATCH. How much of that time?

Attorney General GONZALES. I can't recall now, Senator, when Jim Comey became the Deputy Attorney General.

The consensus in the room from the congressional leadership is that we should continue the activities, at least for now, despite the objections of Mr. Comey. There was also consensus that it would be very, very difficult to obtain legislation without compromising this program, but that we should look for a way ahead.

It is for this reason that, within a matter of hours, Andy Card and I went to the hospital. We felt it important that the Attorney General knew about the views and the recommendations of the congressional leadership, that as a former Member of Congress and as someone who had authorized these activities for over 2 years, that it might be important for him to hear this information. That was the reason that Mr. Card and I went to the hospital. Obviously, we were concerned about the condition of General Ashcroft. We obviously knew that he had been ill and had had surgery, and we never had any intent to ask anything of him if we did not feel that he was competent.

When we got there, I will just say that Mr. Ashcroft did most of the talking. We were there maybe 5 minutes, 5 to 6 minutes. Mr. Ashcroft talked about the legal issue in a lucid form, as I have heard him talk about legal issues in the White House. But at the end of his description of the legal issues, he said, "I'm not making this decision. The Deputy Attorney General is."

And so Andy Card and I thanked him. We told him that we would continue working with the Deputy Attorney General, and we left.

And so I just wanted to put in context for this Committee and the American people why Mr. Card and I went. It's because we had an emergency meeting in the White House Situation Room where the congressional leadership had told us continue going forward with this very important intelligence activity.

I might also add—

Senator HATCH. That was the Gang of Eight, you are saying?

Attorney General GONZALES. Pardon me?

Senator HATCH. That was the Gang of Eight.

Attorney General GONZALES. This was the Gang of Eight.

Senator HATCH. The two leaders in the House, the two leaders in the Senate, the two leaders of the Intelligence Committee in the House, and the two leaders of the Intelligence Committee in the Senate, right?

Attorney General GONZALES. That is correct. I might also add—

Senator HATCH. Democrats and Republicans?

Attorney General GONZALES. Democrats and Republicans. I might also add that the urgency was that the authorities in question were set to expire the very next day.

Senator HATCH. Right.

Attorney General GONZALES. And the President believed this was a very important activity, as did the congressional leadership. In fact, the very next morning, we had the Madrid bombings, and so that puts into perspective the context of the environment that we were operating under. And these are the reasons why we went to the hospital on the evening of March 10th.

Senator HATCH. Well, thank you, sir. The administration has made proposals to modernize FISA, of course, and is working with the Judiciary Committee to ensure that appropriate staff members have the necessary information about the terrorist surveillance plans of the administration. However, some members of the Committee have stated that they will not consider any legislation in this area until they receive additional information about the TSP.

Now, I do find this logic somewhat questionable since this very Committee not only considered but passed three different bills dealing with FISA modernization during the last Congress.

Now, how do you view the decision not to discuss FISA modernization? Of all issues, isn't this the one in which increased attention and expediency is paramount?

Attorney General GONZALES. This is the most important legislative agenda item for the Department of Justice—FISA modernization. The threats exist against the United States, and we believe that FISA, while it has been a valuable tool, also has made it more difficult to engage in electronic surveillance of foreign targets overseas. We don't believe that was ever the intent of FISA. It's a policy question. The Congress has to decide that they want the Department and the Agency, NSA, the FBI, the Department of Justice, utilizing our resources, our agents, our analysts, our lawyers, in order to make a probable cause determination and then present it to a judge in connection with a foreign terrorist who's located outside the United States. Is that what the Congress wants us to do? Because if they do, we will continue to do it.

But I think it's legitimate to ask: Is that the right policy for the United States today?

Senator HATCH. You have been accused of wanting to install interim U.S. Attorneys to serve indefinitely without Senate confirmation. I do not think there has ever been any evidence for that, but then some accusations would be more useful than they are true.

Since you were first asked about this more than a year and a half ago, you said that it is your intention to have a Senate-con-

firmed appointee to these positions. Now, I raise this point to point out that we continue to see nominations to the U.S. Attorney positions of men and women who have been serving in an interim capacity. This is exactly what you said the administration intended to do, if I recall it correctly. We have seen this recently in Nebraska, Puerto Rico, and elsewhere.

Now, is that your continued commitment to have Senate— confirmed U.S. Attorneys in each jurisdiction?

Attorney General GONZALES. It is. I believe that a U.S. Attorney, quite frankly, is stronger in dealing with other law enforcement counterparts at the Federal, State, and local level. And it's also, I think, vitally important with respect to the Deputy Attorney General. We have, I think, a very strong interim—we will have soon a very strong interim Deputy Attorney General, but my intention and hope is that we have someone who is considered and confirmed by the Senate soon.

Senator HATCH. Well, thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Are you saying that the interim Attorney General who served as an interim U.S. Attorney in two different places, whose name was never sent up for confirmation that, that his name will now finally be sent up here for confirmation for something?

Attorney General GONZALES. His name—well, I'm not saying that his name—his name—will be sent up for confirmation. After the White House has completed its very thorough background investigation and interviews of candidates, the intention is to send up someone for consideration by the Senate to confirm as the Deputy Attorney General.

Chairman LEAHY. He is interim, having been interim U.S. Attorney in two different jurisdictions.

Attorney General GONZALES. He is the interim—he will be the interim as soon as Mr. McNulty leaves.

Chairman LEAHY. I thought I would ask. And you said that—you spoke of how important it is to you to have this Committee look at updates for FISA. Have you ever taken even 30 seconds or a minute to call me and tell me that? I mean, I just heard this from you for the first time here. You know, I have a listed telephone number.

Attorney General GONZALES. I am sorry. I lost my train of thinking.

Chairman LEAHY. You just said to Senator Hatch that it is extraordinarily important to you that this Committee consider updates on FISA laws. Have you ever said that to me? Have you ever picked up the phone and called me or told me that?

Attorney General GONZALES. Senator, I would be surprised if that hasn't been communicated in a letter, and certainly it has been communicated to your staff in terms of the importance of FISA modernization.

Chairman LEAHY. I have a listed telephone number. Feel free to call anytime, if it is that important to you.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Attorney General, I have sat here and listened particularly to the

opening comments of the Chairman and the Ranking Member, and in my time in the Senate, I have never heard comments quite like that coming from both sides of the aisle. And then I listened to your response, which was nonresponsive, which went into something about FISA unrelated to anything that had been said.

I do not think you understand what is happening in the Department of Justice—the diminution of credibility, integrity. It is almost as if the walls were actually crumbling on this huge Department. And I listened to you, and nothing gets answered directly. Everything is obfuscated.

You cannot tell me that you went up to see Mr. Comey for any other reason other than to reverse his decision about the Terrorist Surveillance Program. That is clearly the only reason you would go to see the Attorney General in intensive care.

Attorney General GONZALES. May I respond to that?

Senator FEINSTEIN. Yes, you may.

Attorney General GONZALES. Okay. You're right. This is an extraordinary event. But we were confronting extraordinary circumstances where we had been advised that something the Department had authorized for 2 years, they would not longer continue to approve. We had just been advised by the congressional leadership go forward anyway, and we felt it important that the Attorney General, General Ashcroft, was aware of those facts.

Clearly, if we had been confident and understood the facts and was inclined to do so, yes, we would have asked him to reverse the DAG's position. But—

Senator FEINSTEIN. Well, then, why would he have said Mr. Comey is in charge if you had not asked him?

Attorney General GONZALES. I don't understand the question.

Senator FEINSTEIN. Well, clearly, you asked him the question because James Comey testified to us that—

Attorney General GONZALES. My recollection, Senator, is—and, of course, this happened some time ago and people's recollections are going to differ. My recollection is that Mr. Ashcroft did most of the talking. At the end, my recollection is he said, "I have been told it would be improvident for me to sign, but that doesn't matter because I'm no longer the Attorney General."

Senator FEINSTEIN. Okay. All right.

Attorney General GONZALES. And once he said that— Secretary Card and I did not press him. We said, "Thank you," and we left. But, again, we went there because we thought it important for him to know where the congressional leadership was on this. We didn't know whether or not he knew of Mr. Comey's position, and if he did know, whether or not he agreed with it.

Senator FEINSTEIN. All right. I think we have taken care of this.

What I would like to establish once and for all is who put the names on the list to fire what are now nine U.S. Attorneys. Since you were here last, we have had a number of your top staff appear before us.

Kyle Sampson, your former Chief of Staff, said, "I was the aggregator of input that came in from different sources."

Paul McNulty said, "It was presented to me" as here is the idea and here are the names of individuals that are being identified.

Jim Comey said, "I was not aware there was any kind of process going on."

Bill Mercer said, "I didn't understand there was a list. I didn't keep a list."

Mike Battle: "A decision was made to compile a list. It was made by someone. I had no input. Nobody asked for my input."

Will Moschella: "Since I was not part of that process, I don't have firsthand knowledge."

Mike Elston: "Kyle, asked me to give him my thoughts, give him a draft list. I said, 'Sure.' I didn't actually do it. I was very busy."

Who approved those names?

Attorney General GONZALES. I ultimately approved the list of recommendations that were submitted to me. I accept responsibility—

Senator FEINSTEIN. And how many names did you approve for firing?

Attorney General GONZALES. I think on that list that was presented—

Senator FEINSTEIN. No, no. Total. How many names have you approved for firing?

Attorney General GONZALES. You mean total? For cause? Not for cause? I'd have to get back to you on that.

Senator FEINSTEIN. There were seven on December 7th.

Attorney General GONZALES. Seven on December 7th.

Senator FEINSTEIN. We are now up to nine that we know about. How many—this is important. How many U.S. Attorneys did you approve to be summarily fired?

Attorney General GONZALES. Senator, there may have been other—I would be happy to get back to you with that kind of information about who has left. But I don't know the answer to your question. But I can certainly find out.

Senator FEINSTEIN. You don't know after all we have been through, hearing, after hearing, after hearing?

Attorney General GONZALES. Well, in connection with this review process that Mr. Sampson was coordinating, what was presented to me was a list of seven individuals on December 7th. And so those are the seven that I accepted the recommendation to ask for resignation.

Senator FEINSTEIN. Seven, that is right, but those were the ones that were called on December the 7th—

Attorney General GONZALES. Yes.

Senator FEINSTEIN.—and told to leave by January 15th.

Attorney General GONZALES. Yes.

Senator FEINSTEIN. There were others also asked to resign.

Attorney General GONZALES. Yes.

Senator FEINSTEIN. I am asking what the total number was.

Attorney General GONZALES. Well, certainly Mr. Cummins was asked to leave. Mr. Graves was asked to leave. I'm not aware, sitting here today, of any other U.S. Attorney who was asked to leave, except there were some instances where people were asked to leave, quite frankly, because there was legitimate cause.

Senator FEINSTEIN. So you are saying these were asked to leave because the cause was not legitimate?

Attorney General GONZALES. I'm not—no. What I'm saying is wrongdoing, misconduct. There may have been some— in fact, I'm sure there were others—

Senator FEINSTEIN. What kind of misconduct?

Attorney General GONZALES. Well, and I am not suggesting any of this conduct happened but, for example, an inappropriate relationship, taking action where you have a direct conflict of interest to help out a buddy, making a— you know, those kinds—something like that I would say would constitute misconduct. And there—

Senator FEINSTEIN. Were those specific things involved in any U.S. Attorney that was terminated?

Attorney General GONZALES. No. With respect to the seven and with respect to Mr. Cummins and with respect to Mr. Graves, I am not aware that—certainly there was in my mind a problem or basis to accept the recommendation that they be asked to leave.

Senator FEINSTEIN. All right. Let me go to something else. You, of course, recognize these books, "The Federal Prosecution of Election Offenses." In prior hearings we had the 1995 edition. Since May of this year, there is now a new edition. I would like to read to you what has been dropped from the earlier edition.

The first thing that has been removed is this: "The Justice Department generally does not favor prosecution of isolated fraudulent voting transactions. This is based in part on constitutional issues that arise when Federal jurisdiction is asserted in matters having only a minimal impact on the integrity of the voting process."

This was removed in this new edition.

The second thing: "The Justice Department must refrain from any conduct which has the possibility of affecting the election itself." This is weakened on page 92.

This language is removed: "Federal prosecutors and investigators should be extremely careful to not conduct overt investigations during the pre-election period or while the election is underway." Removed.

Then a sentence that is underlined in the 1995 edition, which states, "Thus, most, if not all, investigations of an alleged election crime must await the end of the election to which the allegation relates," was removed in this new edition.

Weakened was this language: "It should also be kept in mind that any investigation undertaken during the final stages of a political contest may cause the investigation itself to become a campaign issue."

Why was it necessary to remove this language in this new edition of the "Federal Prosecution of Election Offenses" rules?

Attorney General GONZALES. Senator, I don't—sitting here today, I don't know the answer to that question. I would like to find out because I am certainly committed to ensuring that we're smart in the way that we do investigations and prosecutions and we do so in a way that doesn't intimidate voters, that doesn't chill potential voters from coming out and voting on election day. So I would like the opportunity to look into this and respond back to you.

Senator FEINSTEIN. I would appreciate it. It becomes more relevant because two and possibly three of the fired U.S. Attorneys were fired because they did not bring those small cases that might

affect an election. And, therefore, when one looks at this book now, sees the new book coming out in May 2007 that deletes the very things that these U.S. Attorneys were told to follow, something is rotten in Denmark.

Attorney General GONZALES. Thank you for the opportunity for me to look into that.

Senator FEINSTEIN. I appreciate that. Thank you very much. My time is up.

Chairman LEAHY. Thank you. Thank you very much, Senator Feinstein.

Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Mr. Attorney General, as I understand it—and I am going to ask you to correct me if I am wrong, to your knowledge—the administration position on Guantanamo Bay is that while it would be nice if we did not have the need for it and we would like to be able to close it, we cannot because the terrorists who represent a threat to the United States need to be held somewhere, and there are no better alternatives. Almost nobody wants them in the United States. You cannot just let them go. Sending them to foreign countries is problematic, among other reasons for the reasons you discussed. Is that your understanding? And if not, what is your understanding?

Attorney General GONZALES. Yes.

Senator KYL. Do you have any different reasons for desiring to close Gitmo, for example, because—to your knowledge or suspicion, is there anything going on down there that might be a violation of either U.S. law or applicable treaties or conventions?

Attorney General GONZALES. Quite the contrary. I think the people who've gone down there, from this body, from the House, other countries, have come away favorably impressed with what's going on down there.

Senator KYL. I just want to associate myself with the remarks of Senator Hatch. It would be nice if we did not have to have any prisons, for that matter, and it would certainly be good if we did not have to have a place for these threats to America. But they do have to be held somewhere, and I know of no better alternative than where they are being held right now.

Let me ask you this question about a matter that you know I am very interested in, and as a matter of fact, in a related, potentially related matter, there is a scandal now brewing with regard to the National Basketball Association.

Sports entities—in particular, the NFL, Major League Baseball, basketball, the NCAA, amateur athletics—have for a long time been concerned about Internet betting, which is illegal under most State laws, and we have our Federal laws as well. You are aware that on October 13th the President signed into law the Unlawful Internet Gambling Enforcement Act to augment enforcement efforts by targeting offshore gambling operations that are not readily subject to U.S. prosecution. There are additional existing laws—the Federal Wire Act and money-laundering laws—that can be and have been used to go after these Internet gambling operators.

I realize that you cannot comment on any existing cases, but I would like for you to just express to the Committee generally what

your views are with respect to the Department's contentions with respect to going after these illegal Internet gambling operations.

Attorney General GONZALES. Thank you, Senator. I appreciate your leadership on this issue. We do believe it is a serious issue because, you talk about Internet gambling, it is highly addictive. Quite frankly, I think it affects our youth. I think it can be tied to money laundering and fraud. And we think it is tied to organized crime.

There are existing laws on the books, and we intend to and do enforce those laws. There are challenges because of the existing laws, challenges because much of the time the evidence is offshore. We may have difficulty getting the evidence. Also because it involves another country, there are sometimes serious issues of extradition.

So we appreciate the additional tools of the Unlawful Internet Gambling Act, which bans certain financial payments to support Internet gambling, and as you know, Treasury and the Federal Reserve have primary responsibility for the issuance of these regulations after consulting with the Department of Justice. We have provided input, and so my understanding is that those regs are moving forward.

Senator KYL. The proposed regs have been made public. My question really was a broader one. You have engaged in prosecutions under other laws as well, and I was simply giving you an opportunity to express your intentions to continue to enforce all of these laws to the extent that they need to be enforced.

Attorney General GONZALES. We certainly intend to do that. You have my commitment, Senator.

Senator KYL. Incidentally, I may have not been clear in my reference to the NBA. I am not suggesting that there is evidence of illegal Internet gambling with respect to that, but I simply wanted to point out that these sports depend on the public's view that they are unadulterated, that they are clean, that they are not being affected by illegal forces. And that is why they are so supportive of this legislation to make sure that illegal Internet gambling does not in any way intrude into those sports. And I think Americans have a right to have that assurance.

Mr. Attorney General, the FBI is facing a mounting caseload of applications from foreign nationals seeking to enter the United States or to adjust status. The FBI, of course, does background checks, but there is a huge backlog, as you know.

What technologies or resources can Congress secure for the FBI to ensure that it is able to timely process applications without compromising the safety and security of the American people?

Attorney General GONZALES. This is a problem that I have discussed with the Director. You are talking about background checks, individuals from other countries. It does take us a long time in some cases because of the fact it requires us to get information and records from other countries. I know that the Director is focused on trying to get additional resources, additional individuals, maybe contract work out to help in this endeavor. And so he is also looking at new computer system technology, taking advantage of technology—

Senator KYL. Let me just interrupt here because of the time. There is a huge backlog. It should not exist. Do we—Congress—need to provide additional resources?

Attorney General GONZALES. I don't know whether or not additional resources are required from the Congress. I do know that additional resources within the Bureau have to be focused on this issue, and it may be—you know, the Director may come to me and say, "Well, if we do that, we are not going to be able to protect America from terrorism the way we ought to be in other areas."

And so I don't know the answer to that, but certainly more resources are necessary. We may already have the resources within the Bureau. I suspect that the Director will say no.

Senator KYL. We need to know if there is something else we can do because you cannot compromise security and we cannot tolerate the long backlogs that currently exist. So something needs to give here, and if it is that we need more resources, Congress needs to be advised.

Let me quickly, while I have just a second, ask one final question. U.S. Customs and Border Protection at DHS reports that 16 percent of foreign nationals apprehended illegally crossing the Southern border have criminal histories. That is about 140,000 individuals in the year 2005. And if that is not alarming enough, DOJ and the GAO indicate that criminal aliens in the U.S. are rearrested on an average of six to eight times per offender, which puts a huge strain on both Federal, State, and local law enforcement officers, prosecutors, courts, and our jails.

Is the Department of Justice undertaking any initiatives with DHS to proactively identify and prosecute and remove criminal aliens? And here again, is there any authority or resource that Congress needs to provide to DOJ to assist in the prosecution of these criminal aliens?

Attorney General GONZALES. I think, quite candidly, Senator, if you were to talk to my border U.S. Attorneys, they would say, "We need more resources," and so we are always looking at ways to try to find those resources within the existing budget. Obviously, the President has to consider a number of priorities with respect to the budget that he submits to the Congress, and the Congress, of course, ultimately makes the decisions as to where those priorities should come out.

But we are having to be smart. We are trying to be more efficient. But it does present—or it has presented some challenges for us.

Senator KYL. Mr. Chairman, if I can just do one follow-up question?

Chairman LEAHY. Go ahead.

Senator KYL. In effect, are you saying you understand the President's budget priorities and needs all across the Government, but if more resources could be made available to you, you could certainly take advantage of them, you could certainly use them?

Attorney General GONZALES. We certainly would put them to good use.

Chairman LEAHY. Of course, you are also aware that the President said if we put any money in there beyond what he has asked for, he will veto the bill.

Senator Cardin.

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

Attorney General Gonzales, I want to return to the U.S. Attorney issue because I think there is a great deal of concern and a lot of questions that have not been answered, and I want to give you a chance to do that.

You have offered conflicting testimonies as to who is responsible for the firing of the U.S. Attorneys. We still do not know. And Senator Feinstein's questions really were not answered. We do not know who was responsible for a particular name ending up being fired. So let me just go over the U.S. Attorneys who were fired, and the concern that I think Americans have that your commitment to make sure the Department of Justice is not politicized is exactly what happened with the U.S. Attorneys that were fired.

Mr. Iglesias was involved in New Mexico as U.S. Attorney in investigating certain Democrats. The prominent Republicans were very unhappy with the timing of that investigation, which I think has now become public. So there was a concern that the U.S. Attorney was not doing what the local political establishment, Republican establishment, wanted.

In Nevada, there was an investigation of the Republican Governor by the U.S. Attorney, which certainly did not make the local political establishment happy.

In Arizona, there was an investigation of two Republican Members of Congress, which was not happy with the local Republican establishment in Arizona.

In Arkansas, there was an investigation by Mr. Cummins in regards to a Republican Governor that was creating a lot of controversy.

In California, with Ms. Lam, there was the indictment and conviction of Duke Cunningham, but then the expansion of that investigation, which had Republicans concerned.

In Washington, the U.S. Attorney declined to intervene in a disputed gubernatorial election, which angered the local Republican establishment.

And then, of course, Mr. Graves in Missouri, we have already talked about the voter fraud investigations and the fact that the local political establishment was unhappy with that.

Here we have an unprecedented removal of U.S. Attorneys without a change in party in the White House, and we look at those who were removed and find in almost all cases they were involved in highly visible political issues that were unpopular to the Republican establishment. What is one to think? And we do not have the answers from the White House, we do not have the answers from you, and we are having a very difficult time getting the information without the assertion of executive privilege.

So where do we go in our—what comfort can you give me that, in fact, these U.S. Attorneys were fired for legitimate reasons and not because of political considerations, which all of us agree would be outrageous and wrong, if not illegal?

Attorney General GONZALES. Well, Senator, I have already said repeatedly that I did not accept these recommendations with the understanding that this was to punish or interfere with an investigation for purely partisan reasons. I accept responsibility for this.

Senator Feinstein asked me who put the names on the list. Quite frankly, I am assuming this Committee has talked to everyone involved in putting those names on the list and has asked that question.

Senator CARDIN. We have not talked to the people in the White House.

Attorney General GONZALES. I did not put the names on the list. I accepted the recommendations. There were some names on the list, the recommendations made to me, that did not surprise me based upon my—what I had heard of performance during my tenure as Attorney General. But no one as far as I know placed anyone on the list. I certainly did not accept the recommendation in order to punish someone because they—

Senator CARDIN. But you do not know who put the names on the list. At least I have not quite figured out who put the names on the list.

Attorney General GONZALES. That is correct.

Senator CARDIN. So how do you know someone didn't put the names on the list because of partisan political considerations.

Attorney General GONZALES. Based on what I know, Senator, that—that is what I know. You have had the opportunity, I think, to talk to everyone involved and ask questions involved, more so than I. The Office of Inspector General and OPR, they're doing an investigation as well to try to find out exactly how these names got on the list.

Senator CARDIN. Let me move on to a second issue that troubles me from your testimony today, and that is, you have talked about your visit to the hospital, the preliminary meetings with the leadership in Congress. Those meetings are not public meetings, are they?

Attorney General GONZALES. Well, which meetings? With Congress?

Senator CARDIN. With the Gang of Eight.

Attorney General GONZALES. Well, I'm not sure—I'm not sure that this meeting has been talked about, although I'm told this meeting has been—information about the existence of this meeting has been transmitted to the Congress, I think, in a communication from the administration.

Senator CARDIN. When you briefed the leadership of Congress and the leadership on the Intelligence Committee, are those briefings done in open session? When you seek their advice, are they in open session?

Attorney General GONZALES. No.

Senator CARDIN. And are those proceedings kept confidential?

Attorney General GONZALES. In most cases, yes.

Senator CARDIN. And the advice that the Congress gives you at those meetings is not released or made public?

Attorney General GONZALES. In cases that is true.

Senator CARDIN. And I would just suggest to you, to the extent that there is importance of confidence in working with the congressional leadership, the President's using the executive privilege to not make information available to Congress, it seems to me that you are being very selective in what information you are making available publicly.

Attorney General GONZALES. Senator, I believe it's important, when people question and wonder what in the world were Andy Card and I doing going to the hospital, that it be placed in the appropriate context.

Senator CARDIN. You are exactly right, and we want the appropriate context of the firing of the U.S. Attorneys. We are entitled—we have a responsibility to get that information. And the White House, when Sara Taylor testified, she was very clear about being able to give information that was self-serving to the White House. But when we are trying to get independent information, we cannot get it. Do you understand our frustration?

Attorney General GONZALES. I do understand your frustration.

Senator CARDIN. I have only a few seconds left, and I want to make sure I cover this last point, which is the hiring in the U.S. Attorney's Office. I very much appreciate your statement in your prepared testimony where you say, "There is no place for political considerations in the hiring of our career employees or in the administration of justice." You further assert that you plan to "remain in office to fix the problem." I am pleased that you acknowledge a problem.

We had a hearing in the Judiciary Committee with the Civil Rights Division in which the way career attorneys are now hired has been changed. It used to be that there were career attorneys that reviewed those applications and made recommendations for the hiring of U.S. Attorneys for the Civil Rights Division. That was taken over by political appointees. I hope in your efforts to fix the problem that you will go back to a nonpartisan environment for selecting the career attorneys in the Department of Justice. We have had testimony here from Monica Goodling and others about White House interference or political interference that crosses the line. And I hope that as part of your efforts to fix the problem you will remove the political appointees from making certain recommendations or standards on bringing in career attorneys or firing or removing or repositioning career attorneys.

Attorney General GONZALES. Thank you, Senator. I think we have taken those kinds of steps.

Senator CARDIN. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Grassley was actually the first one here, but he is, like all of us, juggling more than one Committee assignment. I will recognize him now.

Senator GRASSLEY. Thank you. I was sharing my time with the Finance Committee.

Mr. Chairman, I have a list of outstanding requests for documents and information from the FBI, and I am going to ask that this be put in the record, and I am going to refer to it.

Chairman LEAHY. Without objection, all the material will be part of the record. Also without objection, opening statements by various Senators who have asked be put in the record will be placed in the record as though read.

Senator GRASSLEY. Thank you.

Mr. Attorney General, the requests for documents and information relate to the oversight involving Special Agent Jane Turner, Special Agent Cecelia Woods, the Amerithrax investigation, and e-

mails relating to exigent letters that were detailed in the National Security Letters Report. I continue to wait for these responses, some of them months overdue, and as the FBI is a component of the Department of Justice and I am doing it here at this hearing, I ask if you would personally ensure the prompt delivery of all information requested.

Attorney General GONZALES. I will personally assure you the prompt delivery of the appropriate information requested.

Senator GRASSLEY. I want to refer to the False Claims Act and its use in Iraq contracting. I am referring to the Boston Globe, June 20, 2007, article entitled "Justice Department Opts Out of Whistleblower Suits; Cases Allege Fraud in Iraq Contract." The article noted that the Department declined to intervene in ten False Claims Act whistleblower cases, raising allegations of fraud, waste, and abuse in contracts during reconstruction in Iraq. Further, the article states that the Department has only reached two civil settlements with contractors in Iraq totaling $6.1 million.

Congress has appropriated hundreds of billions of dollars to fund our troops and to support contractors as well as reconstruction projects. So I find it hard to believe that only $6.1 million has been lost to fraud and abuse by Government contractors. For instance, in Government programs such as Medicaid, we know that fraud in the program is around 5 percent, maybe higher. It is hard to imagine that fraud in Iraq would be less, but I will leave the numbers to experts.

In addition, on April 19, 2006, a Wall Street Journal article quoted critics of the Department as saying, "The current administration's use of judicial seal of False Claims Act cases is unprecedented. Its critics argue that the Department is using the judicial seal as a means to mask the true extent of possible fraud in Iraq."

So, General Gonzales, how many—I want to ask—well, let me ask a couple questions at a time. I have got six questions in this series. How many False Claims Act cases alleging fraud in Iraq has the Department joined since 2003?

Attorney General GONZALES. I think the answer to that—I think there are 26, but I would like the opportunity to confirm that, if I can. I think that is in the neighborhood.

Senator GRASSLEY. Okay. Is the Boston Globe article accurate in stating that the Department has declined intervention in ten false claims cases alleging contract fraud in Iraq? And if so, why?

Attorney General GONZALES. I don't know if that number is correct, but I will tell you, of course, the fact that we decline doesn't mean that we don't follow the case. We still remain a real party in interest, and so we closely monitor these cases. And we may decide to intervene at a later point in time. We may decide to file an amicus to protect the interests of the United States. And so the fact that we have declined doesn't mean that we're not going to get involved in any way going forward.

Senator GRASSLEY. Well, for the public and Chuck Grassley, it seems to me that declination of intervention does signal an unwillingness to pursue Iraq contracting fraud cases.

Attorney General GONZALES. No. What it means is that we have to look at the cases and decide really is there now at this time a judgment that we can prosecute these cases. We have been very,

very successful in those cases where we decide to join because we evaluate the cases carefully and we think, Okay, there's something there, we can win this case.

In those cases where we don't join, the relater doesn't fare nearly as well because they are taking on cases that are very, very difficult, and they can't prove them.

And so we are trying to be smart in utilizing the resources that we have and prosecuting those cases where we think, you know, the evidence will support the charge.

Senator GRASSLEY. Are there currently any FCA cases under seal relating to Iraq fraud contracting?

Attorney General GONZALES. I believe the answer to that is yes, because, again, these are difficult cases and it takes us a period of time—sometimes people would argue too long—to decide whether or not we are going to intervene and join the case.

Senator GRASSLEY. Let me ask you last on this point: How do you respond to the criticism outlined in the Wall Street Journal article? Is the Department trying to escape accountability by using the seal as a shield? That is what was stated.

Attorney General GONZALES. No. Far from it. In fact, we want to expose fraud and mismanagement and waste, quite frankly, I think, and we have a special obligation at the Department, if people are going to contract with the United States, they ought to be held to the highest standard. And so, again, we use it as a way to protect the interests of the United States in litigation.

Senator GRASSLEY. I want to go to the *United State DRC, Inc.* v. *Custer Battles*. February 17, 2005, I wrote you regarding this case urging that the Department comply with a request of a district judge to file a brief on the issue of whether the Coalition Provisional Authority—I am going to refer to that as "CPA"—was a Government entity under the False Claims Act. On April 1, 2005, the Department filed a brief stating the Government's position that knowingly false claims presented to the CPA by Custer Battles, if proven, would violate the False Claims Act. The Department also stated that, notwithstanding the brief, they declined to intervene with the whistleblowers.

Ultimately, the jury found Custer Battles violated the FCA and should return $10 million to the U.S. Government. However, the judge overturned the verdict and dismissed the case, finding that the plaintiffs failed to prove the false claims were actually submitted to the Government. The Department has filed a brief supporting the whistleblowers' position on appeal to the Fourth Circuit.

Why did the Department decline to intervene in district court yet continue to support the appellate litigation? And, last, is the Department concerned that failing to intervene at an earlier time may lead to decisions that are detrimental to the False Claims Act?

Attorney General GONZALES. It is a pending case, Senator, so I am limited about what I can say. But going back to a response to an earlier question, the fact that we don't intervene at the initial stage doesn't mean that we don't follow the case. And we do have the opportunity, like we see in this case, of filing an amicus in the Fourth Circuit in order to protect the interests of the United States. And so, clearly, when we make a decision not to intervene,

that doesn't mean that the interests of the United States are going to be jeopardized downstream. We do have the opportunity to file something to ensure that the interests of the United States are protected. As to the individual decision as to why we didn't get involved in the case in the first place, I don't have that answer to you, but I would be happy to go back and look at it. If there's something we can provide to you, I'd be happy to do so.

Senator GRASSLEY. I would like to have you provide that in writing.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

The Attorney General has asked if we might take a brief break, and I should have asked that before. But, yes, we will stand in recess briefly.

Attorney General GONZALES. Thank you, Mr. Chairman.

[Audience comments.]

Chairman LEAHY. You know, we are going to have quiet in this Committee room. We are also going to—we are also going to have people stop blocking others who are here, and in one instance, I have been told of a person who was here was harassed because somebody else wanted her seat. There will be none of that, or I will have the police remove those doing it. I just want to make it clear.

[Recess from 11:09 a.m. to 11:20 a.m.]

Chairman LEAHY. I have been advised that the vote originally scheduled on the Senate floor will be somewhat later, probably in about an hour. There will be a couple votes. I am hoping we can finish the first round before then.

Senator Whitehouse, you are now recognized.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Mr. Gonzales, just before our little break, you indicated in describing your reason for visiting the stricken Attorney General in his hospital room was to alert him to the change in the Department of Justice view of the program at issue. And you testified that Attorney General Ashcroft—and these are the words that I wrote down— "authorized these activities for over 2 years."

Is it your testimony under oath that Attorney General Ashcroft was read into and authorized the program at issue for 2 years prior to your visit to him in that hospital?

Attorney General GONZALES. I want to be very careful here because it is fairly complicated. What I can say is I am referring to intelligence activities that existed for a period of over 2 years, and what we were asking the Department of Justice to do was—which they had approved, and what we—

Senator WHITEHOUSE. They had approved, I guess is the point that I am getting at.

Attorney General GONZALES. General Ashcroft, yes.

Senator WHITEHOUSE. You said that Attorney General Ashcroft had authorized this program for over 2 years prior to that day.

Attorney General GONZALES. General Ashcroft had authorized these very important intelligence activities for a period of 2 years. We had gone to the Deputy Attorney General and asked him to reauthorize these same activities. But there are facts here—and I want to be fair to everyone involved. They're complicated, and we

have had discussions in the Intel Committees about this issue, trying to be as forthcoming as we can.

Let me just say I believe everyone acted in good faith here. All the lawyers worked as hard as they could to try to find a way forward, the right solution. But, yes, I mean, the view was that these activities had been authorized. We informed—

Senator WHITEHOUSE. By Attorney General Ashcroft himself.

Attorney General GONZALES. By Attorney General Ashcroft. But there are additional facts here that—I want to be fair and it's complicated. But—

Senator WHITEHOUSE. I am just trying to nail that one fact down. I'm not trying to go into—

Attorney General GONZALES. Well, I am not sure I can give you complete comfort—I'm not sure I want to give you complete comfort on that point out of fairness to others involved in what happened here. I want to be very fair to them. But what we were talking about—

Senator WHITEHOUSE. It is a different question—

Chairman LEAHY. Well, why not just be fair to the truth. Just be fair to the truth and answer the question.

[Applause.]

Senator WHITEHOUSE. Was Attorney General Ashcroft read into and did he approve the program at issue from its inception?

Attorney General GONZALES. General Ashcroft was read into these activities and did approve these activities—

Senator WHITEHOUSE. Beginning when?

Attorney General GONZALES. From the very beginning. I believe from the very beginning.

Senator WHITEHOUSE. All right.

Attorney General GONZALES. But—well—

Senator WHITEHOUSE. That is all right.

Attorney General GONZALES. Again, it is very complicated.

Senator WHITEHOUSE. My question has been answered.

Attorney General GONZALES. And I want to be fair to General Ashcroft and others involved in this, and it's hard—it's hard to describe this in this open setting. We've tried to be—we've tried to—we have discussed it in the Intel Committees in terms of exactly what happened here. But I can't—I can't get into some fine details, quite frankly, because I want to be fair to General Ashcroft.

Senator WHITEHOUSE. And I think it is also important that people know whether or not a program was run with or without the approval of the Department of Justice, but without the knowledge and approval of the Attorney General of the United States, if that was ever the case.

Attorney General GONZALES. We believe we had the approval of the Attorney General of the United States for a period of 2 years. That is—

Senator WHITEHOUSE. For a period of 2 years? Also from the inception of the program?

Attorney General GONZALES. From the inception, we believed that we had the approval of the Attorney General of the United States for these activities, these particular activities.

Senator WHITEHOUSE. Would that be reflected in any document?

Attorney General GONZALES. Yes, it would.

Senator WHITEHOUSE. We will pursue the document later. When you went into the Attorney General's room at the hospital that night, what document did you have in your hand?

Attorney General GONZALES. I had in my possession a document to reauthorize the program.

Senator WHITEHOUSE. Where is it now?

Attorney General GONZALES. I'm assuming the document is at the White House. It was a White House document.

Senator WHITEHOUSE. And it would be covered by Presidential Records laws?

Attorney General GONZALES. It is a White House document.

Senator WHITEHOUSE. Director Mueller was involved that evening. Do you consider Director Mueller to be reasonable, sober, and levelheaded?

Attorney General GONZALES. Yes.

Senator WHITEHOUSE. He is a former Deputy Attorney General, former United States Attorney?

Attorney General GONZALES. Yes.

Senator WHITEHOUSE. Why would he tell FBI agents not to allow you and Andy Card to throw the Acting Attorney General out of the Attorney General's hospital room?

Attorney General GONZALES. I don't know that he did that, and I have no way—I can't respond to your question. I'm not Director Mueller.

Senator WHITEHOUSE. We have direct testimony that he did. Is there any series of events that led up to this that would so provoke him as to—

Attorney General GONZALES. I wasn't aware of that comment until I read Mr. Comey's testimony.

Senator WHITEHOUSE. Is there some background to this that would help elaborate why he would have that feeling? I mean, when the FBI Director considers you so nefarious that FBI agents had to be ordered not to leave you alone with the stricken Attorney General, that is a fairly serious challenge.

Attorney General GONZALES. Well, again, I'm not sure that the Director knew at the time of the meeting and the conversation that we had had with congressional leaders. Again, we were there following an emergency meeting in the White House Situation Room with the Gang of Eight, who said despite the recommendation of the Deputy Attorney General, go forward with these very important intelligence activities for now, and we will see about moving forward with some legislation. And that was important information that led us to go to the hospital room. The Director, I am quite confident, did not have that information, when he made those statements, if he made those statements.

Senator WHITEHOUSE. Is it awkward to supervise the FBI after this piece of history has come out that the Director didn't feel comfortable leaving you alone with the stricken Attorney General?

Attorney General GONZALES. I can't speak for the Director's feelings about me, but I certainly have a great deal of confidence and admiration and respect for Bob Mueller.

Senator WHITEHOUSE. A separate topic. Will you allow the White House to direct United States Attorneys how to conduct litigation to which the White House is itself a party?

Attorney General GONZALES. Would I?

Senator WHITEHOUSE. Would you allow the White House to direct United States Attorneys how to conduct litigation to which the White House is a party?

Attorney General GONZALES. I don't believe so. Again, you're asking me a hypothetical, but my reaction to that is no.

Senator WHITEHOUSE. Is there any matter—any matter that the Department of Justice is involved in—in which you would allow the Department of Justice to agree to the investigative terms set by the White House for this Committee: no transcript, closed-door interviews, one round of questions only, and then nevermore? Is there any matter in the Department's jurisdiction where you would allow your lawyers to subject themselves to that kind of a restriction in doing their duties?

Attorney General GONZALES. You know I can't answer that question. I don't know. There may be a matter, but I don't know. I don't know.

Senator WHITEHOUSE. Can you think of one?

Attorney General GONZALES. Again, I mean, I could probably think of one, so—

Senator WHITEHOUSE. Where you would allow your lawyers to be subject to those restrictions?

Attorney General GONZALES. Senator, again, you're asking me is it possible. I'd say virtually anything is possible. But, obviously, that's something that we'd have to look at.

Senator WHITEHOUSE. My time has expired, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Whitehouse.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Mr. Attorney General, on the question Senator Feinstein asked you about the voting rights change, some of those are probably changes that needed to be done, but they are very significant—I would say "controversial," within the group of people that practice in that area of the law. I am curious as to your statement saying that you were not aware of that. As to those policies, who signs off on that? And who approved a policy that significantly, at least in certain specific areas, alters the policies of the Department of Justice if you don't?

Attorney General GONZALES. It would be the Deputy Attorney General, who is the chief operating officer of the Department. And so in some certain cases, it would be certain policies that would be adopted by the Deputy Attorney General. In other cases, depending on what we're talking about, it would be something that I would approve of.

Senator SESSIONS. Is that policy for the Voting Rights Section of the Department of Justice something you have delegated to the Deputy Attorney General?

Attorney General GONZALES. I can't answer that question, Senator, but I would be happy to give you that answer.

Senator SESSIONS. Well, I think it is something the Attorney General should do. I think that is a significant policy. There are certain responsibilities that I think you have, and to set major policy positions ultimately should be your responsibility.

Attorney General GONZALES. And I believe that that would be my responsibility, but I just want to confirm that with you.

Senator SESSIONS. Mr. Attorney General, with regard to some of the immigration questions that we are facing, there are so many matters that are within the jurisdiction of the Department of Justice. The effectiveness of our immigration enforcement policies depend on good policies within the Department of Justice. And I was recently reminded of a serious problem we have with regard to aliens who have been convicted of crimes in the United States. Mr. Harvey Lappins, Director of the Federal Bureau of Prisons, recently told us in this Committee—within the last year, I believe—that 27 percent of the Federal prison population is foreign born.

We have laws that I think authorize the removal from our country of persons who are convicted of crimes immediately upon the completion of their sentence, as I recall the statutes. I would note the article by Michelle Malkin quoting some of the examples we have had here where Mr. Adhan was convicted of—was relating to his involvement in the kidnapping and murder of 12-year-old Zina Linnik in Tacoma, Washington, on July 4th. He had been convicted apparently of incest in 1990 and had sexually assaulted his 16-year-old relative, got that pleaded down to second-degree rape. Two years later, he was convicted of intimidation with a dangerous weapon, and the law calls for—says that anyone convicted of a weapon offense is deportable. But he was not deported, and that is how apparently this murder occurred.

Another instance was Mwenda Murithi, arrested 27 times without deportation before being arrested in the shooting death of a 13-year-old innocent bystander, Schanna Gayden, last month in Illinois.

So I guess I am asking you about this whole policy, whether or not you have taken a lead to see that it is carried out. Do you believe it should be systematically and regularly carried out? And if there are any statutory weaknesses, do you have any suggestions about how they should be improved?

Attorney General GONZALES. I think it should be carried out. I am aware that probably the level of cooperation that exists between the Department and DHS on this issue is not as good as it should be, Senator. What I would like to do is have the opportunity to maybe have a conversation with Secretary Chertoff to see whether or not we can do something to improve the situation. Legislation may not be necessary, but obviously it may turn out to be the case that we may need to have some help from the Congress.

Senator SESSIONS. Well, as I understand, the Department of Homeland Security IG estimated last year that half of the 650,000 foreign-born inmates in prisons and jails won't be removed because they say that it "does not have the resources to identify, detain, and remove them." Is that true?

Attorney General GONZALES. I've heard that as a possible complaint or challenge. That very well may be the case. Again, what I'd like to do is have the opportunity to sit down with Secretary Chertoff. I have not spoken with the Secretary about this particular issue. I would be happy to do so, and if there is something that would be helpful for the Congress, I would like to have the opportunity to talk to you about it.

Senator SESSIONS. Well, I hope that you would because I think that is a major issue here. People are concerned when we pass laws in Congress and then law enforcement officials do not enforce them and don't execute them and leaving criminals in the United States in large numbers.

I understand there are a number of prisons that do not participate in the institutional removal program. Do you think it would be beneficial to expand this program to all Federal prisons?

Attorney General GONZALES. I can see very good arguments why that would make sense, and I plan on speaking with Harvey Lappins, the Director, and seeing what the status is and the challenges that exist with respect to implementing it at all the prisons.

Senator SESSIONS. I understand there is a pilot program ongoing, I believe maybe in El Paso, in which persons who enter the country illegally in violation of our laws are being prosecuted before they are deported. And as a result, there has been a significant reduction in the number of people attempting to enter that area of the border. Is that true? And what are your plans to consider expanding that?

Attorney General GONZALES. It is true. It requires the cooperation of the judge, quite frankly, and so we have had discussions with judges along the border to see whether or not they would be agreeable to such a process. And so we would like to expand it. There are challenges, and, again, it does require the cooperation of the judge.

Senator SESSIONS. Well, I would hope that the judges would cooperate. I mean, they don't get to decide who gets charged. They don't get to make the deciding function. Their responsibility is to enforce—to give a fair trial to whoever is brought before them by the prosecutor. Isn't that right?

Attorney General GONZALES. Yes, but they will insist on certain processes, that it follow certain timetables. And so unless a judge is willing to agree to an expedited process in the manner that we are seeing with respect to this particular judge, it can present some challenges for us.

Senator SESSIONS. Well, I understand it has worked well. I think it is something that ought to be replicated, and I would expect that Federal judges, if they understand the national interest in seeing that laws get enforced, would cooperate. I hope that you will pursue that. Will you pursue that?

Attorney General GONZALES. We will certainly do that, yes.

Senator SESSIONS. I wrote you a letter in April—my time is out, and I will just briefly—

Chairman LEAHY. Go ahead and finish your question, Senator.

Senator SESSIONS. In April, asking for a response regarding prosecution of criminal immigration cases. Two questions that—you gave me a response to one of my questions, but two questions that were unanswered are these. I asked what the official policy of each district office was in determining whether to prosecute immigration-related violations; and, two, the declination rate for immigration cases referred to each Southwest border district by the Department of Homeland Security with an explanation as to some of the reasons given for that decision. We have not yet received responses on that. Will you give me a response to that?

Attorney General GONZALES. If I can. The second one may require information from the Department of Homeland Security, but if we can provide the information, we will certainly try to do so.

Senator SESSIONS. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

On my list, the next Senator to question will be Senator Schumer, and unless—

Senator SESSIONS. Could I ask one quick question? I hate—

Chairman LEAHY. Go ahead, Senator Sessions. Feel free.

Senator SESSIONS. Thank you, Mr. Chairman. You are most gracious.

Senators Salazar, Cornyn, Pryor, and I, former Attorneys General, have introduced legislation again to reduce some of the crack penalties and alter the balance between crack and powder cocaine. Has the Department of Justice taken a position on that as of this year? And will you?

Attorney General GONZALES. Well, we think—I'd be happy to have a continued dialog with you. Personally, as I sit here today, I would say that where we're at today is certainly reasonable. We think crack is more dangerous. It's related to, I think, addiction more quickly. It's more related to more dangerous crimes. The effects of it I think are more dangerous. So from a law enforcement perspective, it makes sense to have the kind of sentences that exist today. But we obviously have a great deal of respect for all—

Senator SESSIONS. I think it is time to review that. I hope—

Attorney General GONZALES. And we would be happy to review it.

Chairman LEAHY. I might note that I think it is long past time to review it. There is more and more growing feeling that crack cocaine carries the highest penalties. It is also the people you are apt to see in the poorer neighborhoods. Powder cocaine, which is in some of the boardrooms and some of the yachts and some of the Hollywood parties of others who have a lot more money to hire lawyers and everything else, that gets a lower penalty.

But be that as it may, there will be a time we will have hearings on that. I have told the Senator from Alabama we will look into this issue. I think it is long past looking into. I know the Sentencing Commission has worked on it, and we will want an answer from the Department of Justice on its position.

I started to say that the order on our side will be Senator Schumer, Senator Durbin, Senator Feingold, Senator Kennedy, and Senator Biden. And, of course, we will interpose Republican Senators if they come, but so far we have heard from all of the Republican Senators who have showed up today.

Senator Schumer.

Senator SCHUMER. Well, thank you, Mr. Chairman, and thank you, Mr. Attorney General. I would like to just pick up where Senator Specter left off about the TSP program, just a few preliminaries.

First, I take it there was just one program that the President confirmed in 2005. There was not more than one.

Attorney General GONZALES. He confirmed one, yes, intelligence activity, yes, one program.

Senator SCHUMER. Thank you. Okay. And you have repeatedly referred to the, quote, program that the President confirmed in December 2005. I am just going to put up a chart here. Here is what you said before this Committee on February 6th of 2006. You said, "There has not been any serious disagreement about the program the President has confirmed. With respect to what the President has confirmed, I do not believe that these DOJ officials that you were identifying had concerns about this program."

This was in reference to a question I asked you, was there any dissent here. This was before Comey came to testify. It was in February, but we had some thoughts that maybe that happened. And now, of course, we know from Jim Comey that virtually the entire leadership of the Justice Department was prepared to resign over concerns about a classified program. Disagreement does not get more serious than that.

And what program was the ruckus all about? And this is the important point here. At your press conference on june 5th, it was precisely the program that you testified had caused no serious dissent. You said, "Mr. Comey's testimony"—and he only testified once—"related to a highly classified program which the President confirmed to the American people some time ago." Those are your words, sir.

So please help us understand how you did not mislead the Committee. You just admitted to me there was only one program that the President confirmed in December of 2005. I asked you was there dissent. You said no. Now you are saying—you said in a letter to me there was—well, there was dissent over other intelligence activities. But your June 5th statement confirms that what Comey was testifying about, because he had then testified, was the very program, sir, the very program that you said there was no dissent to.

How can you say you haven't deceived the Committee?

Attorney General GONZALES. Well, I stand by what I said at the Committee. This press conference is one that I would like to look at the question. I would like to look at my response.

Senator SCHUMER. Okay. We are going to bring it up to you right now, sir. Okay?

Attorney General GONZALES. Good.

Senator SCHUMER. These are your words, right? You don't deny that these are your words? This was a public press conference.

[Pause.]

Attorney General GONZALES. I'm told that what I—in fact, here in the press conference, I did misspeak, but I also went back and clarified it with the reporter.

Senator SCHUMER. You did misspeak?

Attorney General GONZALES. Yes. But I went back and clarified it with the reporter.

Senator SCHUMER. When was that? And what was the reporter's name?

Attorney General GONZALES. The Washington Post, 2 days later. Dan Egan was the reporter.

Senator SCHUMER. Okay. Well, we will want to go follow-up with him. But the bottom line is this: You just admitted there was just

one program that the President confirmed in December. Just one. Is that correct, sir?

Attorney General GONZALES. The President talked about a set of activities—

Senator SCHUMER. No. I am just asking you a yes or no simple question, just as Senator Specter has, and just like Senator Specter and others here, I would like to get an answer to that question. You just said there was one program. Are you backing off that now?

Attorney General GONZALES. The President—

Senator SCHUMER. Was there one program or was there not that the President confirmed?

Attorney General GONZALES. The President confirmed the existence of one set of intelligence activities.

Senator SCHUMER. Fine. Now, let's go over it again, sir, because I think this shows clear as could be that you are not being straightforward with this Committee, that you are deceiving us.

Then you said in testimony to this Committee in response to a question that I asked, there has not been any disagreement about the program the President confirmed. Then Jim Comey comes and talks about not just mild dissent, but dissent that shook the Justice Department to the rafters. And here, on June 5th, you say that Comey was testifying about the program the President confirmed.

Attorney General GONZALES. And I've already said—

Senator SCHUMER. You, sir—

Attorney General GONZALES.—clarified my statement on June 5th. Mr. Comey was talking about a disagreement that existed with respect to other intelligence activities.

Senator SCHUMER. How can we—this is constant, sir, in all due respect, with you. You constantly make statements that are clear on their face that you are deceiving the Committee, and then you go back and say, "Well, I corrected the record 2 days later." How can we trust your leadership when the basic facts about serious questions that have been in the spotlight you just constantly change the story, seemingly to fit your needs to wiggle out of being caught, frankly, telling mistruths.

It is clear here. It is clear. One program. That is what you just said to me. That is what locks this in, because, before that you were sort of alluding in your letter to me on May 17th, you said, well, there was one program—you said there was this program, TSP, and then there were other intelligence activities.

Attorney General GONZALES. That is correct.

Senator SCHUMER. You wanted us to go away and say, well, maybe it was other—wait a second, sir.

Attorney General GONZALES. And the disagreement related to—

Senator SCHUMER. Wait a second, sir.

Attorney General GONZALES.—the other intelligence activities.

Senator SCHUMER. I will let you speak in a minute, but this is serious because you are getting right close to the edge right here. You just said there was just one program. Just one. So the letter, which was sort of intended to deceive but doesn't directly do so because there are other intelligence activities, gets you off the hook, but you just put yourself right back on here.

Attorney General GONZALES. I clarified my statement 2 days later with the reporter.

Senator SCHUMER. What did you say to the reporter?

Attorney General GONZALES. I did not speak directly to the reporter.

Senator SCHUMER. Oh, wait a second. You did not. Okay. What did your spokesperson say to the reporter?

Attorney General GONZALES. I don't know, but I told the spokesperson to go back—

Senator SCHUMER. Well, wait a minute, sir. Sir—

Attorney General GONZALES.—and clarify my statement.

Senator SCHUMER.—in all due respect—and if I could have some order here, Mr. Chairman. In all due respect, you are just saying, well, it was clarified with the reporter, and you don't even know what he said. You don't even know what the clarification is.

Sir, how can you say that you should stay on as Attorney General when we go through exercises like this, where you are bobbing and weaving and ducking to avoid admitting that you deceived the Committee. And now you don't even—I will give you another chance. You are hanging your hat on the fact that you clarified the statement 2 days later. You are now telling us that it was a spokesperson who did it. What did that spokesperson say? Tell me now. How do you clarify this?

Attorney General GONZALES. I don't know, but I will find out and get back to you.

Senator SCHUMER. How do you clarify this? This is serious because it looks like you have deceived us.

Chairman LEAHY. In your own words, how would you clarify it?

Senator SCHUMER. How would you clarify it? You don't need—

Attorney General GONZALES. What I would say—here, let me answer the question—

Senator SCHUMER. If you want to be Attorney General, you should be able to clarify it yourself right now and not leave it to a spokesperson who you don't know what he said. Tell me how you would clarify it.

Attorney General GONZALES. I would have said Mr. Comey's testimony about the hospital visit was about other intelligence activities, disagreement over other intelligence activities. That's how I would clarify it.

Senator SCHUMER. That is not what Mr. Comey says. That is not what the people in the room say.

Attorney General GONZALES. That's how we'd clarify it.

Senator SCHUMER. Explain that again? Because it still doesn't add up.

Attorney General GONZALES. What I would—

Senator SCHUMER. You said there is only one—

Attorney General GONZALES. Mr. Comey—

Senator SCHUMER. You said there is one program the President confirmed. Are you saying Mr. Comey didn't disagree with the program that the President confirmed in December?

Attorney General GONZALES. What I'm saying is that the—

Senator SCHUMER. That is what you're saying here.

Attorney General GONZALES.—disagreement Mr. Comey testified about was about other intelligence activities.

Senator SCHUMER. Mr. Chairman, I think we have to pursue this at some point because this is—I have never heard anything quite like this.

Chairman LEAHY. Could I ask, if I might, you said you made a clarification to a reporter. This is such a significant and major point. Did you ever offer such a clarification to either Senator Specter or myself?

Attorney General GONZALES. You mean in terms of what was said at the press conference?

Chairman LEAHY. Yes.

Attorney General GONZALES. I don't believe so. But I think my correspondence and testimony is accurate. The statement at the press conference was not accurate, and I corrected it. That was corrected.

Senator SCHUMER. But, Mr. Chairman, if I might, now what the Attorney General is saying, the way this is clarified, is that Jim Comey was not talking about the program the President confirmed.

Chairman LEAHY. I am going to ask for a review of the transcript, both what Mr. Comey said—

Senator SCHUMER. Everyone knows that is not true.

Chairman LEAHY.—and what Mr. Gonzales said. If there is a discrepancy here in sworn testimony, then we are going to have to ask who is telling the truth and who is not.

Mr. Durbin, Senator Durbin

Senator SCHUMER. Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Mr. Chairman. Thank you, Mr. Attorney General.

There are many controversial issues that have been raised in this hearing: warrantless wiretapping, the political dismissal of U.S. Attorneys, and the like. I think that this administration and your tenure as Attorney General will be haunted in history by another issue, and that is the issue of torture. It is the reason I could not vote for your confirmation, the role that you played as counsel to the President in saying that we as a Nation did not have to follow the torture statute and the provisions of the Geneva Conventions.

Now, last Friday, President Bush signed an executive order interpreting Common Article III of the Geneva Conventions for the purposes of CIA secret detention and interrogation. The Executive order rejected your earlier position and acknowledges that the CIA must follow applicable law, including Common Article III of the Geneva Conventions, the torture statute, and the McCain torture amendment, which I was happy to cosponsor.

Do you now agree that Common Article III applies to all detainees held by the United States?

Attorney General GONZALES. What I can say is that certainly Common Article III applies to all detainees held by the United States in our conflict with al Qaeda.

Senator DURBIN. I am sorry. What—

Attorney General GONZALES. In our conflict with al Qaeda, yes.

Senator DURBIN. Well, I am worried about the qualification at the end. Are you suggesting that other terrorist conflicts are not covered by Common Article III in terms of the treatment of detainees?

Attorney General GONZALES. You know, we have to look at the words of Common Article III. The Supreme Court rendered a decision about the application of Common Article III with respect to our conflict with al Qaeda only. And so—I believe, if I recall correctly.

If that were the case, if there were a different kind of conflict that on its face isn't covered by Common Article III, then obviously we would not be legally bound by Common Article III, although I think the President has said we are going to treat people humanely nonetheless.

Senator DURBIN. So let me get into a specific here. Last year, the highest-ranking attorneys in each of the four military services—Army, Navy, Air Force, and Marines—the Judge Advocates General testified before this Committee, and I sent them follow-up questions asking their opinion about specific abusive interrogation techniques that this administration has reportedly authorized. I received their responses this morning, and, Mr. Chairman, I ask consent that those responses be made a part of the record.

Chairman LEAHY. They will be made part of the record.

Senator DURBIN. Mr. Attorney General, the opinion of the Judge Advocates Generals was unanimous. They all agreed that the following interrogation techniques violate Common Article III of the Geneva Conventions, and there are five: painful stress positions, threatening detainees with dogs, forced nudity, waterboarding, and mock execution. Do you agree?

Attorney General GONZALES. Senator, I'm not going to get into a public discussion here about possible techniques that may be used by the CIA to protect our country. What I can say is the executive order lays out a very careful framework to ensure that those agents working for the CIA, trying to get information about the next attack do so in a way that is consistent with our legal obligations. And so, again, without commenting on specific techniques, we understand what the rules of the road are.

Senator DURBIN. Mr. Attorney General, do you know what you are saying to the world about the United States when you refuse to acknowledge that these techniques are beyond the law, beyond the tradition of America? These Judge Advocates General have a responsibility as well. They have been explicit and unanimous. The problem with your statement, Mr. Attorney General, is that you are leaving room for the possibility that you disagree with them.

Attorney General GONZALES. And, of course, those in the military are subject to the Army Field Manual. It's a standard of conduct that is way above Common Article III. And so they come at it from a different perspective, quite frankly, Senator. And, again, I wish I could talk in more detail about specific actions, but I cannot do that in an open setting.

Senator DURBIN. Well, let me just ask you to consider this for a moment. Aside from the impact of what you have just said on America's reputation in the world, aside from the fact that we have ample record that you have disagreed with the use of Geneva Convention standards and have pushed the torture issue beyond where the courts or the Congress would take it, would it be legal for a foreign government to subject a United States citizen to these so-called enhanced interrogation techniques which I just read?

Attorney General GONZALES. Would it be legal for the United States Government to subject—

Senator DURBIN. No. For a foreign government.

Attorney General GONZALES. For a foreign government.

Senator DURBIN. To subject a United States citizen to the five—any of the five interrogation techniques which I read to you?

Attorney General GONZALES. Well, again, Senator, we would take the position—you are talking about an American soldier who fights pursuant to the rules of the Geneva Convention—

Senator DURBIN. No, no. That is a different story. That is a uniformed person. I am talking about a United States citizen.

Attorney General GONZALES. Would it be legal under their laws? Would it be legal under international standards? What do you mean by "would it be legal"? We obviously would demand humane treatment and treatment for U.S. citizens consistent with international legal obligations and that's what—

Senator DURBIN. And would you—

Attorney General GONZALES. That's what this President expects of those of us who work in this Government.

Senator DURBIN. And do you believe these techniques which I have read to you would be beyond the laws and the international standards if they were used against an American citizen?

Attorney General GONZALES. Senator, you are asking me to answer a question which I think may provide insight into activities that the CIA may be involved with in the future.

Senator DURBIN. No. I am asking you a hypothetical question. Anytime we get close to a specific issue, an investigation, you recuse yourself.

Attorney General GONZALES. Every time—

Senator DURBIN. Now I am asking you for a general observation. Mr. Attorney General, the point I am making to you is if you cannot be explicit about the standards of conduct and the values of this country when it comes to the use of torture, you create an ambiguity which, unfortunately, reflects badly on America around the world and invites those who would take American citizens as captives and detainees to also suggest, well, there is an ambiguity, we can go a little further than perhaps international law allows.

Attorney General GONZALES. Well, what is prohibited would be grave breaches, which are set forth—

Senator DURBIN. What about these five specifics?

Attorney General GONZALES.—in the Military Commissions Act. There are also violations of the DTA, which would be violation of cruel, inhumane, degrading standard, which is tied to our constitutional standards of shocking the conscience. And then there are prohibited actions which would be covered by the President's executive order. And, again, it would depend on circumstances, quite frankly.

Senator DURBIN. Well, that is the kind of ambiguity which allows many people to conclude that you personally and this administration, whether by signing statements or the Bybee memos, are really trying to leave a little opening in a door for the United States to engage in conduct which we condemn around the world.

The last question I want to ask you is this: The latest National Intelligence Estimate suggests that al Qaeda is stronger today than

they were on 9/11. It suggests, as we all know, that Osama bin Laden is still at large. And it suggests that Guantanamo has become a symbol of injustice around the world.

Can you explain to me why 5 years after the Guantanamo detention situation has been created there still has not been a single conviction of any of these detainees or combatants for any wrong doing?

Attorney General GONZALES. It is not for lack of trying on the Government's part, Senator. It is because these individuals—

Senator DURBIN. It could be lack of competence.

Attorney General GONZALES. These individuals have been provided process, and they are taking advantage of that process, and I don't begrudge them for it, for hiring good lawyers and defending their interests in the courts. And so we are slugging it out in the courts. And, you know, I would like to get all these issues resolved. I would like to bring all these individuals to justice. So we are doing our best, but we are doing it in a way that reflects the reality that these individuals have the opportunity and the means to go into court to contest what we are doing.

Senator DURBIN. I would suggest 5 years ago, Senator Specter and I proposed legislation to create military commissions which we thought would have given you that opportunity, and the administration was not receptive. Thank you, sir.

Chairman LEAHY. As I recall, I was one of those who joined with you on that proposal. There was almost arrogant rejection of our proposal. Basically the White House—you were then White House Counsel—said that you knew better, we don't need it, and rejected it out of hand. Of course, when the Supreme Court came down, a Republican-dominated Supreme Court came down, said you were wrong, we were right. We have wasted years, which I think was Senator Durbin's point.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman. I will shortly be introducing a resolution to censure the President and senior members of his administration for undermining the rule of law, from authorizing an illegal wiretapping program to claiming the power to detain U.S. citizens indefinitely without charging them.

I think this administration has shown disdain for the constitution and the laws of the land. You have played a central role in that effort. So I would like to give you an opportunity to defend your actions.

With respect to the NSA's illegal wiretapping program, last year in hearings before this committee and the House Judiciary Committee, you stated that, "[t]here has not been any serious disagreement about the program that the President has confirmed." That any disagreement that did occur "[d]id not deal with the program that I am here testifying about today." And that "[t]he disagreement that existed does not relate to the program the President confirmed in December to the American people."

Two months ago you sent a letter to me and other members of this committee defending that testimony and asserting that it remains accurate, and I believe you said that again today. Now as you probably know, I am a member of the Intelligence Committee. And therefore, I am one of the members of this committee who has

been briefed on the NSA wiretapping program and other sensitive intelligence programs.

I have had the opportunity to review the classified matters at issue here, and I believe that your testimony was misleading at best. I am prevented from elaborating in this setting, but I intend to send you a classified letter explaining why I have come to that conclusion.

Attorney General, the integrity of the Congressional testimony of the highest law enforcement official in the country is an extremely important matter. I therefore ask that after reviewing that letter you provide clarification in a classified setting. But also please consider how you can address this issue publically to dispel the doubts about your voracity that this episode has raised. Will you agree to do that?

Attorney General GONZALES. I certainly would endeavor to do that, Senator. I guess I am very surprised at your conclusion that I may have been misleading. If, in fact, you understood the briefings in the Intel Committees, quite frankly. I find your statements surprising, so I look forward to your correspondence.

Senator FEINGOLD. Well, I look forward to the information, the classified setting, and to your public attempts to set this straight. I strongly disagree with your analysis of how somebody would come down as to whether you were misleading.

In fact, I'm appalled by your efforts today to try to shift responsibility for the effort to strong arm Attorney General Ashcroft. First given your history of misleading this committee, I don't know why we should trust your account of the situation.

Second, unless you're talking about a covert action, the limited Gang of Eight briefing itself was a violation of the National Security Act. And third, it was you, Mr. Attorney General, who visited the hospital to try to strong arm a sick man who had temporarily relinquished his responsibility. You are responsible for those actions.

At your confirmation hearing in January, 2005, I asked you whether the President has the power to authorize warrantless wiretapping under the theories of the torture memo. You called my question "hypothetical," when you knew full well, full well that this had been going on for years. You could have spoken to me after the hearing and told me that there was something I should know that you couldn't explain in open session, but you did not. Then during your campaign to reauthorize the Patriot Act, you told Congress that there were no abuses of that law that we needed to worry about. Even though you had documents showing there had actually been problems with the Patriot Act and other surveillance authorities.

Then again last year you came to this committee and told us that there had not been any serious disagreement about the warrantless wiretapping program the President confirmed in late 2005. A statement I believe was misleading at best.

In every case you somehow managed to come up with some convoluted theory for why your statement was technically accurate. When you look at all of these incidents together, it is hard to see anything but a pattern of intentionally misleading Congress again and again.

Shouldn't the Attorney General of the United States meet a higher standard?

Attorney General GONZALES. The Attorney General of the United States should try to meet the highest standard, and I have tried to meet that standard, Senator.

Senator FEINGOLD. You feel you've met that standard?

Attorney General GONZALES. Obviously there have been instances where I have not met that standard, and I've tried to correct that. When those standards have not been met, I have tried to make amends and tried to clarify to the committee and to the American people about statements that I've made.

Senator FEINGOLD. You state in your testimony that the administration has transmitted to Congress a proposal to modernize the Foreign Intelligence Surveillance Act, and yet your department still refuses to share with this committee and with the Intelligence Committee basic information about the evolution of the department's legal justifications for the illegal wiretapping program from 2001 to the present.

And your legislative proposal contains a provision that would grant blanket immunity to individuals who cooperate with the government for participating in certain unidentified intelligence activities.

How can you come to Congress with a straight face and ask for this immunity provision, yet at the same time refuse to tell most members of Congress what they would be granting immunity for?

Attorney General GONZALES. Of course we have provided briefings to the Intel committees. And again, we went to companies for help, they provided help in trying to protect this country, and we think that's appropriate for the Congress to consider.

Senator FEINGOLD. But I'm asking you how you can say that in light of the fact that most Members of Congress won't even be told what they are being granted immunity for.

Attorney General GONZALES. Well, again, we have provided, it is in the judgment, the administration, the appropriate briefings to the Congress about these activities.

Senator FEINGOLD. I don't think that cuts it for most people who are going to be voting on this. Do you agree that the potential liability of private entities for failing to follow the law is an important part of the enforcement of our privacy laws?

Attorney General GONZALES. If I understand your question, yes.

Senator FEINGOLD. I'm not asking whether you think there was an illegal activity in any particular instance. I'm asking you whether you think private liability is an important part of the enforcement scheme of our privacy laws.

Attorney General GONZALES. I think as a general matter, that would be true, yes.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Senator Kennedy.

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

Just to come back for a moment or two to the issue of torture. As you are aware, the President's latest Executive Order has been published. It was published on July 20th, 2007. Did the department review the Executive order?

Attorney General GONZALES. Yes.

Senator KENNEDY. The order was put out?

Attorney General GONZALES. As a matter of custom, we would do that, yes.

Senator KENNEDY. Okay. And did you produce any memoranda or any other documents assessing the legality of the order?

Attorney General GONZALES. Senator, I don't know, we certainly provided advice, yes, about the order.

Senator KENNEDY. Well—

Attorney General GONZALES. I can't tell you whether or not we provided a legal document with respect to the order.

Senator KENNEDY. Or comments about that.

Attorney General GONZALES. Yes.

Senator KENNEDY. Could you—can you make those available to the committee? Can you make those available to us, all of the department's analysis of that?

Attorney General GONZALES. I will take that back and see what we can do, Senator.

Senator KENNEDY. In the Executive order, at section 3(b)(i) paragraph E it mentions certain activities that by definition violate human decency. It specifies those activities.

It says in paragraph E, outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency.

Then it specifically prohibits certain activities. Certain activities are prohibited in the Executive order. It says, such as sexual or sexually indecent acts undertaken for the purpose of humiliation, those activities are prohibited. It says, forcing the individual to perform sexual acts or to pose sexually, those activities are prohibited.

Threatening the individual with sexual mutilation, or using the individual as a human shield, those activities are prohibited. Then paragraph F says that acts intended to denigrate the religion, religious practices, or religious objects of the individual these acts are prohibited.

So the question is, why aren't you willing, if those are prohibited, why aren't you willing to prohibit the other kinds of activities that were outlined earlier, including waterboarding, stress, dogs, nudity, and mock executions? You prohibit these activities. Why don't you prohibit those?

Attorney General GONZALES. Senator, there are certain activities that are clearly beyond the pale, and that everyone would agree should be prohibited. So obviously the President is very, very supportive of those actions that are identified by its terms in the Executive order.

There are certain other activities where it is not so clear, Senator. Again, it is for those reasons that I can't discuss in a public session.

Senator KENNEDY. The point has been made superbly by my colleague, Senator Durbin. What you are basically saying to this committee and the rest of the world is that these acts, which are mentioned in the Executive order, are prohibited, but these other activities are not, the five other activities which were the subject of

a good deal of our own hearings when we had a problem with your confirmation as Attorney General. These other five activites don't rise to the point where they are prohibited.

Attorney General GONZALES. I am not saying that they are not. What I'm saying is—

Senator KENNEDY. But they weren't of sufficient importance to list them as you listed these other activities.

Attorney General GONZALES. I wouldn't say it is importance. But clearly these activities are ones that are clearly beyond the pale, and everyone agrees the United States government should not be engaged in.

With respect to whether or not other activities should be prohibited, that will be determined based upon the parameters set forth in the Executive Order, and for the Director of the CIA to make sure that certain standards are met before authorizing any activity to ensure that it complies with the requirements of the order.

Senator KENNEDY. This past Sunday, Admiral McConnell was on Meet the Press, and he was asked about some of these activities. He indicated that he was not going to comment specifically on it.

Is it lawful to leave the threat of torture hanging out? Is the threat of torture a violation of the Geneva Convention?

Attorney General GONZALES. Well, of course the—we're not going to torture. We are bound by both domestic and international law. We don't engage in torture. I don't think we've let the threat out there. We have said we are not going to engage in torture.

Senator KENNEDY. Okay. Well, the point is about these five items, which Admiral McConnell indicated in response to a question that he wasn't going to comment on. The question is whether that threat is extreme psychological harm. The fact that you won't indicate that those activities are off the table poses a violation of the Geneva Convention.

Let me go to another issue. This morning's Washington Post had this story on the front page. Diplomats received political briefings. They were done even at the Peace Corps.

Now, we have already had some 15 Federal agencies and departments subject to briefing by Karl Rove's political office at the White House. These briefings focused on the key electoral contests.

According to the Post today, even diplomats and the Peace Corps have been given briefings that went so far as to identify Democrats targeted for defeat in 2008.

Has Karl Rove or anyone from his office given similar briefings to the leadership in the Department of Justice?

Attorney General GONZALES. Not that I'm aware of.

Senator KENNEDY. Well, you would know if he had.

Attorney General GONZALES. I would think so, but I don't believe so, sir.

Senator KENNEDY. And is it your legal opinion that these briefings given in the Peace Corps which target Democrats for defeat, are these briefings consistent with the Hatch Act? Is that a violation of the Hatch Act?

Attorney General GONZALES. I don't know. I haven't studied this article. I'm not aware of what happened in the briefings. I certainly wouldn't rely upon the article in making—

Senator KENNEDY. Well, it raises serious questions, does it not?

Attorney General GONZALES.—in reaching a conclusion as to whether or not the Hatch Act—

Senator KENNEDY. You are going to look into it?

Attorney General GONZALES. We will look to see whether or not there is something there.

Senator KENNEDY. Whether it's a violation. Whether they in these briefings were doing partisan targeting on government property, talking to these officials in the Peace Corps. Going into the Peace Corps, telling them that they should be undermining Democrats who should be defeated in the next election.

Attorney General GONZALES. Let me try to get more information about this, Senator. I really don't know anything. I need to find out more about it.

Senator KENNEDY. Well, if this story is true, would it appear to you that it would be a violation?

Attorney General GONZALES. Again, Senator, I would like to have the opportunity to find out what happened.

Senator KENNEDY. Let me go quickly in the last seconds to the Civil Rights Division in the Justice Department. We had Wan Kim who was here asked about the number of cases filed to fight voter discrimination against African-Americans.

The Bush administration has filed only two voting rights cases on race discrimination against African-Americans, and it took until 2006 to file these. They found time to clear Tom DeLay's Texas redistricting plan and the Georgia photo ID law, but filed just two cases on this.

Attorney General GONZALES. You mean against African-Americans, or total?

Senator KENNEDY. Cases about discrimination in voting rights filed on behalf of African-Americans, just two cases. Dramatically less than the previous administration.

Do you think that this really reflects what's happening out there in terms of voter discrimination against African-Americans?

Attorney General GONZALES. No, I still believe we have a problem, and we have an obligation to try and address it. I read with great interest the testimony. I think it was Dr. Norton and the panel that followed Mr. Kim's testimony in terms of the allegation that the numbers across the boarder down, and I questioned Mr. Kim about that. We talked about the numbers and the cases.

So I think the person to testify was either mistaken or just plain wrong. So we have provided a lot of information to this committee about the successes of the Civil Rights Division, and I can tell you, Senator, I am firmly committed to protecting the civil rights of all Americans.

Senator KENNEDY. My time is up, Mr. Chairman. I'd like to just provide information at this point.

Chairman LEAHY. Thank you. And I would expect an answer to the question on the Hatch Act that Senator Kennedy spoke about.

When Monica Goodling testified under oath before the House Judiciary Committee, she crossed the line with the unprecedented vetting of potential career hires for political allegiances throughout the department, including apparently for career Assistant U.S. attorney positions. I'm not talking about political positions, but career ones.

She testified under oath that she crossed the line. Were you aware that Ms. Goodling was doing so?

Attorney General GONZALES. That she was crossing the line? No.

Chairman LEAHY. Were you aware that she was talking, asking about political allegiances and vetting career Justice Department?

Attorney General GONZALES. I don't recall being aware of that. If I had been aware of that, that would have been troubling to me.

Chairman LEAHY. Do you know whether other officials at the White House were aware she was doing that?

Attorney General GONZALES. Not that I'm—let me just mention, I'm aware, and I think I became aware after the U.S. attorneys were asked to resign. There was an issue that I became aware of where Ms. Goodling apparently asked a potential career hire into the D.C. U.S. Attorney's Office improper questions.

So at some point I did become aware of that. But otherwise, I can't recall being aware of other instances where she may have asked improper questions.

Chairman LEAHY. When you consider, recommend, or approve candidates for employment to career positions at the department, do you ever consider their political party affiliation or ideology or membership in nonprofit organizations or demonstrate loyalty to the President or any of those matters?

Attorney General GONZALES. Did I? No.

Chairman LEAHY. Do you ever?

Attorney General GONZALES. Do I ever? No.

Chairman LEAHY. Do you know whether anybody else in the department does that?

Attorney General GONZALES. Well, again, apparently based upon the testimony, it appears that Ms. Goodling, as she testified, may have crossed the line.

Chairman LEAHY. Have you made it clear that people cannot do that?

Attorney General GONZALES. Yes. We have now revised policies both with respect to immigration judges, with respect to Civil Rights division, with respect to career Assistant United States attorneys, with respect to the honors programs, we have changed our policies to make it clear.

Chairman LEAHY. Do you make that clear that nobody at the White House can do that either?

Attorney General GONZALES. In terms of?

Chairman LEAHY. Those hires.

Attorney General GONZALES. I don't know whether or not—I have communicated with the White House about that now.

Chairman LEAHY. It might not be a bad idea. They are also in the book. Feel free to contact them.

You testified to both the Senate and the House Judiciary Committee that you didn't speak with anyone involved in the firings of the U.S. attorneys about that process because you didn't want to appear with the investigation.

But on May 23rd, Monica Goodling testified under oath before the House Judiciary Committee that she had an uncomfortable conversation with you shortly before she left the department during which you outlined your recollection of what happened and asked for her reaction.

Which one of you is telling the truth?

Attorney General GONZALES. I did have that conversation with her in the context of trying to console and reassure an emotionally distraught woman that she had done something wrong, and I tried to reassure her as far as I knew, nothing had done anything intentionally wrong, and that was the basis of the conversation that I had.

She came to my office, this was March 15th, just days after this really became a big story. She came in and she was emotionally distraught.

Chairman LEAHY. But, you know, we sent you written questions on this, on the eve of this. We got answers, and no place in there did you make reference to that. So it is your statement now that she did come and you did talk with her?

Attorney General GONZALES. Again, we had a conversation for the purpose—my conversation with her, she was seeking to get a transfer. I was simply trying to console this very emotionally distraught woman.

Chairman LEAHY. You did say that in your estimation, nothing wrong was ever done?

Attorney General GONZALES. And I might add, Mr. Chairman, that I had committed to you that we would make these people available as witnesses, that the department would be forthcoming in turning over documents.

As far as I knew, nothing improper, nothing illegal had happened here.

Chairman LEAHY. So your earlier testimony was wrong?

Attorney General GONZALES. Senator, I wouldn't say that it was wrong. What I want to do is put it in context that again, my conversation with her was not to shape her testimony. My conversation with her was to simply reassure her that as far as I knew, no one had done anything intentionally wrong here.

Mr. Sampson had just resigned. She reported to Mr. Sampson, and I think she was confused, and I think needed reassurance.

Chairman LEAHY. Let me ask you about just how the department is administered. You said you do administer it, and I understand that.

In 2003, Congress unanimously, unanimously passed the Home Town Heros Act. This would extend Federal survivor benefits to the families of firefighters, police officers, emergency workers, who die of a heart attack or a stroke in the line of duty.

More than 3.5 years after that the Justice Department used its regulatory authority to shift the burden of proof from the government to the families. So there has been 260 applications, you approved only 14 claims out of those 260, denied 47 others. People are really concerned. It seems like a stall. It took 3 years to write the regulation, and nothing gets approved.

Now, let me just give you one example of what your department denied. You denied benefits to a U.S. forest service firefighter in Arizona. He was standing closer than I am to you behind a fire line, a shovel in his hand, working to contain that. Your department said well, they couldn't determine whether he was engaged in strenuous activity at the time of his heart attack.

I don't know what you consider strenuous activity. I think if I was standing this close to a fire line with a shovel in my hand trying to contain a forest fire, I would certainly consider it more strenuous than my normal day's activities.

What are you going to do to knock down these kind of bureaucratic delays? This is picky, petty, and it is wrong to the families of very, very brave people. It makes many of us feel, many in both parties feel the President may have assigned this law, he may not have put a signing statement in, which he often does to ignore the law. But by God, he's going to make sure the bureaucracy ignores it. What are you going to do to clear that up?

Attorney General GONZALES. Thank you for that question, Senator. You're right. It has taken us too long, and I apologize to the families. There are two reasons for the delay.

One is of course the regulations, which took us much too long, 3 years. Part of the fact is that we wanted to consult with the medical community and with law enforcement to ensure that we have the right regulatory framework in place, but it still took us too long.

The second area of delay is the actual processing of claims. We have to do a better job of—

Chairman LEAHY. Clear it up. Clear it up.

Attorney General GONZALES. That's what I said. Yes, sir, I agree.

Chairman LEAHY. Report back to Senator Specter and I, please.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. Attorney General Gonzales, does Solicitor General Paul Clement now have the unquestioned authority to appoint a special prosecutor since you and the Deputy Attorney General are recused?

Attorney General GONZALES. It would be his decision, yes.

Senator SPECTER. Just to be abundantly clear, so that if a request were made to him to appoint a special prosecutor to handle the contempt proceedings arising out of this entire matter, it would be his decision?

Attorney General GONZALES. Yes.

Senator SPECTER. His sole decision?

Attorney General GONZALES. I would not be involved with it, and neither would the Deputy Attorney General.

Senator SPECTER. Or nobody else would be involved in it. It is the Attorney General's responsibility under the statute.

Attorney General GONZALES. Ultimately he would make the decision, yes, sir.

Senator SPECTER. Going back to the question about your credibility on whether there was dessent within the administration as to the terrorist surveillance program, was there any distinction between the terrorist surveillance program in existence on March 10th when you and the Chief of Staff went to see Attorney General Ashcroft contrasted with the terrorist surveillance program which President Bush made public in December of 2005?

Attorney General GONZALES. Senator, this is a question that I should answer in a classified setting, quite frankly. Now you are asking me to hint about our operational activities. I'd be happy to answer that question, but in a classified setting.

Senator SPECTER. Well, if you won't answer that question, my suggestion to you for, Attorney General Gonzales, is that you review this transcript very, very carefully. I do not find your testimony credible, candidly.

When I look at the issue of credibility, it is my judgment that when Mr. Comey was testifying, he was talking about the terrorist surveillance program. That inference arises in a number of ways, principally because it was such an important matter that led you and the Chief of Staff to Ashcroft's hospital room.

When you say that you were going to get Ashcroft's approval on another intelligence matter, it strains fragility that it would be other than the foremost program to go to his hospital room when he's under sedation.

When you testified here this morning earlier that you were looking to see if Attorney General Ashcroft had sufficient capacity to answer the question as to his giving his approval, the man was under sedation. It's just all the attendant circumstances make it appear, lead to the inference, that we are dealing with a terrorist surveillance program.

So my suggestion to you is that you review your testimony very carefully. The Chairman has already said that the committee is going to review your testimony very carefully to see if your credibility has been breached to the point of being actionable.

I had asked you about the case involving United States Attorney Charlton. Are you aware of the fact that with respect to the defendant for whom you are seeking the death penalty, Jose Rias, that the testimony against him was mostly from addicts and drug dealers?

Attorney General GONZALES. Sitting here today, I have no specific recollection of that, no, sir. But again, this is an ongoing case, Senator, and we are going to try to make this case in the courts. So the more criticism there is of the government's position, the harder it's going to be for the U.S. Government to prevail in court.

I would simply urge that we try not to criticize the government's position in this case in connection with an ongoing matter.

Senator SPECTER. Well, I disagree with you categorically. I think the government's position ought to be reevaluated. I do not know whether it's a proper case for the death penalty or not sitting here. But I do know that if you spent only 5 to 10 minutes on it, you haven't made a reflected, mature, sensible judgment on it. The procedures haven't been followed.

I also know that when the U.S. attorney who handles the case makes a request to the Attorney General, he is one man, and you're another man. You're dealing with a death penalty for a third man. But you owe the process more than 5 to 10 minutes, or you ought to be in the position to say to this committee, it wasn't 5 to 10 minutes, I don't function that way. I don't make the decision on the death penalty in 5 to 10 minutes. But you can't say that, because you don't know.

So what I would say to you to try to simplify it, go back and take another look at this.

Attorney General GONZALES. I will do that.

Senator SPECTER. And I'd also suggest to you that you go back and take a look at all the other cases where you have pressed for

the death penalty, especially the ones where your United States attorneys have recommended against it.

Well, time is almost up and we're about to have a vote. We are having a vote, but let me cover one more subject very briefly. That is the issue on Oxycontin.

This is a matter, Attorney General Gonzales, where your department entered into a plea agreement with the Perdue Pharma Company where scores of people died as a result of Oxycontin abuse, and even a greater number became addicted.

The situation arose where there was an acknowledgment that there was an intent to mislead. Now, that constitutes malice, reckless disregard for the life of somebody else would support a common law prosecution for murder in the second degree.

Now, the question is why does the Department of Justice enter into a plea agreement for a fine? No jail times, the cost of doing business. The only way to deter white collar crime is if there is a penalty involved, if people go to jail who acknowledge that they deliberately misled to sell a product. What was the reason for that?

Attorney General GONZALES. Senator, it was the considered judgment of the prosecutor that it would be—he was not confident in the evidence to support the intent, the individual intent or malice of the corporate executives. He took advantage of the statute passed by Congress to hold these individuals liable without having to show intent.

As a consequence, they are paying $30 million in fines. This was a very difficult and very complex case. So I think that the prosecutors here looked at the evidence and decided—

Senator SPECTER. How many deaths were there?

Attorney General GONZALES. I can't answer that question.

Senator SPECTER. Would you answer it? Did you review this case?

Attorney General GONZALES. I did not review this case.

Senator SPECTER. Do you know how much money is involved for this corporation to sell this product?

Attorney General GONZALES. I don't know the answer to that question, Senator.

Senator SPECTER. $30 million maybe and cheap license.

Attorney General GONZALES. It was $600 million for the company.

Senator SPECTER. $600 million may be slightly more expensive cheap license.

Chairman LEAHY. Are you finished?

Senator SPECTER. Well, I'm not finished, but I'll conclude. Thank you.

Chairman LEAHY. I'm not trying to cut him off. We have to vote and there's about 4 or 5 minutes left in this. We will recess for 20 minutes. We will recess for 20 minutes.

Senator Schumer can vote. Senator—we don't have to recess unless the Attorney General wants a break. I'll turn the gavel over to Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman. Mr. Gonzales, let me just follow-up briefly on what Senator Feingold was saying, because I'm also a member of both committees, and I have to tell you, I have the exact same perception that he does.

That is that if there is a kernel of truth in what you said about the program which we can't discuss, but we know it to be the program at issue in your hospital visit to the Attorney General, the path to that kernel of truth is so convoluted and is so contrary to the plain import of what you said, that I really at this point have no choice but to believe that you intended to deceive us and to lead us or mislead us away from the dispute that the Deputy Attorney General subsequently brought to our attention.

So you may act as if he is behaving, you know, in a crazy way to even think this, but at least count two of us and take it seriously.

When we first spoke some time ago, we talked about communications about cases between your office and the White House. In that context, let me ask you sort of a background question, or a context question.

That is, if you want an independent Department of Justice, one that is protected from improper political influence, as you are assaying the different places from which improper political influence might come to affect the Department of Justice, what do you think would be the locus most presenting that risk?

Attorney General GONZALES. I'm sorry, Senator. I don't understand the question.

Senator WHITEHOUSE. Well, if you are setting up barriers, for instance, administrative barriers to protect the department from improper influence, where would you be looking to have the, I mean, the Boy Scouts of America, not a major risk, wouldn't you say?

Attorney General GONZALES. Of course.

Senator WHITEHOUSE. Mayors, City Councils around the country, not probably a major risk.

Attorney General GONZALES. I think where you are trying to lead me to is the White House.

Senator WHITEHOUSE. Isn't the White House the number one locus of general concern that has persisted through many administrations as to where political influence coming into the Department of Justice improperly is going to come from?

Attorney General GONZALES. Obviously that would be certainly a key source of concern.

Senator WHITEHOUSE. The key. The key, right?

Attorney General GONZALES. Probably the key source of concern.

Senator WHITEHOUSE. Okay. And in response to that, as we discussed in the last hearing, as I can remind you, there was the 1994 letter from Janet Reno to Lloyd Cutler. In response to that concern, which we agree is a very real one, the letter announced, and I believe that the letter, I wasn't here at the time, but I believe the letter was actually reduced to writing at the direction and instigation of then Judiciary Chairman Orrin Hatch, who saw this as a significant concern.

The letter says this. Initial communications between the White House and the Justice Department regarding any pending department investigation or criminal or civil case should involve only the White House counsel or deputy counsel (or the President or Vice President) and the Attorney General or Deputy or Associate Attorney General. Seven people.

As you'll recall, I showed you a graph of what has been done since. In response to that, you seem to agree that I had a somewhat legitimate concern that I was pursuing. You said, this is from your transcript. I remain concerned as Attorney General in terms of making sure that communications from the White House and the Department of Justice remain in the appropriate channels.

You further said, I agree with you. It is important to try to limit the communications about specific criminal cases between the counsel's office and the Department of Justice.

You specifically said, I think the safeguards that you're referring to I think are very, very important. Then you said, I, like you, am concerned about the level of contacts in ensuring that the communications from the White House and the Department of Justice occur at the appropriate, within the appropriate channels.

Attorney General GONZALES. Channels.

Senator WHITEHOUSE. Now, I then showed you the letter that Attorney General, the memorandum that Attorney General Ashcroft prepared. That is the document that sort of kicked open the door from 7 to hundreds of people to be involved and have discussions about ongoing criminal civil investigative matters.

That's what led to our discussion about all of this.

Attorney General GONZALES. Yes.

Senator WHITEHOUSE. Now, you've had some time to think about this. You have indicated a desire to clean up the mess at the department. I would like to bring to your attention a May 4th, 2006 memorandum that is a subsequent document to the Ashcroft memorandum.

This one is signed by you. If you don't mind, could you give them a copy to put up?

Here is what concerns me. And the Ashcroft memorandum, which was the subject of concern before, at the very, very end of the Ashcroft memorandum, as you'll remember, there was that paragraph under asterisks that changes the whole memorandum in front of it.

It says, not withstanding any procedures or limitations set forth above, the Attorney General may communicate directly with the President, Vice President, Counsel of the President, Assistant to the President for National Security Affairs, and various others. Then it provides the staff members it can consult with.

Directly with officials and staff of the Office of the President, Office of the Vice President, Office of the Counsel of the President, National Security Counsel, and so forth.

Now, I took the position that that was pretty much kicking down a very important door that had protected the department from political influence, but I see in your May 4th, 2006 memorandum a number of things that concern me even more.

The first is at the bottom of the first page where there is an asterisk footnote which says at the bottom, for convenience, the executive functions of the Vice Presidency are referred to in this document as the Office of the Vice President, or OVP, and the provisions of this memorandum that apply with respect to communications with the EOP, Executive Office of the President I assume that is, will apply in parallel fashion to communications with the Office of the Vice President.

Let me ask you first, what on earth business does the Office of the Vice President have in the internal workings of the Department of Justice with respect to criminal investigations, civil investigations, and ongoing matters?

Attorney General GONZALES. As a gentleman, I would say that's a good question.

Senator WHITEHOUSE. Why is it here, then?

Attorney General GONZALES. I'd have to go back and look at this.

Senator WHITEHOUSE. I'd like to know where this came from, and how that addition was made.

Then if you look at the very back, the very last paragraph, once again there is a final paragraph set off by asterisks that pretty much undercuts everything that was said in the previous enumerated paragraphs.

Here, you can see the difference. It's almost identical with the previous memorandum, only it adds some things. Not withstanding any procedure or limitation set forth above, the Attorney General may communicate directly with the President, Vice President, so far same as the Ashcroft memorandum.

Then you add, their Chiefs of Staff, Counsel to the President, then you add, or Vice President. Somebody took the trouble to write in Counsel to the Vice President and provide that individual access to ongoing criminal investigations, ongoing civil investigations, and ongoing other investigative matters.

Attorney General GONZALES. Which I don't know whether or not that in fact has happened. So I want to emphasize that.

Senator WHITEHOUSE. Part of what we do around here is to prevent things from happening.

Attorney General GONZALES. Exactly. Exactly.

Senator WHITEHOUSE. And when you kick down doors, you invite people to do it, whether or not it has been done.

Attorney General GONZALES. And I agree. And on its fact, I must say sitting here, I'm troubled by this.

Senator WHITEHOUSE. And if you continue, just let me finish, because we're not done with the paragraph.

Attorney General GONZALES. All right.

Senator WHITEHOUSE. If you go further on down, what was the staff of the Office of the President has become the staff of the White House office, and the entire Office of Management and Budget has been thrown in.

So you come here today with I think, to put it mildly, highly diminished credibility, asserting to us that you want to bring, to restore the Department of Justice, and yet here where there is something that you could do about it since our past discussion, nothing has been done. The memo that has your signature makes it worse, and we have agreed that this connection between the White House and the Department of Justice is the most dangerous one from a point of view of the potential for the infiltration of political influence in the department.

How in the light of all those facts can I give you any credibility for being serious about the promises you have made that you intend to clean up the mess you've made?

Attorney General GONZALES. Well, because we have taken, I have taken several steps to clean up, to address some of the mistakes that have been made, Senator.

I can say that I have directed my staff to try to understand what happened with respect to the Ashcroft, what was the genesis of it? In fact, we went back and talked to a former member of the Ashcroft leadership team to understand, what was the basis of the change? What caused this to happen?

And so we have been looking at this issue, because I am concerned about it. With respect to this memo, quite frankly, I'd have to look at it. I would be concerned about inappropriate access to ongoing investigations, and it is something that if it is encouraged by this kind of memorandum, I think it's something that we ought to rethink.

Senator WHITEHOUSE. I would just mention to you that Senator Leahy and I, the Chairman and I, have a piece of legislation that would restrict the department back to the original seven, unless a notification were made to this committee about other contacts that were actually made. I hope you'll consider that and support it as well.

It is very difficult at this point to take seriously your promises, however well you might mean them subjectively, to restore the Department of Justice. There are a lot of people here who love it. There are a lot of people here who think very highly of it. Everywhere I go, I find increased concern about it. People that I used to work with, people who are friends and family of people who work in the Department of Justice right now.

We have seven U.S. attorneys or more dismissed. You have the Deputy Attorney General McNulty gone, Acting Associate Attorney General Mercer gone, your Chief of Staff Kyle Sampson, gone, White House liaison Monica Goodling, gone, Chief of Staff to Deputy Attorney General Michael Ellston, gone, Director of EOUSA Mike Battle, gone.

In addition to hearing it wherever I go, you get things like the recent op ed in the Denver Post written by an active AUSA.

As a long-time attorney at the U.S. Department of Justice, I can honestly say that I have never been as ashamed of the Department and government that I serve as I am at this time.

The public record now plainly demonstrates that both the DOJ and the government as a whole have been thoroughly politicized in a manner that is inappropriate, unethical and indeed unlawful.

In more than a quarter of a century at the Department of Justice, I have never before seen such consistent and marked disrespect on the part of the highest ranking government policymakers for both law and ethics.

I realize that this constitutionally protected statement subjects me to a substantial risk of unlawful reprisal, from extremely ruthless people who have repeatedly taken such action in the past. But I'm confident that I'm speaking on behalf of countless thousands of honorable public servants at Justice and elsewhere who take their responsibilities seriously and share these views.

Some things must be said, whatever the risk. As you know, this is not an isolated feeling, and I just, I don't know how you can say

that you can help solve the problem. It appears to a lot of people that you, sir, are in fact the problem.

Attorney General GONZALES. Senator, I understand that statement. I disagree. I think the morale the department, I think is good if you look at the output. Clearly the U.S. attorney situation has not been helpful to the morale of the department. But with respect to mistakes that have been identified, we have taken steps to address them.

The fact that there has been changes in personnel, some people would say it's a good thing. It's good we have these changes, it's good these people have left. Some people like Mike Battle you cite in that list, Mike was planning on leaving because of personal reasons that had nothing to do with any of this. It is unfair to include him in this.

So I am working as hard as I can to work with the members of this committee to make improvements in the Department of Justice, responding to Senator Feinstein's earlier comment about how after hearing the opening statements of Senator Leahy and Senator Specter why I would talk about FIZA.

The reason I would is I am focused on doing the work of the people in this country who care most about making sure their country is safe from terrorism, who care most about making sure their neighborhoods are safe from gangs and drugs and violent crime, and who care most about that their children are protected from predators.

That is what I'm permanently focused on, but I'm also at the same time trying to address these problems. I feel that's my obligation as Attorney General.

Senator WHITEHOUSE. Senator Cardin.

Senator CARDIN. Thank you. I want to just raise one, to come back to the concerns that I have about selected release of information.

Our responsibility is to do the oversight to make sure that things are done according to law, that you are held accountable, and that we carry out our responsibilities as a legislative branch of government. We need a complete record in order to do that.

My concern is we get selective release of information. Today you released some information concerning the congressional advice to you in regards to an intelligence briefing at the White House.

My understanding is that the details of those types of briefings are classified information that can be released by the President. You released information concerning the advice given to you by the Congressmen that were there, Senators that were there. We don't know who was there, we don't have those details. We are not entitled to those details if I understand correctly the ground rules for these types of briefings.

So can you just, first of all, was a conscientious decision made to release that information by the White House?

Attorney General GONZALES. No. There was no approval by the White House. Listen. People made statements about my conduct in connection with the hospital visit. I think it's important for the American people and for this committee to understand the context of that visit.

Senator CARDIN. I agree with you completely. But we should have all the information. We should have all the information with the White House. We should be able to have independent review of all the information.

For example, can we get the details of that briefing supplied to this committee?

Attorney General GONZALES. Senator, you are asking me questions that really touch on White House equities, and that will be a decision made at the White House, a decision that I won't, in most cases will not be able to control.

Senator CARDIN. This committee has gotten selective information. The same thing happened to Sara Taylor when she was here. She told us information, she said I can't tell you anything about my conversations at the White House because we have executive Presidential privilege. But however, I can tell you things that I think make us look good.

Attorney General GONZALES. Senator, I don't know if that's to be the case or not. My understanding, it appeared—

Senator CARDIN. Review the testimony.

Attorney General GONZALES [continuing]. That Ms. Taylor was trying to be as helpful to the committee as she could, but that there were certain lines in which she was—

Senator CARDIN. The problem is she sees it helpful when she can advance the cause of the White House. She doesn't think it's helpful giving us subjective information to make our own judgments.

It's the same thing about your—we need to get a complete record, and we're going to get a complete record. The courts are going to ultimately make these judgments.

I just question, we are trying to find out the details of what happened at the hospital, and you give us some information about a briefing, and we don't have the rest of it. I just think it puts us in a very difficult position.

You may not have intended that to be the case, but I would certainly think that the Attorney General of the United States would want to make sure that this committee had a complete record, and that we don't have to take just selective information on making judgments.

Attorney General GONZALES. It was certainly my intent to make sure the committee had a more complete record than the testimony that has been provided in terms of what happened during that period.

Senator CARDIN. But you didn't clear your testimony about that briefing with anyone in the White House. That was your judgment to talk about the briefing?

Attorney General GONZALES. The White House was advised that this is what I was going to be talking about. I did not seek their approval, nor did I get guidance in terms of what to say.

Senator CARDIN. Thank you. I don't believe that, let me just find out whether the Chairman wants this hearing to continue, or if we are all right to do a recess. Oh. The committee will stand in brief recess. My understanding is other Senators will be returning.

[Recess from 12:52 p.m. to 12:58 p.m.]

Chairman LEAHY. The audience will be in order, and the committee will be back in order.

For those who spend much time watching Senate procedures, we know that we sometimes get interrupted by votes, and I am trying to, in this hearing, to a conclusion. Although I express my appreciation both to the majority leader and to Senator Kennedy for delaying the votes as long as they could.

Senator Schumer has asked for a little more time. I yield to Senator Schumer, and if there are no other questions, that will conclude this hearing. Of course all Senators have the right to submit questions for the record.

The witness has the right of course to look at the record, and should he want to change or amplify the answers, he can. I will be looking at that transcript. You may want to look at it very, very carefully.

Attorney General GONZALES. I will look at it very carefully, Mr. Chairman.

Chairman LEAHY. I would recommend you look at it extremely carefully.

Senator Schumer.

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate your waiting for the votes. I have just a few quick questions that I hope you'll be able to answer quickly and concisely.

First, Mr. Attorney General, at the time you went to Mr. Ashcroft's hospital bed, did you know that power had been transferred to Jim Comey?

Attorney General GONZALES. I think that there were newspaper accounts, and the fact that Mr. Comey was the Acting Attorney General is probably something that I knew of.

Senator SCHUMER. Probably you knew of it?

Attorney General GONZALES. Well, again, sitting here today, I can't tell you yes, absolutely I knew. But let me make an important point here. The fact that transfer had, let's assume that transfer had occurred. There is no governing legal principle that says that Mr. Ashcroft if he decided he felt better could decide I'm feeling better and I can make this decision, and I'm going to make this decision. But to answer your question, I—

Senator SCHUMER. But you believe you knew?

Attorney General GONZALES. Yes.

Senator SCHUMER. Is that a fair characterization?

Attorney General GONZALES. I would say that, let's just assume that I knew. But again, I'm not sure that's the main point.

Senator SCHUMER. And at the time you went to Mr. Ashcroft's hospital bed, you touched on this. What was your understanding of Mr. Ashcroft's authority?

Attorney General GONZALES. My understanding, sitting here today, my understanding is that the main focus was that Mr. Comey would be making the decision with respect to this matter.

Senator SCHUMER. All right. When you went to the hospital room, what was your understanding of Mr. Ashcroft's condition?

Attorney General GONZALES. I don't know if I can recall exactly my understanding. I suspect it was of course that he was sick, had had surgery. I may have understood that he was in intensive care.

I may have, from newspaper accounts may have understood in fact that he had problems with his pancreas or gallstones or something.

Senator SCHUMER. Did you know that all visitors had been barred by his wife because of how ill he was?

Attorney General GONZALES. I don't know if I knew that subsequently. I certainly have been made aware of the fact that she was being very, very careful in terms of who could visit with him and who could speak with him.

Senator SCHUMER. The facts have come out that all visitors were barred by her. Okay.

Next, do you have documents in your possession reflecting the transfer of power or authority from Ashcroft to Comey?

Attorney General GONZALES. I do have them now, yes.

Senator SCHUMER. You didn't have them then?

Attorney General GONZALES. I don't recall personally having them. There is some question, as I understand it, about whether they came to the White House and who at the White House had them.

But again, I'll just—

Senator SCHUMER. Wouldn't the counsel have gotten such documents?

Attorney General GONZALES. I would think so, yes.

Senator SCHUMER. So you probably had them? Would that be fair?

Attorney General GONZALES. I would say that they may have come in. I have no recollection of that.

Senator SCHUMER. Would you go through your records and produce for this committee any documents in your possession at that time, or in your offices, the Office of Counsel's possession at that time?

Attorney General GONZALES. I'd be happy to take that back and see if that can be done.

Senator SCHUMER. Why couldn't it be done?

Attorney General GONZALES. Well, I don't know, Senator. If we can do it, we'll produce it.

Senator SCHUMER. Okay. Could you give them to our committee by Friday?

Attorney General GONZALES. We'll certainly do our best.

Senator SCHUMER. Thank you. Did you discuss classified information in front of Ms. Ashcroft, who did not have a security clearance?

Attorney General GONZALES. It is my recollection that the answer to that question is no. General Ashcroft did virtually all of the talking, and he did all of the talking with respect to the legal issues. I can't, sitting here today, I don't believe that he disclosed classified information in the hospital room.

Senator SCHUMER. Okay. Let me ask you this. Who sent you to the hospital?

Attorney General GONZALES. Senator, what I can say is we had had a very important meeting at the White House over one of the—

Senator SCHUMER. I didn't ask that.

Attorney General GONZALES. I am answering your question, sir, if I could.

Senator SCHUMER. Did anyone tell you to go?

Attorney General GONZALES. It was one of the most important programs for the United States. It was important. It had been au-

thorized by the President. I'll just say that the Chief of Staff to the President of the United States and the counsel of the President of the United States went to the hospital on behalf of the President of the United States.

Senator SCHUMER. Did the President ask you to go?

Attorney General GONZALES. We were there on behalf of the President of the United States.

Senator SCHUMER. I didn't ask you that.

Attorney General GONZALES. I understand that.

Senator SCHUMER. Did the President ask you to go?

Attorney General GONZALES. Senator, we were there on behalf of the President of the United States.

Senator SCHUMER. Why can't you answer that question?

Attorney General GONZALES. That's the answer that I can give you, Senator.

Senator SCHUMER. Well, can you explain to me why you can't answer it directly?

Attorney General GONZALES. Senator, again, we were there on an important program for this President on behalf of the President of the United States.

Senator SCHUMER. Did you talk to the President about it beforehand?

Attorney General GONZALES. Senator, obviously there were a lot of discussions that happened during that period of time. This involved one of the President's premier programs.

Senator SCHUMER. But sir, you are before this committee, you are before this committee, you are supposed to answer questions. You have not claimed any privilege. I don't think there is any here, and I asked you a question and you refuse to answer it. Why?

Attorney General GONZALES. If I can answer the question, I will answer the question.

Senator SCHUMER. You did that. I know, but could you tell me why you can't answer this question?

Attorney General GONZALES. Senator, because again, this relates to activities that existed when I was in the White House. Because of that with respect to your specific questions, I will go back and see whether or not I can answer the question.

Senator SCHUMER. Did the Vice President send you?

Attorney General GONZALES. Again, Senator, we were there on behalf of the President.

Senator SCHUMER. Did you talk to the Vice President about it?

Attorney General GONZALES. We were there on behalf of the President, sir.

Senator SCHUMER. You will not answer that question as well, is that correct?

Attorney General GONZALES. We were there on behalf—I'd be happy to take back your question, and if we can respond to it, we will.

Senator SCHUMER. Okay. Now, you kept referring to this meeting of the gang of eight. Did any member of the gang of eight direct you to go Ashcroft's hospital bed?

Attorney General GONZALES. No. In fact, I'm not sure—

Senator SCHUMER. Was there any discussion—

Attorney General GONZALES. No. I'm not sure that they knew that we went.

Senator SCHUMER. So they had no knowledge you were doing that?

Attorney General GONZALES. Let me put it this way. I did not tell them that we were going to do it.

Senator SCHUMER. Okay. Did every member of the gang of eight know that Comey, Ashcroft, and Muller and others were prepared to resign over the program?

Attorney General GONZALES. Well, first of all, I'm not aware that that is true, that saying is true. But in terms of, I'm not sure that we got into discussions about any resignations. The discussions centered on the fact that Mr. Comey was unwilling to authorize the continuation of this very important intelligence activity, and that we were there to seek help from Congress for legislation.

Senator SCHUMER. Understood. But you didn't, did they know that there was dissent within the administration on this, within the Justice Department?

Attorney General GONZALES. I was pretty clear, quite frankly, in making sure that they understood that the Deputy Attorney General did not believe that the President had the authority to authorize these activities.

I tried to paint—I didn't want to be accused in any way of not presenting in the most forceful way that I could the disagreement that existed. So I, yes, I think that they understood that there was serious dissent.

Senator SCHUMER. Okay. But you testified to us that you didn't believe there was serious dissent on the program that the President authorized, and now you're saying they knew of the dissent, and you didn't?

Attorney General GONZALES. The dissent related to other intelligence activities. The dissent was not about the terrorist surveillance program.

Senator SCHUMER. So if we asked the eight who were there, they would say that's the case? Would they say that? Would they say it was not about the TSP? That it was about other issues? I thought you just testified that you brought them to talk about that issue because you needed legislation.

Attorney General GONZALES. I can't tell you what they would say if you asked them the questions, sir. I'm just telling you what I recall.

Senator SCHUMER. Sir, we're back in the same conundrum as always. It just doesn't seem that you're leveling here with the American people or the committee.

Attorney General GONZALES. I don't see how I can be more clear.

Senator SCHUMER. Sir, you said that they knew that there was dissent. But when you testified before us, you said there has not been any serious disagreement and it's about the same—it's about the same exact—you said the President authorized only one before.

The discussion, you see, it defies credulity to believe that the discussion with Attorney General Ashcroft or with his group of eight, which we can check on, and I hope we will, Mr. Chairman, that will be yours—was about nothing other than TSP. If it was about the TSP, you are—to this committee.

Now, was it about the TSP or not, the discussion on the 8th?

Attorney General GONZALES. The disagreement on the 10th was about other intelligence activities.

Senator SCHUMER. Not about the TSP? Yes or no.

Attorney General GONZALES. The disagreement and the reason we had to go to the hospital had to do with other intelligence activity.

Senator SCHUMER. Not the TSP? Come on. If you say it's about other, that implies not. Now say it or not.

Attorney General GONZALES. It was about other intelligence activities.

Senator SCHUMER. Was it about the TSP? Yes or no, please. That is vital to whether you are telling the truth to this committee.

Attorney General GONZALES. It was about other intelligence activities.

Senator SCHUMER. Okay. All right. Let me ask you this. Did the gang of eight have access to the Office of Legal Counsel opinions expressing concerns about the program's legality?

Did they know that the Justice Department Office in charge of saying whether this program was legal or not said it's not?

Attorney General GONZALES. In essence, what they understood was that the Department of Justice, Mr. Comey, was unwilling to approve the continuation of these intelligence activities.

Senator SCHUMER. I know that. Did they have any access, you're having a discussion here, you are asking them to approve new legislation. Don't you think it would be extremely logical and fair to tell them that the Office of Legal Counsel disagreed?

Attorney General GONZALES. I think it would be equally logical for them to assume that if the Deputy Attorney General took that position, that perhaps the Office of Legal Counsel might also have that same position.

Senator SCHUMER. All right. I know the Chairman wants to wrap up, and I appreciate that. Just one other quick question here.

Senator Leahy, Chairman Leahy and Senator Specter and I have discussed some idea, that would have to go ahead with this, of having the special prosecutor, Patrick Fitzgerald, come testify before the committee.

Now, just last week on July 17th, the department made available to the committee Texas U.S. attorney Johnny Sutton, who is in the exact same position as Fitzgerald is. In other words, Sutton testified at length about the case, about border agents Ramos and Campion. In that case, as in this, the trial is over, and in that case, as in this, there are appeals pending.

Mr. Sutton testified about issues that will not affect the appeal. So my question to you is should this committee, and that decision is not mine, but should this committee, and given the public interest in this case, wish to bring Patrick Fitzgerald before us, would you have any objection?

Attorney General GONZALES. Senator, you know, I am recused from Mr. Fitzgerald's investigation. So I'm not sure that I'd be in a position to say one way or the other.

Senator SCHUMER. Who would make that decision?

Attorney General GONZALES. It would be the Deputy Attorney General.

Senator SCHUMER. So the Acting Deputy Attorney General would make that decision?

Attorney General GONZALES. No, the Deputy Attorney General, Paul McNulty.

Senator SCHUMER. Paul McNulty. Okay. But you are not going to opine whether that would be okay?

Attorney General GONZALES. I don't believe so. Again, I was recused from that investigation.

Senator SCHUMER. Okay. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Specter.

Senator SPECTER. Just a few concluding comments. Attorney General Gonzales, I would ask you to take a close look at the functioning of your department, or perhaps consult with others to give you an objective view as to what is happening.

The consensus appears to be that the morale is at an all time low from what has happened. The U.S. attorneys around the country don't know when the next shoe is going to drop, although perhaps replacements or requests for resignations have been tempered to slow down and perhaps even eliminated because of the focus of this committee's inquiry.

But I would ask you to take a look at that morale issue.

Attorney General GONZALES. I will do so.

Senator SPECTER. And then I'd ask you to take a look at how the department is functioning generally. I mentioned the Oxycontin case only because it received a lot of newspaper publicity.

The case involving the homicide where you asked for the death penalty also received a lot of publicity. But it looks to me candidly, Attorney General Gonzales, as if the department is dysfunctional.

When you have many people killed and many people addicted from a dangerous drug where there is malicious misleading of the consumers, that constitutes malice. That is criminal conduct.

The profits that are made from these drugs are in the billions. So when you have even $600 million, I don't know all the details, and this committee can't possibly run your department. We can't possibly run your department.

I know you are recused technically, but you are still the Attorney General. We really ought to reach an accommodation with the administration on finishing up this investigation.

I think you would obviously be as anxious to have it finished as anyone, perhaps more so. We have made concessions to what the President has proposed, and I wrote to White House counsel. You're not White House counsel anymore, and talked to Mr. Fielding about a meeting where Chairman Conyers, Chairman Leahy and I might talk to the President. I found dealing with the President would move above the levers of bureaucracy to be able to come to conclusions and come to judgments.

The transcript issue seems to me fundamental. I don't know why any witness would want to appear before a committee on an informal basis and not have a transcript so that someone might contend at a later time that a false official statement was made which carries the same penalty as perjury, 5 years. I don't know why anyone would want that.

But if they insist on it, I'd even take that. I think that John Conyers and Pat Leahy and Chuck Schumer and Arnold Specter and

others could find out a lot of information, even on an informal basis. But I won't give up the Senate's right to pursue a subpoena if we feel it necessary.

We cannot delegate that. I think back to the great attorneys general in our history. Edmond Randolph, Washington's attorney general, Harlen Fisk Stone, later Chief Justice of the Supreme Court, Robert Jackson, FDR's attorney general, still citing his opinions on a wide variety of subjects.

I would just ask you to consider the interest of the Department of Justice and the interest of the American people, because your department, next to the Department of Defense, is the most important department in the government. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter. I find this frustrating. I have a lot more questions, and I find it so difficult to get answers, I may or may not submit them for the record.

But I think the tragic thing here is the ongoing crisis in the ongoing crisis of leadership of the Justice Department is the undermining of good people in the crucial work the department does.

There are thousands of honest, hard working prosecutors and civil servants. They work every day. They deter crime or prevent crime or uncover crime.

I know in my years as a prosecutor, the admiration I had for them. I've worked with them for decades since, both Republican and Democratic administrations, the professionals, the career people.

I have never had any one of them say anything to me that indicates one way or the other what their political feelings are. I just got straight answers.

But I, you say morale is good. It is not, and I'm not trying to put words in your mouth. Let me just say this. You come here seeking our trust. Frankly, Mr. Attorney General, you've lost mine. You've lost mine. This is something I have never said to any cabinet member before, even some of whom I've disagreed with greatly.

I hope you can regain the trust of the hardworking men and women who are at the department. They deserve better. Now, once a government shows a disregard for the independence of the justice system and the rule of law, it is very hard to restore people's faith.

Any prosecutor will tell you when they go into court, they carry with them the credibility of their office. If that credibility is lost, it's an uphill battle the whole way through.

This Committee will do its best to try to restore independence and accountability, and commitment to the rule of law, to the operations of the Justice Department. I'll be joined by a lot of the Senators, Republican and Democratic.

I take no pleasure in saying this, but I am seriously gravely disappointed. Thank you. If you wish to say something—then we stand adjourned.

[Whereupon, at 1:19 p.m., the Committee was adjourned.]

[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 25, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions for the record, which were posed to former Attorney General Alberto Gonzales following his appearance before the Committee on July 24, 2007. The hearing concerned Department of Justice Oversight. This submission provides responses to a large number of questions posed by the Committee. The Department is working expeditiously to provide the remaining responses, and we will forward them to the Committee as soon as possible.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to the submission of this letter.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of further assistance with this, or any other matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record
Posed to former Attorney General Gonzales
Following the July 24, 2007,
Senate Committee on the Judiciary Hearing
Regarding DOJ Oversight
Part 1

Leahy 3 The Washington Post reported on July 28 that in October 2004, the FBI did report an intentional violation of law in connection with the collection of financial information as part of a national security investigation. That report was sent to the Department of Justice. How is that report consistent with your April 2005 and July 2007 testimony, by any definition of abuse or violation?

ANSWER: While the October 2004 Intelligence Oversight Board (IOB) report by the FBI notes that the FBI agent's conduct of requesting financial records was intentional, the report also makes clear that the agent, who was a rookie in probationary status, did not realize that she had acted contrary to the statute and FBI policies. Thus, while the agent's conduct was clearly intentional and in violation of the relevant laws and policies, such an unwitting violation should not be viewed as systematic and recurring "abuse." Additionally, as you know, the matter was referred to the FBI's Office of Professional Responsibility to determine what actions should be taken with respect to the agent.

Leahy 4 According to news reports and briefings provided by the FBI, the FBI has been conducting an internal audit of its use of National Security Letters that has confirmed the findings of the March 2007 Inspector General report that there was and I quote: "widespread and serious misuse of the FBI's national security letter authorities." Do you agree that on your watch, there has been "widespread and serious misuse of the National Security Letter authorities"?

ANSWER: The Inspector General (IG) did not find intentional or deliberate violations of the national security letter (NSL) statutes, Attorney General Guidelines, or internal FBI policies with respect to the issuance of NSLs. However, the deficiencies identified that with respect to the FBI's use of NSL authorities are serious and, as a result, Former Attorney General Gonzales and FBI Director Mueller ordered substantial and significant corrective actions to address those problems, including implementation of all of the IG's recommendations.

Leahy 36 The President issued an executive order recently governing interrogations conducted by the CIA. While the order took the positive step of recognizing that the Geneva Conventions and the ban on cruel and inhuman treatment apply to CIA detention and interrogations, it also suggested a return to secret prisons and unchecked

38236.146

interrogations. Does the issuing of this order mean that the President is authorizing the resumed use of secret CIA prisons?

ANSWER: As the President explained on September 6, 2006, the CIA detention and interrogation program has disrupted terrorist attacks and saved lives. Congress enacted the Military Commissions Act of 2006 to ensure that the CIA program could go forward, consistent with United States obligations under Common Article 3. Accordingly, the President issued the Executive Order to provide authoritative guidance as to the meaning of Common Article 3 as it applies to the CIA program. Beyond that, we are not able to discuss publicly the status of any ongoing intelligence activities.

Leahy 37 The executive order provides for no external check on the interrogation techniques used or the conditions of these prisons. Given the recent history of abuses, on what basis should we rely on this Executive Order to ensure that detainees will be kept and interrogated in accordance with the law, international obligations, and sound policy?

ANSWER: The statutory prohibitions incorporated into Executive Order 13440 provide clear external checks on the CIA program. The Order specifically requires that the CIA Director issue written policies to ensure that the activities within the CIA program comply with all applicable laws (including the anti-torture statute and the War Crimes Act), as well as the detailed procedures and safeguards contained within the Order. The Order requires appropriate training for CIA personnel, effective monitoring to ensure the safety of detainees, and rigorous compliance with the procedures and safeguards contained within the Order. The President has directed that anyone who breaks the rules be held accountable, and violators could face administrative action by the CIA Director. For those violations that constitute crimes, there is also the potential for criminal prosecution.

Leahy 40 Kyle Sampson and Monica Goodling claimed that approval to factor politics into the hiring of immigration judges came from the Justice Department's Office of Legal Counsel. However, on May 25th, the Department issued a statement that it had no record of such an opinion. Do you agree that your office was violating civil service laws, which prohibit political considerations in hiring, by using politics as a screen for selecting immigration judges?

ANSWER: The Department has not located any record of legal advice that Immigration Judges are not subject to civil service restrictions on hiring based on political affiliation. The Department agrees that Immigration Judges and Board of Immigration Appeals ("BIA") members occupy positions that have not been exempted from the civil service requirements of 5 U.S.C. § 2302 (with the exception of the BIA Vice Chair, who occupies a general Senior Executive Service position that may be filled by a career or non-career appointee). The civil service laws would permit political affiliation to be taken into account if the positions were exempted or if they were reclassified, but the Department is aware of no plans to do so.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00295 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.147

The Department's Office of Inspector General and Office of Professional Responsibility are currently examining the allegations referenced in your question, and we defer further comment on the matter until the completion of their work.

Leahy 44 The report also notes that the Department's Office of Information Policy – the office responsive for coordinating FOIA compliance in the federal government – provided inaccurate information to Congress regarding its oldest outstanding FOIA requests. The Department reported in its 2006 annual report to Congress that its oldest FOIA requests dated back to February 5, 2002. However, the Department provided information to the National Security Archive indicating that requests date back further. Did the Department provide inaccurate information to Congress? Do you want to correct the record regarding these outstanding FOIA requests?

ANSWER: The Office of Information and Privacy (OIP) provided accurate information to Congress. The National Security Archive subsequently corrected its report to reflect that fact. The Department of Justice accurately reported to Congress in 2006 that its oldest FOIA request was from February 5, 2002. That date is the date the request was received, which is the legally operative date as provided for in the FOIA statute. The National Security Archive, which received a copy of the request letter, made its erroneous assertion by using the date of the request letter rather than the date of its receipt by the Department of Justice, although both dates were clearly visible on the face of the letter. The delay between the two dates was likely the result of the Anthrax mail screening program that took place in 2001-2002. After being contacted by OIP, the National Security Archive corrected its report to clarify its earlier statement. The corrected report now states that "[b]ecause agencies calculate their response time from the date of receipt of the request, OIP's report to Congress listing its oldest pending request as dating from February 5, 2002 is not inaccurate."
http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB224/index.htm

Specter 56 The Administration has produced legislation, the FISA Modernization Act of 2007, to modernize the FISA. This was first introduced near the end of the last Congress. In your testimony, you stated that "While FISA has been and continues to be one of our most valuable intelligence tools, it is imperative that the statute be modernized to account for the new technologies and threats of the 21st century. It has been almost thirty years since FISA was enacted, and revolutionary advances in telecommunications technology in that time have upset the delicate balance that the Congress originally struck in the statute. As a result, FISA now imposes a regime of court approval on a wide range of intelligence activities that do not substantially implicate the privacy interests of Americans—an unintended consequence that has impaired our intelligence capabilities. In many cases, FISA now requires the Executive Branch to obtain court orders to monitor the communications of individuals posing a threat to our national security located overseas. This process of obtaining a court order necessarily slows, and in some cases may prevent, the Government's efforts to conduct surveillance of communications that are potentially vital to protecting the national security. This situation is unacceptable—we must quickly reform FISA's outdated legal framework and ensure

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00296 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.148

that the Intelligence Community is able to gather the information it needs to protect the Nation." However, in the February 6, 2006 hearing that the Senate Judiciary held on the TSP, you stated: "And I know today there's going to be some discussion about whether or not we should amend FISA. I don't know that FISA needs to be amended per se. Because when you think about it, FISA covers much more than international surveillance. It exists even in the peacetime. And so when you're talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite reasonable. And so that's one of the dangers of trying to seek an amendment to FISA is that there are certain parts of FISA that I think provide good protections. And to make an amendment to FISA in order to allow the activities the president has authorized, I'm concerned will jeopardize this program." However, in your letter dated January 17, 2007 to Chairman Leahy and me, you informed us: That on January 10, the FISA 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." You further said that in light of this order, "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." You also informed us that the President had determined not to reauthorize the Terrorist Surveillance Program because the FISA Court orders will "allow the necessary speed and agility." In light of these statements, could you tell me why the Administration wishes to modernize the FISA?

ANSWER: The prior statements you cited are not inconsistent with the continuing need to modernize FISA and the existence of the FISA Court orders does not alter the need to modernize FISA permanently and comprehensively to reflect the new threats and technologies of the 21st Century. Changes in telecommunications technologies since 1978 have resulted in FISA's requiring the Government to obtain court orders to intercept the communications of persons overseas—a result that hampers our intelligence capabilities in a manner that we believe was not intended by FISA's drafters and that does not advance the privacy interests of Americans in the United States. It simply makes no sense to extend FISA Court procedures and protections to terrorist suspects overseas. The Administration's FISA modernization proposal incorporates many provisions supported by members of Congress last year—including several proposals made in the bill you introduced, S. 2453 (National Security Surveillance Act of 2006).

The Protect America Act of 2007, which passed the Senate and House with bipartisan support, was a good start. We urge Congress to make that Act permanent and to enact other important reforms to FISA. In particular, it is imperative that Congress provide liability protection to companies alleged to have assisted the Government with intelligence activities in the wake of the September 11 attacks. The Department of Justice looks forward to working with the Congress, and with this Committee, on this important issue.

Specter 57 I am concerned about the provision in the Administration's recent FISA bill that grants immunity for telecommunications companies that have cooperated with the Terrorist Surveillance Program (or any other intelligence surveillance program) since the Sept. 11, 2001, attacks. (Section 408). The White House has failed to provide

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00297 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.149

Congress with sufficient information about the role of the companies in the Terrorist Surveillance Program or any other program. Congress cannot grant these companies blanket immunity without first learning the facts. For this provision to even be considered, the Administration will have to provide a detailed briefing to Congress about the role these telecommunication companies have played. To this end, what plans have been made to brief the Congress on these essential facts?

ANSWER: Throughout the war on terror, the Administration has notified the Congress about the classified intelligence activities of the United States through appropriate briefings of the Intelligence Committees and congressional leadership. For example, the full membership of each Intelligence Committee has been briefed on the Terrorist Surveillance Program, as have other members of the congressional leadership. Under the National Security Act and the well-established and bipartisan tradition and understanding of both the Executive Branch and Congress, these are the appropriate Committees and Members to address such issues.

With respect to the details you seek, negotiations between the Chairman and the Administration continue on these matters. We are not able to provide additional details on any planned briefings at this time. Nevertheless, we think it is imperative to enact meaningful protection for those who are alleged to have assisted the Government in a time of great need.

Specter 58 In your written testimony you state that your proposed omnibus crime bill, the Violent Crime and Anti-Terrorism Act of 2007, "makes the US Sentencing Guidelines mandatory, as Congress intended, rather than merely advisory. How do you square your testimony with the Supreme Court's decision in U.S. v Booker, 543 U.S. 220 (2005), wherein the Court rejected a mandatory application of the Guidelines?

ANSWER: Under the mandatory guidelines system we are proposing, the sentencing guidelines' minimum would return to being mandatory and again have the force of law, while the guidelines' maximum sentence would remain advisory. This would comport with the constitutional requirements of *Booker*, because defendants, upon conviction, would always be subject to the maximum statutory penalty set by Congress, rather than being subject only to the maximum set in the guidelines. Moreover, such a system would embody the time-tested values of the Sentencing Reform Act of 1984. The sentencing guidelines would work in the same manner they have since their inception: with judges identifying aggravating and mitigating factors in individual cases, with carefully circumscribed judicial discretion, and with results that are certain, consistent and just.

Specter 59 In Booker, the Court stated, "We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system. But, we repeat, given today's constitutional ruling, that is not a choice that remains open." How do you reconcile your proposal and testimony with this language from the Booker decision?

ANSWER: The majority in *Booker* contemplated that advisory guidelines would not be a permanent solution and anticipated that Congress would consider legislation in the wake of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00298 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.150

Booker. Indeed, Justice Breyer stated in his majority opinion that "[t]he ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice." *Booker*, 543 U.S. at 220,265 (2005).

Specter 60 Your proposed bill establishes the Sentencing Guidelines as a mandatory floor – the minimum Guidelines range is binding – but the Guideline maximum is merely advisory. Accordingly, under this approach, which has been labeled a "topless" approach, a court could go no lower than the low range of the Guideline range, but could impose a sentence as high as the statutory maximum. Didn't the Supreme Court in Booker reject the Government's argument along these same lines in the Booker court's remedial holding?

ANSWER: The Department has closely examined the constitutionality of this proposal. We understand that it can survive only as long as the Supreme Court declines to extend the rule in *United States v. Blakely,* 178 Fed. Appx. 302 (4th Cir.), cert. denied 498 U.S. 905 (1990) to findings necessary to enhance a mandatory minimum sentence. We acknowledge that the proposal relies on the Supreme Court's holdings in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Harris v. United States*, 536 U.S. 545 (2002), which held that judges can sentence defendants based upon facts found by the judge, rather than a jury, as long as these facts are not used to increase the maximum sentence a defendant faces. Thus, courts may impose mandatory minimum sentences based on their own fact-finding. There is no reason to believe that these cases have been weakened that allow judges to impose such mandatory minimums. Although *Harris* was a plurality opinion, it was issued only a few years ago, after *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which the Court explicitly found did not apply. While *Blakely* has redefined what the "maximum sentence" faced by a defendant is, it has not undermined the concept that courts can find facts that determine mandatory minimum sentences within the maximum sentence. Thus, the Department's proposal addresses the Court's concern and complies with *Blakely* and *Booker* by allowing only judicial fact finding within the maximum authorized by the jury's finding of guilt or the defendant's plea.

Specter 61 Maher Arar is a Canadian who, on September 26, 2002, during a stopover in New York, was detained by the United States Immigration and Naturalization Service. Despite carrying a Canadian passport, he was forcibly removed to Syria, the land of his birth. Arar was held in solitary confinement in a Syrian prison where he was regularly tortured for almost a year, until his eventual release and return to Canada in October 2003. Why was Mr. Arar sent to Syria, and not Canada?

ANSWER: The Department provided a classified briefing on the Arar matter to Chairman Leahy and Ranking Member Specter on February 1, 2007. In addition, the Department has sent classified documents regarding the Arar matter to the Senate Select Committee on Intelligence (SSCI) and notified Chairman Leahy and Senator Specter that they can view those documents via SSCI.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00299 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.151

Specter 62 In your previous responses, you have stated that "we do not transport anyone to a country if we believe it more likely than not that the individual will be tortured; and we seek assurances, where appropriate, that transferred persons will not be tortured." Considering Syria's long and ignominious record of abusing its own people, how could Syria reasonably assure you that Mr. Arar was in no danger?

ANSWER: Please see the response to question 61, above.

Specter 64 In your March 6, 2006 remarks you stated that "we do not transport anyone to a country if we believe it more likely than not that the individual will be tortured." Is that your understanding of the "substantial grounds" standard required of us by the Article 3 of the UN Convention Against Torture?

ANSWER: Yes. As set forth in the Senate resolution consenting to U.S. ratification of the U.N. Convention Against Torture, "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.'" Text of Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment as agreed to in the Senate on October 27, 1990, section II(2), *available at* 136 Cong. Rec. 36198 (1990); *see also* 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").

Specter 73 The Seattle Post-Intelligencer has reported that thousands of white-collar criminals across the country are no longer being prosecuted in federal court – and, in many cases, not at all – leaving a trail of frustrated victims and potentially billions of dollars in fraud and theft losses – as a result of this Administration's massive restructuring of the FBI after the terrorism attacks of 9/11. According to this report, the White House and the Justice Department have failed to replace at least 2,400 FBI agents transferred to counterterrorism squads. It has further been reported that as Attorney General, you have rejected the FBI's pleas for reinforcements behind closed doors. Is this report true?

ANSWER: The FBI's post-9/11 reallocation of Special Agents (SAs) previously assigned to its criminal program did not diminish the FBI's commitment to criminal matters, but it did reduce the number of FBI SAs available to prevent and respond to crime. The FBI appreciates the efforts of this Committee and the Appropriations Committees to ensure we have the necessary resources. As always, the FBI will work with other DOJ components and OMB to identify the programs and budgeting needed for the FBI to continue to fulfill its responsibilities.

Specter 74 If so, why did you choose not to replace these FBI agents?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00300 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.152

ANSWER: Please see the response to question 73, above.

Specter 75 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. Last year you declined to take a position on centralizing immigration appeals. Therefore, I ask you again, do you support centralizing immigration appeals in a single court of appeals?

ANSWER: As you know, immigration reform is a difficult task. It is often not possible to take a firm position on any single immigration issue without knowing what the other parts of an immigration reform package would look like. Consolidating or centralizing immigration appeals in a single court is such an issue. The Department is not categorically opposed to centralizing immigration appeals in a single court of appeals. The Department also acknowledges, however, that immigration litigation reform can be achieved through a variety of mechanisms and that a solution will likely require multiple parts. Moreover, any immigration litigation reform must ensure that other litigation (government and non-government) is not adversely affected.

The Department is very grateful for the additional resources it has received from Congress to litigate immigration cases. These resources allow the Department to meet its obligations to defend final orders of removal in the courts of appeals and, at the same time, meet many of its other critical obligations in other types of cases. It is very important that the Department have the resources to defend immigration cases in the courts of appeals and to carry out its other litigation duties and obligations.

Specter 76 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." It has recently come to my attention that immigration judges largely operate without the assistance of law clerks. Would you support the hiring of law clerks to assist immigration judges?

ANSWER: Yes. In an August 9, 2006, memorandum that followed the completion of the comprehensive review of the immigration courts and the Board of Immigration Appeals, the Attorney General instructed the Deputy Attorney General and the Director of the Executive Office for Immigration Review (EOIR) to prepare a plan for seeking a budget increase beginning in Fiscal Year (FY) 2008. One purpose for the budget increase was to fund the hiring of more law clerks for the immigration judges. The War Supplemental in FY 2006 authorized EOIR to hire 20 more law clerks (and the money to fund this authorization permanently is included in the Administration's FY 2008 request). In addition, the Department requested and received an additional 20 law clerks in the Administration's FY 2007 request. Accordingly, the Department

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00301 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.153

supports—and has supported—hiring law clerks for immigration judges and asks for your help and support in securing that funding.

Kennedy 77 This Administration has repeatedly refused to discuss specific techniques used to interrogate detainees, arguing that such techniques are classified. During last week's hearing you refused to discuss five specific interrogation techniques when Senator Durbin and I questioned you about their legality -- painful stress positions, threatening detainees with dogs, forced nudity, waterboarding, and mock execution. In response, you stated at one point, "Senator I'm not going to get into a public discussion here about possible techniques that may be used by the CIA to protect our country." You declined to confirm whether those particular techniques were legal but you and the President are more than willing to comment on the legality of other specific techniques -- those contained in the Executive Order, which publicly prohibits sexual or sexually indecent acts, sexual mutilation, threatening to use the detainee as a human shield, and acts intended to denigrate a detainee's religion or religious practices. Without discussing the substance of the techniques at issue, please explain why you believe public discussion of specific techniques in the Executive Order do not compromise the effectiveness of the classified CIA Program?

ANSWER: As the President has explained, we cannot discuss publicly, and thereby share with al Qaeda operatives, information on what techniques are used in the CIA interrogation program because it would compromise the effectiveness of that vital program. *See, e.g.*, Address of the President (Sept. 6, 2006) ("I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country.").

Executive Order 13440 ensures that all detainees in the CIA interrogation program are to be treated humanely, in accordance with Common Article 3, by providing the general standards and procedures with which the program must comply. As you note, to provide additional clarity, the Order does identify examples of certain serious and outrageous conduct that any reasonable person would deem beyond the bounds of human decency under any circumstances. The specific acts mentioned in section 3(b)(i)(E) of the order are acts well-recognized as violations of Common Article 3, including in the decisions of international war crimes tribunals. Accordingly, we believe that identifying such prohibited conduct provides greater clarity as to how the United States understands its obligations under Common Article 3 without disclosing classified operational details concerning the CIA program. It would be incorrect to assume, of course, that other acts, which are not specifically prohibited by the Executive Order, are therefore authorized for use in the program.

Kennedy 78 You testified that the Executive Order, "laid out a very careful framework . . . to get information . . . in a way that is consistent with our legal obligations." Do you believe that the Order's prohibitions on specific techniques in Section E are necessary to this framework or are these specific acts already covered by the prohibition in

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00302 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.154

Section D of the Executive Order? In either case, please explain why you believe the prohibitions on specific acts are, or are not, covered by Section D.

ANSWER: On September 6, 2006, the President recommended the passage of military commission legislation that would have provided that conduct satisfying the prohibition on "cruel, inhuman, and degrading treatment or punishment" codified in the Detainee Treatment Act of 2005 (DTA) would satisfy United States obligations under Common Article 3. There is a strong argument that the prohibition of the DTA, which reflects the constitutional protections that apply to American citizens, are equally or more protective than the baseline wartime standards established by Common Article 3. Some members of Congress expressed concern, however, about codifying the DTA standard as a ceiling upon our Nation's international obligations. Accordingly, under the Military Commissions Act of 2006 (MCA), Congress chose to clarify United States obligations by defining the grave breaches of Common Article 3 under the War Crimes Acts, *see* MCA § 6(b), recognizing the DTA prohibition as an additional prohibition directed at satisfying United States obligations under Common Article 3, *see id.* § 6(c), and reinforcing the President's authority to interpret the meaning and application of the Geneva Convention, including by specifying higher standards than those codified into law, *see id.* § 6(a).

The President exercised that authority under Executive Order 13440. Section 3(b)(i)(D) provides, consistent with the MCA, that the DTA prohibition constitutes an additional requirement with which the CIA program must comply in order to ensure that the program is consistent with Common Article 3. As you note, however, the order does not stop there, but includes additional prohibitions, including section 3(b)(i)(E)'s prohibition on "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the actions beyond the bounds of human decency." This standard is consistent with how international tribunals have interpreted the "outrages upon personal dignity" term in Common Article 3 conflicts.

Much of the conduct that would violate section 3(b)(i)(E) also would likely be prohibited by section 3(b)(i)(D). The Executive Order, however, requires that the CIA program comply with both of these prohibitions so as to demonstrate and ensure United States compliance with Common Article 3. This approach is consistent with the President's authority not only to interpret the meaning and application of Common Article 3, but also to require the United States to meet higher standards than those codified into law.

Kennedy 79 The most obvious conclusion to be drawn in resolving the apparent inconsistency between the Executive Order's specific discussion of certain techniques and your unwillingness to do the same is that the administration is willing to discuss only those techniques that it considers to be illegal and would therefore not use in any case. In light of the Executive Order's direct prohibition of certain specific techniques, please explain how we may interpret your inability to discuss waterboarding, painful stress positions, forced nudity, use of dogs, and mock execution as anything but a confirmation that the Department of Justice and the President view these techniques as legal in certain circumstances under the President's Executive Order?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00303 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.155

ANSWER: Please see the response to question 77, above.

Kennedy 80 In responding to my questions at the hearing you testified that the Executive Order's prohibition of specific techniques was justified because those acts went "beyond the pale." You implied that the five techniques at issue did not rise to this same level. Can you please explain the legal definition of this standard? Focusing specifically on process, as opposed to the substance of any techniques, please also explain in detail the Department's precise procedures in assessing, or commenting upon, those acts which should be specifically prohibited and those which did not merit mention in the Executive Order? What criteria did you use in applying this standard?

ANSWER: With respect to your first question, please see the response to question 77. With respect to the process, the President issued the Executive Order following an extended interagency deliberative process. We believe that it is well established that the conduct specifically prohibited in the Executive Order violates Common Article 3. It would be inappropriate, however, to comment further on the internal deliberations within the Executive Branch.

Kennedy 81 When assessing which specific acts to prohibit, did the President or the Department consider the five acts Senator Durbin and I mentioned: painful stress positions, threatening detainees with dogs, forced nudity, waterboarding, and mock execution?

ANSWER: Please see the responses to questions 77 and 80, above.

Kennedy 82 Senator Durbin asked you whether you believed the use of these five techniques by a foreign government on an American citizen (not a uniformed soldier) would be illegal under international laws. You responded that given our own laws that interpret and codify international law, "it would depend on the circumstances." Do you stand by this statement that there are some circumstances in which use of these five specific techniques by a foreign government on an American citizen would be legal under our understanding of international law?

ANSWER: The Executive Order establishes standards that ensure that the CIA interrogation program complies with Common Article 3. As the International Criminal Tribunal for the Former Yugoslavia has recognized, the application of the "outrages upon personal dignity" standard requires a consideration of the circumstances. *See, e.g.*, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, ¶ 53 (ICTY Trial Chamber I, 1999) ("The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim"). No doubt, there are some forms of conduct that are prohibited under Common Article 3 regardless of the circumstances, and the Executive Order identifies some of them. For the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00304 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.156

reasons explained in the response to question 77, however, we do not believe it would be appropriate to discuss publicly whether other techniques would, or would not, fall under such a prohibition.

Kennedy 83 Please explain under what circumstances it would be legal to use waterboarding.

ANSWER: Please see the response to question 82, above.

Kennedy 84 Please explain under what circumstances it would be legal to use painful stress positions.

ANSWER: Please see the response to question 82, above.

Kennedy 85 Please explain under what circumstances it would be legal to conduct a mock execution.

ANSWER: Please see the response to question 82, above.

Kennedy 86 Please explain under what circumstances it would be legal to use military dogs.

ANSWER: Please see the response to question 82, above.

Kennedy 87 Please explain under what circumstances it would be legal to use forced nudity.

ANSWER: Please see the response to question 82, above.

Kennedy 92 Four federal courts of appeals have reversed an opinion of your Office of Legal Counsel on the Bureau of Prisons' placement of inmates into community reentry centers. As a result, as described in a letter I received dated June 4, 2007, the Bureau's policy is to use two different processes for making placements. In those four circuits, the Bureau follows the long-established practice which preceded the OLC opinion. In the other circuits, the Bureau still uses a process which reflects the OLC opinion. Are you concerned by this unequal application, of the Bureau's policy for placing of inmates in community reentry centers?

ANSWER: Each of the decisions from the four Circuit Courts of Appeals that have invalidated the Bureau of Prisons (BOP) regulations concerning placement of inmates into residential reentry

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00305 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.157

centers was decided by a two-to-one vote (there has been one dissenting vote to uphold the regulations in each case). The issue has been appealed or is being reviewed for appeal in three more circuits (the First, Sixth, and Ninth Circuits). Because decisions issued in one circuit do not automatically control other circuits, we will follow the rulings of the circuit courts in the four circuits where the regulations have been invalidated and will continue to apply and defend the regulations in the circuits that have not ruled on this matter. If a circuit court rules in favor of the regulations resulting in a split in the circuits, we will consider seeking Supreme Court review to resolve the issue. The goal of the BOP is to have uniform policy and to treat all inmates as equally as possible. Conflicting rulings by courts in different parts of the country certainly make it more difficult for the BOP to achieve this goal and create more work for staff. However, there are other issues where the BOP treats inmates differently based on conflicting court decisions.

Kennedy 93 Does this lay a foundation for legal challenges by individual inmates over unequal treatment?

ANSWER: Different treatment of any persons, including inmates, based on their geographic locations (i.e., judicial circuit) does not constitute a violation of equal protection. A split in the circuits, which results in different treatment of persons based upon their locations, is one of the typical reasons for the Supreme Court deciding to hear a case. The different treatment in such cases is not based on any sort of invalid distinction or classification and, therefore, does not provide a basis for a constitutional challenge.

Kennedy 94 Wouldn't a single process governing all cases be a better way to manage placements in community reentry centers?

ANSWER: We would prefer to have a consistent process nationwide.

Kennedy 95 Is this a process that Congress should approve?

ANSWER: This situation can hopefully be rectified through Congress' consideration of changes to the statutes that govern pre-release custody and the BOP's designation authority.

Section 251 of the Second Chance Act of 2007 would change the time permitted in pre-release custody from the current 10 percent of the term of imprisonment, not to exceed 6 months, to a period of time that is not more than 12 months. The provision maintains the current ability to use the last 10 percent of the term, not to exceed 6 months, for home confinement.

Expanding allowable pre-release custody to 20 percent of the term is needed to provide additional reentry assistance to inmates with short sentences. However, for inmates classified as minimum or low security, confinement in a residential reentry center is more expensive than incarceration in Federal prison, therefore, the expansion of use of residential reentry centers for pre-release purposes must be done judiciously and must not be open to an unrestricted 12

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00306 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.158

months. Therefore, the Department's position is that the 12-month limit must be paired with a 20 percent limit as well.

In addition, the provision includes language that attempts to prohibit direct court commitments by stating that "Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau...to determine or change the place of imprisonment of that person."

We believe that a stringent prohibition on direct court placements is essential; and we included preferred language as an attachment to our August 1, 2007, letter to the Committee presenting views on the Second Chance Act of 2007 that addresses both of these concerns.

Kennedy 99 In one of my written questions after your January 18, 2007 appearance before the committee, I asked this question about the standard for revoking gun dealers' licenses after they have committed offenses: "Does the Department support reducing the burden of proof to revoke a license from a 'willful' violation to a 'knowing' violation, one that would not require years of repeat offenses to revoke a license?" In your response of April 5, you noted that "willful" is the current standard, but failed to state whether the Department supports reducing this to a "knowing" standard. Does the Department support such a reduction? Please explain in detail.

ANSWER: The current standard of willfulness, as articulated in case law (purposeful disregard of, or plain indifference to, a known legal duty) is sufficient. See Procaccio v. Lambert, 2007 FED App. 0365N (6th Cir. 2007); RSM, Inc. v. Herbert, 466 F.3d 316 (4th Cir. 2006); Article II Gun Shop v. Gonzales, 441 F.3d 492 (7th Cir. 2006); Willingham Sports, Inc. v. ATF, 415 F.3d 1274 (11th Cir. 2005). The Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF's) mission is to achieve compliance from Federal firearms licensees to help protect public safety, and the current willfulness standard strikes an appropriate balance by allowing Federal Firearms Licenses (FFLs) an opportunity to comply while at the same time allowing ATF to remove those from the industry that are a danger to the public.

Kennedy 134 Your contradictory and misleading statements about the Terrorist Surveillance Program have been well documented. In February 2006 you said, "there has not been any significant disagreement about the program the President has confirmed. With respect to what the President has confirmed, I do not believe these DOJ officials that you were identifying had concerns about this program." Former Deputy Attorney General Comey's testimony, however, appeared to contradict this account. On July 24th, you testified to the same essential set of facts – most importantly that there was a significant disagreement involving senior DOJ officials over a national security surveillance program. In response to claims that you perjured yourself, you maintain that the intelligence activities at the heart of the disagreement are somehow distinct from the intelligence program that the President confirmed in December 2005. Two days later, however, FBI Director Robert Mueller again seemed to contradict your testimony, telling Congress that

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00307 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.159

the discussions that took place at the hospital concerned an "NSA program that has been much discussed." As you noted in your testimony there has only been one NSA surveillance program confirmed by the President and discussed publicly, leaving little room to misinterpret the FBI Director's remarks. The Chairman of the Senate Intelligence Committee, Senator Rockefeller, who was briefed on all of the intelligence activities, has similarly stated that they were all understood to be part of one program. Because of the doubt cast upon your testimony, and the consistent rejection by those involved of the distinctions that you rely on in that testimony, it is clear that you cannot continue to parse language on this issue while maintaining your credibility. In answering the following questions please answer truthfully and directly. To remove any doubt as to the distinctions you are relying upon please explain whether an intelligence "program" may consist of several intelligence activities, or if a program is always related to a single activity.

ANSWER: As you know, operational details concerning the Terrorist Surveillance Program (TSP) remain highly classified. Throughout the war on terror, the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The full membership of each intelligence committee has been briefed on the TSP, as have other members of the Congressional leadership. Current and former Administration officials also have testified in closed hearings regarding these matters. On July 31, 2007, the Director of National Intelligence sent a letter to the Chairman and the Ranking Member discussing this topic, and on August 1, 2007, Former Attorney General Gonzales sent an additional letter to the Chairman and the Ranking Member about this matter. We are not able to provide additional details, beyond those already provided by current and former officials, regarding the meetings you reference at this time.

Kennedy 135 If a program does consist of more than one activity, and without discussing the classified activities themselves, was it your understanding that the NSA surveillance activities being discussed at the time of the disagreement were all part of the same program? For instance, were they all briefed under one overarching title? Did they all receive funding under one programmatic title? Were all of the activities reviewed by the Department of Justice's Office of Legal Counsel together as a coordinated package of intelligence activities? Please provide any documentation in supporting your answers to these questions.

ANSWER: Please see the response to question 134, above.

Kennedy 136 Without going into the substance of any changes, is it your view that the NSA Terrorist Surveillance Program that existed before the visit to Attorney General Ashcroft in the hospital was changed into a different NSA Terrorist Surveillance Program due to the subsequent addition or revision of the intelligence activities contained in the program?

ANSWER: Please see the response to question 134, above.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00308 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.160

Kennedy 137 Did this change occur because of the elimination of an NSA data mining activity? Were any other intelligence activities changed or eliminated?

ANSWER: Please see the response to question 134, above.

Kennedy 138 Did you testify to this Committee that there was no disagreement over the "program" that the President confirmed to the American people, based on the above rationale that elimination of contentious activities contained within a single program results in the creation of a new program?

ANSWER: Please see the response to question 134, above.

Kennedy 139 If so, this would suggest that even when there is clear disagreement over the direction of a "program", the removal of controversial elements always creates a new program about which one may claim there has been no disagreement. Given this misleading reasoning, would it have been more accurate to say that there had been no significant disagreement over the intelligence activities that the President has confirmed to the American people?

ANSWER: Please see the response to question 134, above.

Kennedy 140 If this account is incorrect, is it your view, instead, that the intelligence activities at the heart of the disagreement were never part of the NSA Terrorist Surveillance Program? If that is true, then to which program did these activities belong? Please be specific.

ANSWER: Please see the response to question 134, above.

Kennedy 141 Was it your understanding at the time that the Chairman of the Senate Intelligence Committee and the FBI Director regarded the activities as falling under one program, as they have testified? Did they ever communicate this understanding to you in conversation or through written documents?

ANSWER: Please see the response to question 134, above.

Kennedy 147 At the July 24, 2007 hearing on oversight of the Department of Justice, I asked you to explain the Department's poor record of enforcing the Voting Rights Act's prohibition of voting discrimination against African Americans. As I noted then, the Assistant Attorney General for Civil Rights recently sent the Committee a letter stating

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00309 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.161

that the Department had filed four cases during this Administration alleging discrimination against African Americans in voting. However, of the cases he identified, one was actually investigated and approved during the Clinton Administration (U.S. v. Crockett County (W.D. Tenn.)), and another involved language discrimination, not discrimination based on race (U.S. v. Miami-Dade County (S.D. Fla.)). So the Bush Administration actually has filed only two voting rights cases on race discrimination against African Americans – and it took until 2006 to file those. Yet the Clinton Administration filed 18 voting rights cases alleging race discrimination against African Americans under Section 2 of the Voting Rights Act. Before you were confirmed as Attorney General, you told the Committee that you would give "special emphasis" to the Department's role in protecting civil rights and the right to vote. Given that promise, why has the Department given so little attention to combating race discrimination in voting against African Americans?

ANSWER: During this Administration, the Civil Rights Division has been exceptionally active in enforcing all provisions of the Voting Rights Act and has set a number of records in enforcement.

As stated in the attached letter from Principal Deputy Assistant Attorney General Richard Hertling to Chairman Leahy dated July 3, 2007, during this Administration, the Voting Section (Section) of the Civil Rights Division has filed four cases and successfully litigated a fifth, in addition to interposing thirty-six Section 5 objections, on behalf of African-American voters in various jurisdictions. The cases filed include *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. In addition, we successfully litigated *United States v. Charleston County, South Carolina* (D.S.C.) and successfully defended that victory through appeal to the U.S. Supreme Court. Though *Crockett County* was investigated and approved during the prior Administration, it was filed and litigated during this Administration. *Miami-Dade County* involved violations of Section 208 of the Voting Rights Act and alleged that county poll officials effectively prevented Creole-speaking Haitian-American voters in Miami-Dade County with limited ability to understand English from securing assistance at the polls from persons of their choice.

Further, a majority of all of the Division's cases ever brought on behalf of both Hispanic and Asian voters in history under the substantive provisions of the Act were brought during this Administration. On September 27, 2007, the Justice Department announced the settlement of a lawsuit against Kane County, Illinois, alleging violations of the rights of Spanish-speaking voters under the Voting Rights Act. The settlement agreement with Kane County requires the county to provide all voting materials and assistance in Spanish as well as in English and ensures that voters with limited English-proficiency can receive assistance from the persons of their choice. It also permits the Justice Department to monitor future elections. Similarly, the Division has obtained improved and extended consent agreements to better protect Native American voters in many jurisdictions, including Bernalillo, Cibola, Sandoval, and Socorro Counties, New Mexico. The Division also filed a new lawsuit under the National Voter Registration Act to protect

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00310 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.162

Laguna Pueblo and other Native American voters in Cibola County; Further, we have obtained a Choctaw language program for Mississippi, where nine counties are covered under Section 203.

During this Administration, the Division has brought two thirds of all cases *in history* under the minority language provisions of the Voting Rights Act, with a total of 26 of the 39 cases ever filed by the Division. These have included the first cases ever filed by the Section on behalf of Filipino, Korean, and Vietnamese Americans, and the first two cases ever filed by the Section under Section 4(e) of the Voting Rights Act. On September 20, 2007, the Department reached a settlement agreement with the City of Walnut, California, which requires the city to provide all voting materials and assistance in Chinese and Korean as well as in English and to permit the Justice Department to monitor future elections. This is the first lawsuit ever filed by the Civil Rights Division on behalf of Korean American voters.

The Division also has filed over 75 percent of all cases ever filed under Section 208 of the Voting Rights Act, an important protection against voter suppression through its guarantee of the right of voters who need assistance in casting their ballots to receive that assistance from any person of their choice other than their employer or union officer. The Civil Rights Division has filed seven lawsuits under Section 208 during this Administration, including the first case under the Act on behalf of Haitian Americans. The Division also filed the first case under Section 5 since 1998.

The Civil Rights Division also has been vigorous in its Section 2 enforcement. In the last year, the Civil Rights Division obtained preliminary injunctions against the use of at-large election systems in two cases. There had been no previous comparable preliminary injunctions since 1986 and only four previous such injunctions in the history of the Act. In all, during this Administration, the Civil Rights Division has filed eleven cases under Section 2 and successfully tried additional cases filed in the previous Administration. The Civil Rights Division has filed these eleven Section 2 cases across the country, in Colorado, Florida, Georgia, Massachusetts, Mississippi, New York, Ohio, Pennsylvania, and Tennessee. In addition to challenging discriminatory at-large election systems, the Division also has filed ground-breaking lawsuits in a vigorous campaign against vote suppression. Such lawsuits include *United States v. Long County, Georgia*, where Latino voters were subjected to spurious race-based challenges, and *United States v. City of Boston, Massachusetts*, where ballots were taken from minority voters and marked contrary to the voters' wishes, as well as the many lawsuits under Section 208 filed by the Division, including those noted previously.

The Civil Rights Division has also breathed new life into other statutes it is responsible for enforcing. The Division has filed the first case in decades under the Civil Rights Act of 1960. During this Administration, the Division already has surpassed the number of cases filed in the previous Administration under the Uniformed and Overseas Citizens Absentee Voting Act. The Division has filed a majority of all cases under the National Voter Registration Act (NVRA), including the first Section 7 "agency" cases since 1996. The Division recently filed an NVRA lawsuit in Cibola County, New Mexico, where hundreds of voter registration applications were not processed in a timely fashion, and where Native American voters were removed from the voter lists without the notice required by the list maintenance provisions of the NVRA.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00311 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.163

The Cibola County case also involved a claim under the Help America Vote Act (HAVA), as Native American voters were not offered provisional ballots as required under the statute. HAVA is a major statute that has required an extensive commitment of resources by the Division. The Division has filed nine lawsuits under HAVA since it was passed in 2002 and has performed extensive outreach to state and local election offices to encourage voluntary compliance with the Act's complex provisions.

In all, the Civil Rights Division actually has filed substantially more voting cases during this Administration than were filed during the comparable period of the previous Administration.

Kennedy 148 When I asked about the Department's voting rights record at the hearing, you testified that you had reviewed the testimony of Professor Helen Norton at the June 21, 2007 civil rights oversight hearing, and you disagreed with her conclusions. You also stated that you had a detailed conversation with the Assistant Attorney General for Civil Rights about Professor Norton's testimony. This answer was not responsive to my question about voting rights enforcement, because Professor Norton's testimony addressed only the Department's record on job discrimination and did not mention voting cases. Please clarify your testimony on this issue. In particular, when you stated that you and Mr. Kim "talked about the numbers and the cases" and concluded that the testimony at the June 20, 2007 civil rights oversight hearing "was either mistaken or just plain wrong," were you referring to the Department's cases alleging job discrimination or its voting cases? Please explain in detail why you believe the testimony was incorrect. In addition, to the extent that you think testimony at the June 21, 2007 hearing relied on incorrect data about the Department's case filings, please provide the complete and correct data.

ANSWER: With respect, Professor Norton's analysis is misleading. The Civil Rights Division remains diligent in combating employment discrimination on behalf of all Americans, one of the Division's most long-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers.

Pursuant to Section 707 of Title VII, the Attorney General has authority to bring suit against a State or local government employer where there is reason to believe that a "pattern or practice" of discrimination exists. These cases are factually and legally complex, as well as time-consuming and resource-intensive. In FY 2006, we filed three complaints (as many as filed during the last three years of the previous Administration combined) alleging a pattern or practice of employment discrimination.

In *United States v. City of Virginia Beach* and *United States v. City of Chesapeake*, the Division alleged that the cities had violated Section 707 by screening applicants for entry-level

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00312 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.164

police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. In *Virginia Beach*, the parties reached a consent decree providing that the City will use the test as one component of its written examination and not as a separate pass/fail screening mechanism with its own cutoff score. On June 15, 2007, the court provisionally entered a consent decree in the *City of Chesapeake* litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

We filed or authorized three pattern or practice cases in Fiscal Year 2007. One recent case highlights our efforts. In *United States v. City of New York*, filed on May 21, 2007, the Division alleged that since 1999, the City of New York has engaged in a pattern or practice of discrimination against African-American and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York (FDNY) in violation of Title VII. Specifically, the complaint alleges that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against African-American and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

This Administration places a very high priority on developing successful cases. Our results reflect this effort. To date, this Administration has prevailed in or favorably resolved every complaint that it has filed under Section 706. With the sole exception of *United States v. City of Garland*, which was filed in 1998, this Administration has successfully prosecuted or favorably resolved every case it has brought to trial under Section 707.

The Division also has enforcement responsibility for the Uniformed Service Employment and Reemployment Rights Act of 1994 (USERRA). USERRA was enacted to protect veterans of the armed services when they seek to resume the job they left to serve their country. USERRA enables those who serve their country to return to their civilian positions with the seniority, status, rate of pay, health benefits, and pension benefits they would have received if they had worked continuously for their employer. In Fiscal Year 2006, the Division filed four USERRA complaints in Federal district court and resolved six cases.

During Fiscal Year 2006, we brought the first USERRA class action complaint ever filed by the United States. The original class action complaint, which was filed on behalf of the individual plaintiffs we represent, charges that American Airlines (AA) violated USERRA by denying employment benefits to three pilots and a putative class of other pilots during their military service. Specifically, the complaint alleges that AA conducted an audit of the leave taken for military service by AA pilots in 2001 and, based on the results of the audit, reduced the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00313 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.165

employment benefits of its pilots who had taken military leave, but did not reduce the same benefits of its pilots who had taken similar types of non-military leave. Other examples of recent USERRA suits include *Richard White v. S.O.G. Specialty Knives*, in which a reservist's employer terminated him on the very day that the reservist gave notice of being called to active duty. We resolved this case through a consent decree that resulted in a monetary payment to the reservist. In *McCullough v. City of Independence, Missouri*, the Division filed suit on behalf of Wesley McCullough, whose employer allegedly disciplined him for failing to submit "written" orders to obtain military leave. We entered into a consent decree in which the employer agreed to rescind the discipline and provide Mr. McCullough payment for the time he was suspended. The employer also agreed to amend its policies to allow for verbal notice of military service.

As of Fall 2007, we had filed five USERRA complaints in district court and resolved five cases. Additionally, the United States Attorney's Offices had resolved three cases this fiscal year. One of these cases we have resolved in the current fiscal year is *McKeage v. Town of Stewartstown, New Hampshire*. In that case, the Town sent Staff Sergeant Brendon McKeage a letter while he was on active duty in Iraq telling him he no longer had his job with the Town. McKeage had been employed as the Chief of Police for the Town of Stewartstown. When the citizens of Stewartstown learned that their Chief of Police had been terminated while serving his country, they voted to censure the Town for its "outrageous and illegal" conduct. Despite this public censure, the Town still refused to reemploy SSG McKeage in his former position. Once we notified Stewartstown that we intended to sue, the employer decided to settle the case. The settlement terms include a payment to SSG McKeage of $25,000 in back wages.

The Division has proactively sought to provide information to members of the military about their rights under USERRA and other laws. For example, we recently launched a website for service members (www.servicemembers.gov) explaining their rights under USERRA, the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA), and the Servicemembers' Civil Relief Act (SCRA).

Kennedy 149 The Department's Voting Section traditionally has maintained a list of all cases filed by the Section since October 1976, which identifies the particular statute or statutes involved in each case. Please provide an up-to-date copy of the Voting Section case list, showing all cases filed by the Voting Section or in which the Section has intervened. If the Department no longer maintains this list, please state when and why it ceased to do so, and please explain how the Civil Rights Division management is able to keep track of the voting section's caseload without this information.

ANSWER: Attached please find a copy of the list of cases filed by the Voting Section since October 1976.

Kennedy 150 At the June 21, 2007 civil rights oversight hearing, the Committee received detailed testimony about the steep decline in the Department's enforcement of Title VII of the Civil Rights Act of 1964. Specifically, through the Civil Rights Division, the Department has filed and resolved substantially fewer Title VII lawsuits compared to the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00314 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.166

previous Administration, even though it now has more attorneys. This information is confirmed by information on the Civil Rights Division's website. If you exclude cases that were developed by the Clinton Administration or by a U.S. Attorney's office, according to the Division's website, the Department has filed only 39 Title VII job discrimination cases since 2001. The Section currently has almost 40 attorneys, so it should have a stronger enforcement record. How do you explain the decline in the Department's Title VII enforcement?

ANSWER: Please see the response to question 148, above.

Kennedy 151 Do you have any reason to believe that vigorous enforcement of the nation's laws against race discrimination is less needed today than it was in the late 1990s? If so, please explain.

ANSWER: All of our civil rights laws remains as important today as it was the day the statutes were enacted. The Justice Department remains committed to the vigorous enforcement of our Nation's civil rights laws.

Kennedy 152 Do you disagree with Professor Norton's testimony that the Bush Administration has resolved and filed significantly fewer Title VII cases that the Clinton Administration? Please provide a detailed list of all cases or matters filed or resolved in the Clinton Administration, and a brief description of each. Please also provide a detailed list of all cases or matters filed or resolved by the Bush Administration, and a brief description of each. To the extent that these cases have not been listed on the Division's website, please explain the reasons for that omission.

ANSWER: Please see the attached list of cases. As stated on the Division's website, only a sample of the Section's complaints, court-approved consent decrees and judgments, and out-of-court settlements are included.

Please see the above response to question 148 for further information on the Division's vigorous enforcement of Title VII.

Kennedy 153 In addition to enforcing Title VII with respect to state and local government employers, the Civil Rights Division's Employment Litigation Section also defends the United States and federal agencies in actions challenging the constitutionality of federal civil rights programs and policies. Please provide a copy of the complaint in each case in which the Employment Litigation Section has served as a defendant since January 1, 2005.

ANSWER: The Employment Litigation Section has never served as a defendant in an action challenging the constitutionality of a Federal civil rights program or policy. The Section has, however, served as trial counsel in suits challenging the application or enforcement of Federal

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00315 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.167

laws that prohibit discrimination or require affirmative action by government contractors or recipients of federal financial assistance. We note that no such complaints have been filed since January 1, 2005.

Kennedy 154 At the June 21, 2007 hearing on civil rights oversight, Professor Norton testified that the cases approved for suit in this Administration "reveal a disquieting shift in enforcement priorities, as [the Section's] docket – now significantly reduced – devotes an even smaller proportion of its resources to job discrimination experienced by African Americans and Latinos." Her statement reflects the information on the Division's official website. Although workers who suffer discrimination on the job deserve a remedy whatever their race, the Department also should focus its Title VII enforcement on the areas of greatest need. According to data maintained by the EEOC, in each year since 2001, approximately eight times as many race discrimination charges have been filed nationwide by African Americans as by whites, although whites make up a far greater proportion of the overall population. In addition, the vast majority of race discrimination charges that the EEOC has referred to your Department have been filed by African Americans. This is a powerful indication that race discrimination against African Americans occurs more frequently in the nation's workplaces than race discrimination against whites. Yet the Civil Rights Division's Employment Litigation Section has filed almost as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined. Please explain the reasons for this shift in the Department's Title VII enforcement priorities.

ANSWER: Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion. The Civil Rights Division is committed to vigorously enforcing Title VII and combating employment discrimination on behalf of all Americans.

Last year, the Division filed three lawsuits alleging a pattern or practice of employment discrimination. This compares to one filed in FY 1998; one filed in FY 1999; and one filed in FY 2000. The lawsuits filed in 2006 included *United States v. City of Virginia Beach* (E.D. Va.), and *United States v. City of Chesapeake* (E.D. Va.), in which the Division alleged that the defendants had violated Section 707 by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. We have filed or authorized three pattern or practice cases thus far in FY 2007. Please see the answer to question 148 for more discussion of all of these cases.

In addition to four pattern or practice cases filed on behalf of African Americans, the Division has filed or authorized seven Section 706 cases on behalf of African-American workers during this Administration. For example, on November 2, 2006, the Division filed a complaint in *United States v. Board of Directors of Tallahassee Community College* (N.D. Fla.), pursuant to Section 706 of Title VII, alleging that the victim was discriminated against on the basis of his race when he was not promoted to a particular position. On July 13, 2004, we filed a complaint in intervention in *Lemons & United States v. Pattonville Fire Protection District* (E.D. Mo.),

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00316 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.168

pursuant to Section 706 of Title VII, alleging that the victim was harassed on the basis of his race and constructively discharged from his unit.

During this Administration, the Division also has vindicated the rights of Hispanic workers who have been discriminated against on the basis of national origin in violation of Title VII. For example, in addition to filing three pattern or practice cases on behalf of Hispanics, the Division obtained a settlement agreement with the District of Columbia Public Schools that favorably resolved, pre-suit, a Section 706 referral in which the charging party, a Hispanic man, alleged that he was the victim of discrimination on the basis of national origin.

This Administration places a very high priority on developing successful cases. Our results reflect this effort. To date, this Administration has prevailed in or favorably resolved every complaint that it has filed under Section 706. With the sole exception of *United States v. City of Garland*, which was filed in 1998, this Administration has successfully prosecuted or favorably resolved every case it has brought to trial under Section 707.

During the past six years, the Division has filed employment discrimination lawsuits on behalf of African Americans, Hispanic Americans, Native Americans and women, among others. We are fully committed to the vigorous enforcement of Federal law.

Kennedy 155 Has the Civil Rights Division sought to increase the number of race discrimination cases filed on behalf of white males? If so, please explain why that this category of cases merits greater focus than enforcement of discrimination cases against African Americans or Latinos.

ANSWER: Please see the above response to question 154. The Division is committed to enforcing the federal civil rights laws on behalf of all Americans. Former Assistant Attorney General Wan J. Kim made a pledge to take his cases where he found them and to bring any case where he found a recognizable violation of the law based upon the facts that would be sufficient for the Division to prove that violation in court. The Division has been, and will continue to be, committed to honoring this pledge. As the Jackson, Mississippi, Clarion-Ledger editorialized on January 31, 2007, "Discrimination is discrimination – and it's wrong in whatever color it comes. That's the law."

Kennedy 156 According to EEOC data, since 2001, over half of the nearly 300 charges of national origin discrimination that EEOC has referred to the Department after finding reasonable cause to believe discrimination occurred have been filed by Latinos. Yet in this Administration, the Department has not filed a single case of national origin discrimination based on an EEOC charge filed by a Latino. The Section has filed four cases, however, based on EEOC charges alleging race or national origin discrimination against whites. Please explain why you chose to file suit on discrimination charges filed by whites but not on charges filed by Latinos.

ANSWER: Please see the responses to questions 154 and 155, above.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00317 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.169

Kennedy 157 The Department's decision to focus on race discrimination cases against the group that appears least likely to suffer race discrimination in the workplace may be interpreted by some as a political message that the Department is not interested in protecting the rights of those most in need of our civil rights laws. What is your response to that concern?

ANSWER: Please see the responses to questions 154 and 155, above.

Kennedy 158 The information included on the Employment Litigation Section's website does not indicate the race of the victim involved in one of the Section's race discrimination cases. Please provide that information with regard to the charging party in United States v. Weimar Independent School District.

ANSWER: The charging party in *United States v. Weimar Independent School District* is African American.

Kennedy 159 The Department's Employment Litigation Section, which is responsible for enforcing Title VII of the Civil Rights Act of 1964, has undergone a large number of personnel changes in the Bush Administration. Please provide: The number of trial attorneys who have left the Section since 2001.

ANSWER: As of January 2008, thirty-seven trial attorneys have left the Employment Litigation Section since 2001.

Kennedy 160 The number of attorney supervisors (i.e., attorneys in the position of Special Litigation Counsel, Deputy Chief, or Chief) who have left the section since 2001.

ANSWER: As of January 2008, eleven attorney supervisors have left the Employment Litigation Section since 2001.

Kennedy 161 The loss of experienced attorneys appears to have undermined the work of the Section. In addition to the overall decline in the Section's caseload, the Section also has filed fewer Title VII cases alleging a pattern or practice of discrimination in this Administration than during the Clinton Administration. Of the approximately 36 attorneys now serving in the Division, how many have ever participated in the trial of a case alleging pattern or practice discrimination under Title VII? If the Department does not regularly track this information, I ask that you obtain it from the Civil Rights Division's Employment Litigation Section.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00318 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.170

ANSWER: Please see the above response to question 154 regarding the Section's accomplishments during this Administration. In addition, the average rate of attorney attrition in the Civil Rights Division during this Administration is almost identical (differing by less than 1.5percent) to a comparable period of the prior Administration. During this Administration, the peak attrition rate for attorneys occurred in 2005, when a number of attorneys accepted a retirement package offered to multiple Justice Department components.

Since 1994, only five of the Section's pattern or practice cases have gone to trial – two during the prior Administration and three during this Administration thus far. The Employment Litigation Section does not track the number of attorneys who have participated in pattern or practice case trials.

Kennedy 162 Of the supervisory attorneys currently in the Section (i.e., attorneys in the position of Special Litigation Counsel, Deputy Chief, or Chief), have all of them participated in the trial of a Title VII pattern or practice case? If not, please provide the number of supervisory attorneys who have such experience.

ANSWER: Please see the above response to question 161. Three of the five current supervisory attorneys in the Employment Litigation Section have participated in pattern or practice cases that have gone to trial.

Kennedy 163 On many occasions, I and other members of the Judiciary Committee have expressed concerns about the Department's record in enforcing Title VII. Have you done anything to investigate or address these concerns? If so, please state in detail what you have done.

ANSWER: Please see the responses to questions 148 and 154, above.

Kennedy 164 There have been recent reports that racial and ethnic diversity has declined among attorneys hired to work in parts of the Civil Rights Division. WJLA TV recently reported that only 2 of 50 attorneys in the Criminal Section are African Americans, a significant drop from past years. Because of its mission and prestige, the Civil Rights Division in particular has long attracted a very diverse group of attorney applicants, so these reports are very disturbing. Do you agree that diversity in attorney hiring is an important goal?

ANSWER: Attorneys from an extremely wide variety of backgrounds have been hired to work in the Division since 2001. 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. Of course, all of our attorneys, regardless of their racial or ethnic background, are fully committed to the work of the Division.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00319 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.171

The Civil Rights Division has hired a diverse group of attorneys from a wide variety of backgrounds. Over the past five fiscal years, 27percent of the new attorney hires in the Civil Rights Division were minorities. This is nearly three times the national average, as reported in a 2004 study by the American Bar Association, which found that minority representation in the legal profession is about 9.7percent. The ABA study also found that nationally, African Americans represent 3.9percent of lawyers, or approximately 1 in 25.

In addition, this Administration has promoted as many minorities to section management positions in the Civil Rights Division in six years as the previous administration did in eight years. Indeed, at the end of the previous Administration, the Civil Rights Division had no minority Section Chiefs. This Administration has since promoted two minority Section Chiefs, including the first Hispanic Section Chief in the Division's fifty year history.

Kennedy 166 Is there any legitimate reason for the low number of African American Attorneys in the Division's Criminal Section? Please examine this issue and give us a specific response explaining the reasons for the lack of diversity in Criminal Section attorneys?

ANSWER: Please see the response to question 164, above.

Kennedy 167 This concern also applies to the Voting Section of the Civil Rights Division. National Public Radio reports that several African American attorneys have left the Section in recent months, and that it now has only 2 African American attorneys out of about 35. How do you explain the decline in the number of African American attorneys in the Voting Section?

ANSWER: Please see the response to question 164, above.

Kennedy 168 Since the Voting Section was created in large part to address race discrimination in voting against African Americans, do you agree that it's important for the Section to have African American attorneys?

ANSWER: Please see the response to question 164, above.

Kennedy 169 Teresa Lynn, a civil rights analyst who retired from the Voting Section last year after three decades, told NPR about her experience. She said that attorneys hired for the Section in recent years seemed to be less committed to civil rights enforcement than their counterparts in earlier years. The Boston Globe found the same problem in the Section in 2003. You said you disagreed with the Globe's findings. How do you explain the change in the backgrounds of these attorneys?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00320 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.172

ANSWER: We respectfully disagree with many of the assertions made in the *Boston Globe* article, nor is it clear what methodology was employed in reaching its conclusions. Attorneys from an extremely wide variety of backgrounds have been hired to work in the Division since 2001. 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.

Kennedy 206 In your response received by the Committee on July 22, 2007, to written questions, you stated that "as a general matter, candidates for interim U.S. Attorneys do go through a recommendation process." Please describe the recommendation process for Mr. Schlozman, including the names and titles of persons involved, and any other information that would help us to understand how and why Mr. Schlozman was chosen. In addition, please provide any written documentation related to the recommendations and appointment of Mr. Schlozman as interim U.S. Attorney.

ANSWER: Mr. Schlozman, one of the candidates considered for the position of temporary United States Attorney in the Western District of Missouri, and who was then serving as the Principal Deputy Assistant Attorney General in the Civil Rights Division—was interviewed for the temporary United States Attorney position on March 17, 2006. At that time, such interviews would usually be conducted by members of the Senior Staff, including Michael A. Battle, Director of the Executive Office for United States Attorneys; David Margolis, Associate Deputy Attorney General; and Monica M. Goodling, Counsel to the Attorney General and White House Liaison. The order appointing Mr. Schlozman to be interim United States Attorney was signed on March 23, 2006.

Kennedy 207 In question 158, I asked whether those responsible for selecting Mr. Schlozman as interim U.S. Attorney knew of Mr. Schlozman's role in approving discriminatory voting changes in Texas and Georgia over the virtually unanimous objections of the career staff of the Voting Section. You responded that you did not recall discussions of his qualifications, but expected that "Mr. Schlozman's work in the Civil Rights Division was a factor DOJ staff would consider in its evaluation of his candidacy for an interim U.S. Attorney appointment." Was Mr. Schlozman's work on the Texas and Georgia preclearances a positive factor in the evaluation? If not, why was he nonetheless recommended?

ANSWER: Mr. Schlozman was interviewed by members of the Senior Staff who usually interview prospective United States Attorney candidates and was found suitable for the position. Interviews of candidates for interim United States Attorney typically cover a candidate's current duties at the Department of Justice. No record is available of the deliberations that took place following Mr. Schlozman's interview in March 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00321 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.173

Kennedy 210 In response to my question 159, you said that "we did not use the Patriot Act's interim appointment authority for Mr. Schlozman." However, Mr. Schlozman served as an interim U.S. Attorney for over a year, from March of last year to April of this year. Before you received authority to make indefinite interim appointments under the Patriot Act, interim appointments lasted no longer than 120 days. After that, the chief judge of a district court could appoint an interim U.S. Attorney who could serve indefinitely. Mr. Schlozman clearly served more than 120 days. Please explain why you believe you were not exercising the authority you had received under the Patriot Act.

ANSWER: Upon re-review, it appears that the order appointing Mr. Schlozman to be interim United States Attorney was signed on March 23, 2006, 14 days after the President signed the USA PATRIOT Improvement and Reauthorization Act. He therefore was appointed with the PATRIOT Act Authority. We regret the mistake in calculating the relative date of Mr. Schlozman's appointment.

Kennedy 212 In your answers of April 5, 2007, to our written questions following your Jan. 18, 2007, appearance before the Committee, you responded to Senator Schumer's question 354 that "between 1/1/06 and 11/30/06, the FBI opened 38 formal investigations involving alleged federal election law violations related to activity leading up to and surrounding the 11/7/06 election." You added that these investigations concerned allegations of several offenses—"campaign finance violations, ballot fraud, voter intimidation, and voter fraud." Please state how many of the 38 investigations you identified were involved with each of the offenses you listed.

ANSWER: Under the FBI's file classification system, all investigations involving violations of federal election law are maintained under one file classification number. As a result, it is not possible to identify numbers of cases involving various types of alleged activities without conducting a very labor-intensive manual review of all the case files. In addition, when the FBI indicated that there were 38 formal investigations involving "campaign finance violations, ballot fraud, voter intimidation, and voter fraud," these categories were not technical investigative labels, but were instead general descriptions of a substantial majority of the relevant cases in this classification. As with other criminal areas, a large percentage of the 38 investigations (and of all election crime investigations) involves multiple allegations involving a variety of criminal activities. Thus, an attempt to distinguish between artificial categories such as "voter intimidation" and "voter fraud" would not be meaningful, because it would fail to take into account the many cases that involve multiple allegations.

Kennedy 213 Please note how many of the voter fraud investigations involved registration, not votes actually cast. Please also note how many voter fraud investigations concerned individual violations versus larger conspiracies, and the approximate number of votes or registrations those conspiracies affected.

ANSWER: Please see the response to question 212, above.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00322 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.174

Kennedy 218 In questions 213, 214, and 215, I asked for basic background information about the attorneys hired to work in the Special Litigation Section of the Civil Rights Division. You said that "the Department does not track this information." Please provide the resumes for attorneys hired into any career position in the Special Litigation Section since January 1, 2001.

ANSWER: On April 11, 2007, the Department provided to this Committee copies of the resumes of all attorneys hired by the Civil Rights Division during this Administration.

Kennedy 220 As you know, I've long been concerned about the Department's commitment to Section 5 of the Voting Rights Act, which requires jurisdictions with a history of voting discrimination to get federal approval before changing their voting laws. In this Administration, there have been repeated reports that the Division's enforcement decisions are based on politics, not law. From the rubber-stamping of Tom DeLay's 2003 Texas redistricting plan to the approval of voter photo identification requirements that disenfranchised minority citizens, the Department has overruled career attorneys and approved discriminatory changes in election rules. In addition to these problems, it appears that the Department has reduced its resources for reviewing requests under Section 5 of the Voting Rights Act. Under the Clinton Administration, the Department typically had about 20 civil rights analysts dedicated to reviewing Section 5 cases. Yet only 12 analysts were left as of January this year, even though the Assistant Attorney General for Civil Rights has said the Department received a record 40 percent increase in requests for approval under Section 5 of the Voting Rights Act. Personnel who usually work on other issues had to assist in reviewing requests. It's no surprise that we have begun hearing that the Department is having trouble processing these submissions within the legal deadline, especially with the large number of submissions from Texas. Do you agree that the Department's commitment to Section 5 should include the resources necessary to review Section 5 submissions within the legal deadline?

ANSWER: Each Section 5 submission is processed on receipt and assigned to one or more analysts, paralegals, or attorneys. These staff members conduct a review of the file and gather information from knowledgeable persons to determine the limited question of whether the change was adopted with a discriminatory purpose or whether it would have a retrogressive effect on minority voters. Members of each affected minority community in the jurisdiction, as well as relevant officials, are contacted.

The large majority of submissions involve routine changes that do not raise issues of discrimination cognizable under Section 5. Such submissions are processed routinely by analysts, paralegals, and reviewing attorneys. Where a change does raise substantive issues, the responsible staff members prepare a memorandum setting forth in neutral fashion the facts and legal issues. This process often involves considerable discussion. The authority to interpose an objection to a change rests with the Assistant Attorney General for Civil Rights.

In FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history. While 7,080 submissions were received in 2006, only 4,121 submissions were

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00323 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.175

received in 2001, 5,788 in 2002, and 4,750 in 2003. Accordingly, all current staff members, including attorneys, are receiving valuable experience reviewing Section 5 submissions. The Section also has instituted Section 5 and Geographical Information Systems (GIS) training for all attorneys and professional staff. As the census approaches, the Section will continue such training, expand it and will incorporate additional training as warranted.

While four attorneys currently are devoted primarily to Section 5 review, all attorneys, including managers, participate in the review of voting changes under Section 5 as the need arises. In terms of civil rights analysts, in January 2001, the Section had 14 civil rights analysts, compared to 12 in January 2007. As of July 10, 2007, the Voting Section has ten civil rights analysts and two contract personnel engaged in the analysis of Section 5 submissions, and the Section has advertised three civil rights analyst openings. The Section also has become very energetic in training interns and externs to analyze the more routine voting changes.

The Section also has initiated e-Submissions so that governments can submit voting changes on-line. Among other advantages, this will free significant staff time and resources for more effective review of voting changes. In addition, each trial attorney in the Section is required to gain expertise in the laws, demographic patterns, and election-related issues in several States, enabling them to be better prepared to play the major role that Section attorneys traditionally have played in the review of redistricting plans.

In 2003, the Department conducted a deliberate and careful review of every relevant fact relating to the Texas submission of its congressional redistricting under Section 5 of the Voting Rights Act, concluding that there was no retrogression in the overall plan. The legislature offset one lost opportunity district for Latino voters by creating a new district in that region in which Latino voters dependably would be able to elect a representative of their own choice. Indeed, the plan was used during the 2004 elections and resulted in an increase in the number of minority representatives elected to Congress from Texas.

In *League of United Latin American Citizens v. Perry,* 126 S. Ct. 2594 (2006), the Supreme Court agreed with the Department's principal argument that the State did not violate Section 2 by redrawing former congressional district 24. The Court also found no violation of the Constitution or the Voting Rights Act in thirty-one of Texas's thirty-two congressional districts. The Court's decision left the Texas redistricting plan largely intact and left it to the State to determine how to remedy the lone problem identified as to congressional district 23. With respect to district 23, the Supreme Court reversed the decision of the lower court, which had found no violation in the redistricting plan, including district 23. Moreover, the Supreme Court's 5-4 decision produced six separate opinions from six different Justices in 120 pages of discussion.

The Supreme Court's decision in no way calls into question 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 majority's decision as to district 23 was founded on a new principle, under Section 2 of the Voting Rights Act, that the creation of an offsetting majority-minority district

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00324 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.176

may not remedy the loss of a majority-minority district in the same part of the State if the new district is not compact enough to preserve communities of interest. Indeed, this new compactness inquiry issue was not the subject of briefing and was not addressed by the Department.

In August 2005, the Department precleared a Georgia voter identification law, which itself amended an existing voter identification statute that had been precleared by the prior Administration. This preclearance decision followed a careful analysis that lasted several months and considered 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 and the views of minority legislators in Georgia (as well other current and former minority elected officials). The data showed, among other things, that the number of people in Georgia who already possessed valid photo identification greatly exceeded the total number of registered voters and that there was no racial disparity in access to the identification cards. The state subsequently adopted, and in April 2006 the Department precleared, a new form of voter identification that would be available to voters for free at one or more locations in Georgia's 159 counties. On September 6, 2007, the federal district court dismissed the challenge to the Georgia voter ID law noting, among other things, that the plaintiffs had identified no individual who did not have or could not obtain the requisite ID. The court also rejected plaintiffs' data analyses purporting to show problems with the ID law as unreliable and/or irrelevant.

Similarly, Georgia's Supreme Court recently directed that the state case be dismissed for lack of standing. As in the federal case, no plaintiff actually was harmed by the statute.

Kennedy 221 Why have you allowed the number of analysts to drop so sharply?

ANSWER: Please see the response to question 220, above.

Kennedy 222 The problem will only grow worse as the 2010 Census approaches. After each Census, states adjust their election districts, state-wide redistricting efforts, leading to an increase in the number of submissions to the Department. Traditionally, the Department would begin planning for that increase well before the Census. We're still a few years away from that, but you will need to hire new analysts and ensure that they have the experience they need before the flood of new submissions arrives. Have you considered how the Department will handle the increase in submissions after the Census, when it doesn't even have enough personnel now? Please explain how you plan to ensure that the Department will be prepared for the increased submissions under Section 5 after the next Census.

ANSWER: Please see the response to question 220, above.

Kennedy 223 In addition to the loss of personnel, I'm concerned about reports of low morale in the Department's Section 5 Unit. Thirteen of the analysts who review

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00325 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.177

Section 5 requests have left since 2003 – that's more than are now in the Section. Recently, Teresa Lynn, an African American civil rights analyst who served for 33 years in the Section 5 unit, said she retired because of "fear of retaliation" and "disparate treatment of civil rights analysts based on race." She spoke of low morale among the Section 5 analysts and said the Chief of the Voting Section and the new Deputy Chief of the Section 5 unit were responsible. When she retired, Ms. Lynn sent an email to her colleagues saying she left "with fond memories of the Voting Section I once knew" and was "gladly escaping the plantation it has become." Those are very serious charges from someone who had spent decades in the Department under both Republican and Democratic administrations. Were you aware of these allegations? If not why not? If so, what have you done to get to the bottom of this?

ANSWER: The Department takes very seriously any allegations of disparate treatment based on race by its employees. Not only may an employee file an Equal Employment Opportunity complaint if that employee feels he or she has received disparate treatment based on race, but the Civil Rights Division also recently created an internal Ombudsman to meet with Division employees on a wide variety of issues and concerns.

Former Assistant Attorney General Wan J. Kim worked hard to foster positive relationships in the Division. He made himself and his Deputy Assistant Attorneys General available to career attorneys to hear their concerns. He created the internal Ombudsman and, during his first week as Assistant Attorney General, he established the Division's Professional Development Office, which ensures that the Division's staff members are afforded every opportunity to improve their professional development. The office has devised a week-long orientation program for new Division attorneys and supervises the new attorney mentor program. Its most recent success was a three-day civil rights seminar for attorneys held at the Department's National Advocacy Center.

In addition, the Voting Section has been remarkably productive, achieving some of its highest levels of enforcement during the past year. In fact, the eighteen new lawsuits the section filed in CY 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding thirty years. In addition, in FY 2006, the Voting Section processed the largest number of Section 5 submissions in its history, and interposed important objections to protect minority voters in Texas and Georgia. With over 7,100 submissions, the Division handled roughly 40percent more submissions in FY 2006 than in a normal year. The Voting Section also brought the first Section 5 enforcement action since 1998. The Voting Section also has begun a major enhancement of the Section 5 review process which, as described in question 220, includes allowing online submission of voting charges, making the process easier, more efficient, and more cost-effective for covered jurisdictions and for the Department.

Kennedy 224 Do you agree that these allegations of race discrimination and poor morale in the Voting Section raise serious concerns that should be addressed? If so, please explain how you will address them.

ANSWER: Please see the response to question 223, above.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00326 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.178

Biden 225 I am growing increasingly concerned about the explosion of child pornography being trafficked over the Internet. The latest research shows this threat to our children is continuing to grow and that it is actually trending towards younger victims with images becoming more graphic and brutal. I believe that we must do all that we can to prevent child exploitation and interdict child predators. However, I question whether we have demonstrated the necessary leadership and dedicated the resources necessary to ensure that the law enforcement community can effectively respond to this threat. As you know, effective partnerships are the cornerstone of any law enforcement response, and I believe that the Internet Crimes Against Children ("ICAC") Task Force program is poised to form the backbone of an effective law enforcement response. However, we have not sufficiently invested in this program to ensure its success. In my view, developing strong ICAC task forces throughout the nation is critical because it will ensure a vast network of highly-trained investigators working together to stop child predators. This will help reduce child exploitation in the U.S, and it will allow the FBI and other federal agencies to focus on international cases which are growing exponentially.

In testimony before the U.S. House Energy and Commerce Committee in April, 2006, Flint Waters of the Wyoming Division of Criminal Investigation stated that ICAC Task Force surveillance had identified and logged information on millions of online transactions involving distribution of child pornography on peer-to-peer networks.

Please briefly describe the type or nature of these criminal transactions and provide updated estimates of the number of such crimes (transactions) that have been identified by the ICAC task force network since it began this surveillance.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 226 What number or approximate percentage of these known crimes (transactions) have involved at least one party within the United States?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 227 What number or approximate percentage of these known crimes (both domestic and international transactions) have the ICAC task forces been able to investigate to date?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00327 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.179

Biden 228 What number or approximate percentage of these known crimes have the ICAC task forces referred to other law enforcement agencies for investigation?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 229 Does the ICAC program have the ability to translate these known criminal transactions to an approximate number of computers or computer users? If so, please explain in simple terms how this is done and provide answers to the following questions:

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 230 How many individual users or computers has the ICAC Task Force program identified within the United States being used to engage in criminal activities involving child pornography or online enticement of children?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 231 How many outside the U.S.?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 232 What number or approximate percentage of these identified users or computers have the ICAC task forces been able to investigate to date?

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 233 Please provide a detailed breakdown of the number of complaints or case leads coming into the ICAC program, by source, including the ICAC's own surveillance program(s), the CyberTipline, and other sources.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00328 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.180

Biden 234 In addition to the questions above, I would like answers to the following questions. (If these answers are not immediately available, please do not delay providing answers to the other questions.) Total number of known criminal transactions involving child pornography where at least one party was within the U.S., broken down by state.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 235 Total number of computers identified engaged in child pornography activities within the U.S.- broken down by state.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 236 The total number of online enticement cases investigated by ICAC task forces, nationally and by state.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Biden 237 Total number of investigative referrals made from ICAC task forces to federal law enforcement agencies.

ANSWER: The Department provided this information in a separate written response, dated January 24, 2008.

Feinstein 277 The Director of the Information Security Oversight Office in the National Archives wrote to you on January 9 of this year to ask for an interpretation of whether the Office of the Vice President is covered by Executive Order 12958 ("Classified National Security Information"), as amended. What actions has DOJ taken in response to the request that it determine whether the Office of the Vice President needs to comply with the Executive Order?

ANSWER: The January 9, 2007 letter to the Attorney General from the Director of the Information Security Oversight Office (ISOO) of the National Archives and Record Administration requested an opinion addressing whether the Office of the Vice President is an "agency" for purposes of Executive Order 12958, as amended. In a letter dated July 20, 2007, a copy of which is attached, the Department responded to the request as follows:

> On July 12, 2007, the Counsel to the President wrote a letter to Congress stating that "[t]he President has asked me to confirm to you that . . . the Office of the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00329 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.181

Vice President . . . is not an 'agency' for purposes of the Order." Letter to the Honorable Sam Brownback, United States Senate, from Fred F. Fielding, Counsel to the President (copy enclosed). That statement on behalf of the President directly resolves the question you presented to the Attorney General. Therefore, the Department of Justice will not be providing an opinion addressing this question.

Feinstein 278 Do you believe the Executive Order applies to the Vice President? If not, why not?

ANSWER: As noted in response to question 277, the statement by the Counsel to the President directly resolves the question whether the Executive Order applies to the Office of the Vice President.

Feinstein 279 Have you, or has anyone at the Department, communicated with the Office of the Vice President or anyone in the White House about this request?

ANSWER: Yes. Representatives of the Department communicated with the Office of the Counsel to the President concerning the question raised about the meaning of Executive Order 12958.

Feinstein 280 Have you, or anyone in the Department, issued any decision, guidance, or memo on this issue?

ANSWER: As noted in response to question 277, the Department has issued a letter informing the Director of ISOO that the statement by the Counsel to the President resolves the question ISOO presented to the Attorney General.

Feinstein 281 When asked about the "gang of eight" briefing and the hospital visit you said it is important "for people to know the context" of what occurred, so please provide the full context, if necessary please submit under separate cover in a classified context. What exactly did you or others in the Administration communicate to Congressional leaders at the March 10, 2004, or related meetings?

ANSWER: As you know, operational details concerning the Terrorist Surveillance Program (TSP) remain highly classified. Throughout the war on terror, the Administration has notified the Congress concerning the classified intelligence activities of the United States through appropriate briefings of the intelligence committees and congressional leadership. The full membership of each intelligence committee has been briefed on the TSP, as have other members of the Congressional leadership. Current and former Administration officials also have testified in closed hearings regarding these matters. We are not able to provide additional details, beyond

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00330 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.182

those already provided by current and former officials, regarding the meetings you reference at this time.

Feinstein 286 If you will not answer these questions, will the Administration allow the congressional members present at the meeting to answer these questions?

ANSWER: We have sought to be responsive to the questions above. Of course, the Members who participated in the briefings would be subject to restrictions on the disclosure of classified information.

Feingold 289 The Inspector General's Patriot Act reports were limited to investigating citizen complaints and many of the Patriot Act authorities operate entirely in secret. Thus, these reports were highly unlikely to uncover any misuse or abuse of those authorities. The Inspector General confirmed to me that the serious misuse of the NSL authorities that he uncovered would never have come to light if Congress had relied solely on waiting for individual citizens to complain. Do you agree?

ANSWER: The Justice Department, including the FBI, has processes in place to catch abuses and errors. While it is true that not all of the NSL errors were caught, many were, and as a result of the IG's report, the Department has implemented significant new oversight measures. These efforts include the planned implementation of a dedicated Oversight Section within the Department's National Security Division and the establishment of a new Office of Integrity and Compliance within the FBI. The Department will exercise this oversight through a regular process of conducting National Security Reviews of FBI field offices and Headquarters national security units. These reviews are staffed by career Department attorneys with years of law enforcement and intelligence experience from the NSD and the FBI's Office of General Counsel, along with officials from the Department of Justice's Privacy and Civil Liberties Office.

These reviews, which the Division started conducting in April 2007, broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and Attorney General Guidelines, and its use of various national security tools, including NSLs. The reviews are not limited to areas where shortcomings have already been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

Feingold 292 The Administration sent legislation to Congress in April that, while billed as "modernization" of the Foreign Intelligence Surveillance Act, contains provisions having nothing to do with modernization of FISA. Please answer each of the following questions individually. Why did the Administration decide to include a provision in its proposal that would grant immunity retroactively to individuals who cooperated with the government in certain unidentified intelligence activities?

ANSWER: Private industry partners alleged to have cooperated with the Government to ensure our nation is protected against another attack should not be held liable for any assistance they are

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00331 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.183

alleged to have provided. Such litigation risks the disclosure of state secrets and could seriously damage our national interests. We believe that it is imperative that Congress provide liability protection to companies that are alleged to have assisted the nation in the conduct of intelligence activities in the wake of the September 11th attacks.

Feingold 293 Why did the Administration decide to include a provision in its proposal that would permit the Attorney General to transfer any pending lawsuits challenging the legality of any "classified communications intelligence activity" to the secret, ex parte FISA Court?

ANSWER: The provision you reference is section 411 of the comprehensive FISA modernization proposal the Director of National Intelligence submitted to Congress in April 2007. Section 411 is designed to protect sensitive national security information and would allow for the transfer of litigation involving sensitive national security information to the FISA Court in specified circumstances. This provision would require a court to transfer a case to the FISA Court if: (1) the case is challenging the legality of a classified communications intelligence activity relating to a foreign threat, or the legality of any such activity is at issue in the case, and (2) the Attorney General files an affidavit under oath that the case should be transferred because further proceedings in the originating court would harm the national security of the United States. By providing for the transfer of such cases to the FISA Court, section 411 ensures that, if needed, judicial review may proceed before the court most familiar with communications intelligence activities and most practiced in safeguarding the type of national security information involved. Section 411 also provides that the decisions of the FISA Court in cases transferred under this provision would be subject to review by the FISA Court of Review and the Supreme Court of the United States.

Feingold 294 You state in your testimony that this FISA proposal includes provisions that "strengthen the privacy protections for U.S. persons in the United States." Please specifically identify each of those provisions, including the section number, and explain how they strengthen privacy protections.

ANSWER: There are many sections in the comprehensive FISA modernization proposal the Director of National Intelligence submitted to Congress in April 2007, working in combination, that would enhance the privacy protections for U.S. persons in the United States. FISA Court and the Government to devote more resources to the preparation and review of applications to conduct surveillance that most directly implicate the privacy interests of persons in the United States. We urge Congress to make that Act permanent and to enact other important reforms to modernize and streamline FISA.

Feingold 295 The DOJ Inspector General issued a report in March 2007 about misuse and abuse of the National Security Letter authorities. During a hearing on that report, the FBI General Counsel told the House Judiciary Committee that she believes one root of the problems laid out in the IG report is that many FBI agents grew up in the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00332 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.184

transparent criminal system, where, as she put it, "if they mess up during the course of an investigation, they're going to be cross-examined, they're going to have a federal district judge yelling at them." On the national security side, on the other hand, she explained that actions "are typically taken in secret and they don't have the transparency of the criminal justice system." She suggested that more controls are needed in the less transparent arena of national security investigations than in criminal investigations, According to testimony before the Senate Judiciary Committee, the FBI Director agrees with this assessment. Please answer each of the following questions individually. Do you agree with the FBI Director and the FBI General Counsel?

ANSWER: The FBI Director and FBI General Counsel are correct in stating that additional oversight is needed in the area of national security investigations. At the direction of former Attorney General Gonzales, the National Security Division has been building its capacity and increasing the tempo of its oversight activities and recently announced the initiation of a comprehensive national security oversight program that extends well beyond the Department's traditional, primarily FISA-related oversight role. DOJ attorneys have been given the clear mandate to examine all aspects of the FBI's national security program for compliance with law, regulations, and policies.

To accomplish this expanded mandate, the Department has stood up a dedicated Oversight Section within the National Security Division's Office of Intelligence which will consist of attorneys and staff members specifically dedicated to ensuring that the Department fulfills its national security oversight responsibilities across the board.

This oversight will be exercised through regular National Security Reviews of FBI field offices and Headquarters national security units. These reviews are staffed by career Department attorneys with years of law enforcement and intelligence experience from the National Security Division and the FBI's Office of General Counsel, along with officials from the Department of Justice's Privacy and Civil Liberties Office.

These reviews, which the Division started conducting in April 2007, broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and Attorney General Guidelines, and its use of various national security tools, such as National Security Letters. The reviews are not limited to areas where shortcomings have already been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

Since establishing this new national security review process in April, the National Security Division already has completed national security investigation reviews in eleven field offices and one headquarters unit. By the end of this year, the Department will have completed a total of 15 reviews in field offices and headquarters units.

The Oversight Section will also play an important role in other areas. It will review all referrals by the FBI to the President's Intelligence Oversight Board, focusing on whether these referrals indicate that a change in policy, training, or oversight mechanisms is required. The Oversight Section will report to the Attorney General semiannually on such referrals and will

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00333 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.185

inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues. In addition, it will provide compliance-related training for National Security Division lawyers and FBI agents and analysts.

Feingold 306 Earlier this month the President issued an Executive Order to govern the CIA's interrogation of detainees. Please answer each of the following questions individually. Does DOJ's analysis of what interrogation techniques are and are not permissible under the statutes and the Constitution apply to the questioning of a U.S. citizen, on U.S. soil, who is thought to be involved in or possess information on a terrorist plot, regardless of the agency or entity conducting the interrogation?

ANSWER: The Executive Order interprets and applies Common Article 3 to alien detainees who are members of al Qaeda, the Taliban, or affiliated entities, and who are detained and interrogated by the CIA outside the United States. *See* Exec. Order No. 13440 § 3(b)(ii). Accordingly, neither the Executive Order nor the CIA program has required the Department to consider how Common Article 3 may apply to U.S. citizens on U.S. soil. As you note, U.S. citizens would be entitled to invoke an array of constitutional and statutory protections, beyond the baseline standard of Common Article 3.

Feingold 307 If there are distinctions based on the nationality or citizenship of the person being interrogated, where in the statutes and Constitution are those distinctions located?

ANSWER: As noted, we have not had occasion to address the question that you raise. Of course, the Department's analysis of these issues would not depend upon the nationality or citizenship of the individual to the extent that the relevant legal provisions, like the anti-torture statute and the War Crimes Act, prohibit specific conduct without regard to nationality or the citizenship.

Feingold 308 FISA requires that the Department issue a report to the Judiciary and Intelligence Committees every six months on its implementation of FISA. By statute, it must include "a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court," as well as copies of all decisions and opinions of the FISA Court. When the Department submits its report covering the first half of 2007, will it comply fully with that statute?

ANSWER: The provision you reference, 50 U.S.C. § 1871, requires the Department to report semiannually, "in a manner consistent with the protection of the national security," specified information, including "a summary of significant legal interpretations of [FISA] involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review" and "copies of all decisions (not including orders) or opinions" of those courts containing "significant construction or interpretation of the provisions" of FISA.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00334 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.186

The Department will issue its next semiannual report at the end of the year, and that report will be consistent with these requirements.

Schumer 336 On June 25th, I wrote you a letter concerning the Vice President's questionable claim that he need not comply with classified material oversight requirements because he is not an entity within the executive branch. In that letter I expressed my concern with the delay in your Office's response to the National Archives' January request for an opinion on that claim. I also expressed my concern over your ability to be impartial in making such a determination. Almost a month later, I have received no response. So, once again, I would like to ask you: Has your office since responded to the National Archives' request as required by Executive Order 12958? If not, why has it taken over six months to do so?

ANSWER: The January 9, 2007, letter to the Attorney General from the Director of the Information Security Oversight Office of the National Archives and Record Administration requested an opinion addressing whether the Office of the Vice President is an "agency" for purposes of Executive Order 12958, as amended. In a letter dated July 20, 2007, a copy of which is attached, the Department responded to the request as follows:

> On July 12, 2007, the Counsel to the President wrote a letter to Congress stating that "[t]he President has asked me to confirm to you that . . . the Office of the Vice President . . . is not an 'agency' for purposes of the Order." Letter to the Honorable Sam Brownback, United States Senate, from Fred F. Fielding, Counsel to the President (copy enclosed). That statement on behalf of the President directly resolves the question you presented to the Attorney General. Therefore, the Department of Justice will not be providing an opinion addressing this question.

Schumer 337 As requested, have you recused yourself from involvement in this process? If not, why not?

ANSWER: Former Attorney General Gonzales did not recuse himself from that matter. We are aware of no basis for him to have recused himself.

Schumer 338 Does the Office of Legal Counsel have an opinion as to whether the Office of the Vice President is part of the Executive Branch? If so, what is that opinion?

ANSWER: The Office of Legal Counsel has written a number of memoranda that contain discussions that may relate to the status of the Vice President or the Office of the Vice President with respect to the Executive Branch and the Legislative Branch. Copies of memoranda relating to your request are attached.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00335 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.187

Durbin 344 In your 25-page single-space written testimony submitted to this Committee for last week's hearing, you listed and discussed nine priority issues for the Justice Department. They are important priorities. But I was troubled by the fact that civil rights enforcement was not mentioned at all – not once – in your 25-page testimony. This is disturbing because we have learned about how politicized your Civil Rights Division has been in recent years. And it is troubling because when you came before this Committee for your nomination hearing in January 2005, you testified that your top two priorities would be fighting terrorism and protecting civil rights. Is civil rights enforcement no longer a priority issue for the Department of Justice? If it is, in fact, a priority, why was it not mentioned in your 25-page testimony last week before this committee?

ANSWER: The Civil Rights Division has enforcement responsibility for many antidiscrimination statutes. The Department takes seriously its responsibility to protect the rights secured by each of these laws. During this Administration, the Division has been vigilant and aggressive in its enforcement, outreach, and training efforts across the full breadth of its jurisdiction, including prosecuting criminal civil rights violations, protecting equal access to the ballot box, combating discrimination in employment, housing, and educational settings, ensuring the rights of persons with limited English proficiency, and protecting the rights of institutionalized persons and persons with disabilities.

To enhance the Division's law enforcement efforts in three of its busiest areas, the Attorney General endorsed major initiatives to combat housing discrimination, human trafficking, and post-9/11 backlash. In addition, the Attorney General announced initiatives to investigate and prosecute unsolved civil rights era murder cases and to protect religious liberty.

The Attorney General announced his housing discrimination initiative, "Operation Home Sweet Home", on February 15, 2006. Operation Home Sweet Home seeks to ensure equal access to housing by expanding and targeting the Division's fair housing testing program. In FY 2007, the Division's Housing and Civil Enforcement Section conducted a record high number of fair housing tests in order to expose housing providers who are illegally discriminating against persons seeking to rent or purchase homes. The program is conducted primarily through paired tests, an event in which two individuals – one acting as the "control group" (*e.g.*, white male) and the other as the "test group" (*e.g.*, black male) – pose as prospective buyers or renters of real estate for the purpose of determining whether a housing provider is complying with the fair housing laws. Under the initiative, the Department focuses significantly on outreach by creating a new fair housing website, establishing a telephone tip line and e-mail complaint process, and sending outreach letters to more than 400 public and private fair housing organizations encouraging them to report suspected housing discrimination.

At the outset of this Administration, President Bush identified the eradication of human trafficking as a priority. The President focused federal resources on combating these crimes by creating a Cabinet-level Interagency Task Force to Monitor and Combat Trafficking in Persons and by issuing a directive which instructed federal agencies to strengthen their efforts to combat this crime. Trafficking in persons is a form of modern-day slavery. The victims of human trafficking are often lured to this country with the promise that they will enjoy the great gifts of liberty and prosperity. Instead, they find themselves trapped, victims of forced prostitution, or of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00336 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.188

domestic labor or migrant farm work under illegal and exploitative circumstances. They are predominantly women and children; many are undocumented immigrants, who lack familiarity with our language and culture. They fear law enforcement because of their illegal status. Their captors often confiscate their passports, limit their access to the outside world, and physically or psychologically coerce them into providing labor or services.

From FY 2001 to FY 2006, the Civil Rights Division and U.S. Attorneys' Offices throughout the Nation prosecuted 360 human trafficking defendants, secured almost 240 convictions and guilty pleas, and opened nearly 650 new investigations. That represents a six-fold increase in the number of human trafficking cases filed in court, quadruple the number of defendants charged, and triple the number of defendants convicted, in comparison to 1995-2000. In FY 2006, the Department obtained a record number of convictions in human trafficking prosecutions. In FY 2007, the Department exceeded that record, obtaining 103 convictions, in addition to charging eighty-nine human trafficking defendants and initiating 183 investigations.

We will seek to build on this success by continuing vigorous investigations and prosecutions. Furthermore, we will continue to coordinate and share intelligence among the forty-two victim-centered law enforcement task forces established across the Nation. These task forces are collaborations among U.S. Attorneys, law enforcement, and victim service agencies. Their activities focus on increasing the identification and rescue of trafficking victims through proactive law enforcement, provision of services to victims, and investigation and prosecution of human trafficking cases.

On January 31, 2007, the Attorney General and the Assistant Attorney General for the Civil Rights Division announced the creation of the new Human Trafficking Prosecution Unit within the Criminal Section. This new Unit is staffed by the Section's most seasoned human trafficking prosecutors, who will work with our partners in federal and state law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases.

The Department of Justice Criminal Division's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) provides technical assistance and training geared to enhance the capabilities/capacity of our law enforcement partners overseas to prevent transnational (and domestic) trafficking; protect victim witnesses and thereby encourage their cooperation in investigations and prosecutions; and effectively investigate and prosecute trafficking in persons cases. OPDAT also assists with legislative reform and drafting in the area of Trafficking in Persons (TIP) to ensure that a host country's TIP law is victim assistance centered and compliant with the Palermo Protocol of the UN Organized Crime Convention. OPDAT regularly calls upon the expertise of the Department attorneys from the Civil Rights Division, Child Exploitation and Obscenity Section, and the US Attorney's Offices in both the design and execution of TIP assistance programs overseas. In FY 2007 for example, OPDAT conducted 55 programs involving 18 countries (Armenia, Azerbaijan, Bangladesh, Bosnia, Bulgaria, Ghana, Indonesia, Kyrgyzstan, Latvia, Macedonia, Malawi, Nepal, Romania, Russia, Taiwan, Tanzania, Thailand, and Zambia). A mark of the success of the significant training and outreach by OPDAT is Russia's increase in criminal prosecutions of human trafficking cases – ranging from a ten fold increase in the last five years in child pornography prosecutions (more

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00337 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.189

than 350 investigations last year) to a more than four hundred percent increase in human trafficking investigations in the last four years. It is important to note that OPDAT training and outreach has also resulted in closer cooperation between the United States and foreign law enforcement on a series of sex traveler cases.

After the national tragedy of September 11, 2001, the Assistant Attorney General for the Civil Rights Division directed the Division's National Origin Working Group to work proactively to combat violations of civil rights laws against Arab, Muslim, Sikh, and South-Asian Americans, and those perceived to be members of these groups, through the creation of the Initiative to Combat Post-9/11 Discriminatory Backlash.

Since the terrorist attacks of September 11th, members of these groups, and those perceived to be members of these groups, have been the victims of increased numbers of bias-related assaults, threats, vandalism and arson. Reducing the incidence of such attacks, and ensuring that the perpetrators are brought to justice, is a Civil Rights Division priority. The Division also has made a priority of cases involving discrimination against Arab, Sikh, Muslim, and South-Asian Americans in employment, housing, education, access to public accommodations and facilities, and other areas within the Civil Rights Division's jurisdiction.

The Initiative is combating bias crimes and discrimination by:

- Ensuring that there are efficient and accessible processes in place for individuals to report violations to the Civil Rights Division and making sure that these cases are handled expeditiously.

- Implementing proactive measures to identify cases involving bias crimes and discrimination being prosecuted at the state level that may merit federal action.

- Conducting outreach to affected communities to provide them with information about how to file complaints and the resources available through the Department of Justice and other federal agencies to protect their civil rights.

- Working with other Department of Justice components and other government agencies to ensure accurate referral, effective outreach, and comprehensive provision of services to victims of civil rights violations.

There has been renewed interest in the investigation and prosecution of unsolved civil rights era murder cases. The Criminal Section continues to play a central role in this effort. In January 2007, the Attorney General announced the indictment of James Seale on two counts of kidnapping and one count of conspiracy for his role in the 1964 abduction and murder of Charles Moore and Henry Dee in Franklin County, Mississippi. A federal jury returned guilty verdicts against Seale on all three counts on June 14, 2007. Earlier, in February 2007, the Attorney General and the FBI announced an initiative to identify other unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of federal law.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00338 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.190

On February 20, 2007, the Attorney General announced a new initiative, entitled the First Freedom Project, and released a "Report on Enforcement of Laws Protecting Religious Freedom: Fiscal Years 2001 to 2006". The First Freedom Project includes creation of a Department-wide Religious Liberty Task force, a series of regional seminars on federal laws protecting religious liberty to educate community, religious, and civil rights leaders on these rights and how to file complaints with the Department of Justice, and a public education campaign that includes a new website, www.FirstFreedom.gov, speeches and other public appearances, and distribution of literature about the Department's jurisdiction in this area.

In addition to these initiatives, the Division has built on and plans to build on several other recently announced and ongoing innovations pertaining to the rights of persons with disabilities and military service members.

The Division has continued its important work under Project Civic Access, a wide-ranging initiative to help towns and cities across America comply with the Americans with Disabilities Act. The goal of Project Civic Access is to ensure that people with disabilities have an equal opportunity to participate in civic life. As of September 27, 2007, we have reached 155 agreements with 144 communities to make public programs and facilities accessible. Each of these communities has agreed to take specific steps, depending on local circumstances, to make core government functions more accessible to people with disabilities. The agreements have improved access to many aspects of civic life, including courthouses, libraries, parks, sidewalks, and other facilities, and address a wide range of accessibility issues, such as employment, voting, law enforcement activities, domestic violence shelters, and emergency preparedness and response. During the past six years, our agreements under Project Civic Access have improved the lives of more than three million Americans with disabilities.

In October 2006, the Attorney General directed the Civil Rights Division to use the knowledge and experience the Division has gained in its work with state and local governments under Project Civic Access to begin a technical assistance initiative. As a result, the Division is publishing the "ADA Best Practices Tool Kit for State and Local Governments", a document to help state and local governments improve their compliance with ADA requirements. This Tool Kit is being released in several installments. In the Tool Kit, the Division will provide common sense explanations of how the requirements of Title II of the ADA apply to state and local government programs, services, activities, and facilities. The Tool Kit will include checklists that state and local officials can use to conduct assessments of their own agencies to determine if their programs, services, activities, and facilities are in compliance with key ADA requirements.

The first and second installments, released on December 5, 2006, covered "ADA Basics: Statute and Regulations" and "ADA Coordinator, Notice and Grievance Procedure: Administrative Requirements Under Title II of the ADA". The third and fourth installments, issued February 27, 2007, covered "General Effective Communication Requirements Under Title II of the ADA" and "9-1-1 and Emergency Communications Services." The fifth and sixth installments, released May 7, 2007, covered "Website Accessibility Under Title II of the ADA" and "Curb Ramps and Pedestrian Crossings". The seventh installment, released on July 26, 2007, covered "Emergency Management Under Title II of the ADA". These installments, and all subsequent installments, will be available on the Department's ADA Website (www.ada.gov).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00339 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.191

While state and local officials are not required to use these technical assistance materials, they are strongly encouraged to do so, since the Tool Kit checklists will help them to identify the types of noncompliance with ADA requirements that the Civil Rights Division has commonly identified during Project Civic Access compliance reviews as well as the specific steps that state and local officials can take to resolve these common compliance problems.

On August 14, 2006, the Former Attorney General Gonzales unveiled www.servicemembers.gov, a website aimed at ensuring that our Nation's troops understand the rights that the Civil Rights Division enforces on their behalf and how to file a complaint in the event that those rights are violated. The website provides information on three statutes: the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Servicemembers Civil Relief Act (SCRA), and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). One example of the Division's work to protect the rights of service-members is *Woodall, McMahon & Madison v. American Airlines*, the first class-action USERRA complaint filed by the United States. The Division will continue its enforcement of those important statutes, and its outreach to educate service members of their rights.

In addition to these newly announced and ongoing priorities, the Division's ten litigating sections have pursued the following priorities from 2002–2007:

- In addition to representing the Department on direct appeal in civil rights cases across the Division, the Appellate Section has focused on identifying appropriate cases for participation as amicus curiae. In particular, the Section has monitored Eleventh Amendment cases and has prepared briefs defending the constitutionality of civil rights statutes in the federal district courts, the Federal courts of appeals, and the United States Supreme Court. This work is vital to the defense of the statutes enforced by the Division, especially Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act.

- The Coordination and Review Section has focused its outreach to train recipients of federal funds on the requirements of Title VI and to educate Federal agencies on their responsibilities under Executive Order 13166. The Section conducts outreach and training to beneficiary groups and organizations that represent them. In addition, the Section uses www.lep.gov as a vehicle for outreach and technical assistance. The Section has played a central role in assisting persons with limited English proficiency (LEP). For example, in March 2007, the Section hosted the Interagency LEP Conference, which was designed to assist Federal agencies, fund recipients, and the community in the quest for reasonable language access. Additionally, the Section has organized and coordinated meetings of the Federal Interagency Working Group on LEP, which functions under Section leadership. Active members of this group represent more than thirty-five Federal agencies.

- The Criminal Section has made a priority of the prosecution of hate crimes, which are acts or threats of violence motivated by a victim's race, color, religion, or national origin that interfere with certain federally protected rights. In fact, Criminal Section Deputy Chief Barbara Bernstein was selected to receive the coveted Helene and Joseph Sherwood Prize for Combating Hate by the Anti-Defamation League (ADL). As one of the select few in law enforcement to

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00340 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.192

receive the prestigious award, the ADL said that Deputy Chief Bernstein "exemplifies an ongoing commitment, support, and contribution in helping to eliminate hate and prejudice." The ADL also praised the Department for its successful prosecution of *U.S. v. Walker* in which three members of the National Alliance, a white supremacist organization, were charged and convicted with assaulting a Mexican-American bartender in the Salt Lake City bar where he was working and of assaulting an individual of Native-American heritage outside a different bar in Salt Lake City.

In an effort to enhance the Division's ability to identify hate crime incidents, the Section has held regular meetings with officials from the ADL and other members of the Hate Crimes Coalition.

Nearly fifty percent of the criminal civil rights prosecutions brought in FY 2006 involved official misconduct. The Division has also worked closely with the FBI, the United States Attorneys' Offices, and State and local law enforcement to identify and prosecute historical civil rights era crimes.

- In addition to actively investigating and seeking to resolve meritorious complaints of discrimination against persons with disabilities, the Disability Rights Section has continued its efforts under Project Civic Access and has focused on outreach to representatives of the business and disability communities in order to increase voluntary compliance with the Americans with Disabilities Act (ADA). During 2006 and 2007, the Section continued to develop revised ADA regulations that will adopt updated design standards consistent with the revised ADA Accessibility Guidelines published by the Access Board in July 2004. The revised guidelines are the result of a multi-year effort to promote consistency among the many federal and state accessibility requirements. We are now drafting a proposed rule and developing the required regulatory impact analysis.

- The Educational Opportunities Section has aggressively investigated and taken appropriate action with respect to reports of discrimination, including harassment, on the basis of race, sex, religion, and national origin in our Nation's public schools. The Section has also reviewed existing desegregation orders to ensure compliance and seek relief where appropriate. Additionally, the Section has expanded its English Language Learner project by initiating investigations and developed other practice areas such as disability rights.

- The Employment Litigation Section has investigated and prosecuted employers engaging in patterns or practices of discrimination in violation of Section 707 of Title VII of the Civil Rights Act of 1964 and individual acts of discrimination in violation of Section 706 of Title VII. The Section has actively monitored and ensured full compliance with existing consent decrees.

- The Housing and Civil Enforcement Section has worked to ensure nondiscriminatory access to housing, public accommodations, and credit. The Section has maintained its commitment to vigorous enforcement of the Fair Housing Act, the mainstay of our efforts to eliminate housing discrimination in America. Enforcing the prohibitions against credit discrimination in the Fair Housing Act and Equal Credit Opportunity Act is another priority for the Section. The Housing and Civil Enforcement Section has built on its efforts to enforce the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00341 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.193

Religious Land Use and Institutionalized Persons Act, opening investigations and initiating litigation when warranted.

- The Special Litigation Section has built on its impressive record of actively protecting the rights of institutionalized persons under the Civil Rights of Institutionalized Persons Act by identifying, investigating, and seeking remedial reform of patterns or practices of unconstitutional conditions in institutions. The Section has monitored consent decrees, settlement agreements, and court orders involving nearly one hundred facilities to ensure compliance with negotiated reform.

Under the police misconduct statutes, the Section has investigated, and, where appropriate, sought systemic reform regarding patterns or practices of constitutional and federal violations involving law enforcement agencies. The Special Litigation Section has prioritized our enforcement of police misconduct consent decrees and other settlement agreements to ensure compliance with negotiated reform by local law enforcement agencies.

- The Voting Section has vigorously enforced each of the statutes for which it is responsible, including the Voting Rights Act, the Help America Vote Act (HAVA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and the National Voter Registration Act (NVRA). The eighteen new lawsuits we filed in Calendar Year (CY) 2006 is more than twice the average number of lawsuits filed by the Division annually over the preceding thirty years.

The Division places importance on enforcement of each provision of the Voting Rights Act. Enforcement of Section 2 has been a priority; the Section recently won several contested judgments against at-large election systems in Ohio, Florida, and New York, and has obtained the first two Section 2 preliminary injunctions against such systems in the past twenty-one years. It is also investigating potential election-related discrimination in other jurisdictions. The Division continues to vigorously defend challenges to the constitutionality of Section 5 of the Voting Rights Act as the top priority. The Section is also expanding its pool of local citizens whom it contacts in reviewing Section 5 submissions to include current leadership of African-American, Hispanic, Asian-American, and Arab-American groups and communities. Additionally, our investigations and enforcement of Section 203 and Section 208 continue to be a priority. In this Administration, the Voting Section has filed more than twice as many minority language cases as it filed in the entire previous history of the Act combined, and it has filed four times as many cases under Section 208 as in the Act's history before 2001.

Virtually all of HAVA's requirements became fully enforceable as of January 1, 2006. In advance of this deadline, the Division worked hard to help States achieve timely voluntary compliance. Where that did not appear possible, the Division brought enforcement actions, filing five lawsuits under HAVA in 2006.

The UOCAVA remains a priority of the Section. In CY 2006, the Voting Section filed the largest number of cases under UOCAVA in any year since 1992. The Section has proactively identified and challenged structural impediments to compliance in various States'

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00342 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.194

laws, such as unrealistic primary and special election schedules. The Section has continued to make expansion of its enforcement of the National Voter Registration Act a priority.

Finally, election monitoring has proved to be an important element of our overall enforcement program and will remain a priority. During CY 2006, the Division deployed a record number of monitors and observers to jurisdictions across the country for a mid-term election. On November 7, 2006, more than 800 federal personnel monitored the polls in sixty-nine political subdivisions in twenty-two states. In CY 2006, we sent over 1,500 federal personnel to monitor elections, double the number sent in CY 2000, a presidential election year.

Durbin 348 In light of the allegations of wrongdoing involving Mr. Schlozman, why does the Department of Justice continue to employ him?

ANSWER: Mr. Schlozman is no longer an employee of the Department of Justice.

Durbin 350 Are there any U.S. Attorney's offices in America that have had more U.S. Attorneys – either confirmed, acting, or interim – under the Bush Administration than the Southern District of Illinois?

ANSWER: No.

Durbin 351 In your opinion, have there been any public corruption cases in the Southern District of Illinois that have not been aggressively pursued for lack of that district having a confirmed U.S. Attorney?

ANSWER: No.

Durbin 352 On page 46 of the responses to the questions for the record that you provided on July 6, 2007, in response to a question I asked you (203), you stated that ATF has "begun the process of amending the ATF form 4473 (the firearms transaction record) to provide additional information to purchasers about the definitions of 'adjudicated mentally defective' and 'committed to a mental institution.'" On February 6, 2007, I sent a letter to ATF Acting Director Michael Sullivan requesting the views of ATF on whether it would be feasible and beneficial to law enforcement agencies and gun owners if the ATF form 4473 were modified to include a tear-off section on which the firearm serial number could be written and provided to the purchaser. It is my belief that such a modification to the form 4473 would be helpful to victims of firearm theft and would facilitate crime gun tracing involving stolen guns. I have not yet received a response to this letter. Given that ATF has already "begun the process of amending the ATF form 4473," please advise me of the views of ATF and the Department of Justice on the suggested modification to the form 4473 contained in the letter.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00343 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.195

ANSWER: The Department previously responded to you in a letter, dated August 20, 2007. In the response, ATF mentions our publication titled "Personal Firearms Record", P3312.8, which is available to the public on the ATF web site and to Federal Firearms licensees from our distribution center. The record was developed to provide a firearms purchaser an easy to use format to record information needed to report a theft or loss of a firearm to law enforcement officials. While ATF thinks that the P3312.8 is an efficient way for owners to record firearms information, we agree that your suggestion for a tear-off section to Form 4473 is a good idea, and we will consider your suggestion the next time the form is revised.

Durbin 358 Executive Order 12958, issued by President Clinton in 1995, and updated and reissued by President George W. Bush in 2003, prescribes a uniform system for classifying, safeguarding, and declassifying national security information. This Executive Order requires, among other things, that entities in the executive branch that come into possession of classified information file annual reports with the Information Security Oversight Office (ISOO) within the National Archives and allow the ISOO to conduct on-site reviews to ensure procedures are in place and being followed Section 6.2 (b) of the Executive Order states that "(t)he Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration." On January 9, 2007, over six months ago, the Director of the ISOO asked you to render an interpretation on the issue of whether the Office of the Vice President is subject to the requirements of this Executive Order. You are required to provide a response, but you have not yet done so. Please explain why you have not yet responded to this request to render an interpretation. When can the Information Security Oversight Office expect to receive the guidance it is awaiting from you?

ANSWER: The January 9, 2007 letter to the Former Attorney General Gonzales from the Director of ISOO requested an opinion addressing whether the Office of the Vice President is an "agency" for purposes of Executive Order 12958, as amended. In a letter dated July 20, 2007, a copy of which is attached, the Department responded to the request as follows:

> On July 12, 2007, the Counsel to the President wrote a letter to Congress stating that "[t]he President has asked me to confirm to you that . . . the Office of the Vice President . . . is not an 'agency' for purposes of the Order." Letter to the Honorable Sam Brownback, United States Senate, from Fred F. Fielding, Counsel to the President (copy enclosed). That statement on behalf of the President directly resolves the question you presented to the Attorney General. Therefore, the Department of Justice will not be providing an opinion addressing this question.

Grassley 359 As a longtime supporter of the False Claims Act, I am concerned that recent court decisions have limited application of this law. For example, in Rockwell International v. United States, the Supreme Court limited the definition of an "original source" under the FCA. Further, in United States ex. rel Totten v. Bombardier Corp, the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00344 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.196

D.C. Circuit Court of Appeals limited the application of the FCA to grantees because they are not government employees under the FCA. In your opinion, were these cases decided incorrectly?

ANSWER: The Department of Justice filed amicus briefs in both cases urging a result opposite to that reached by the court in each case. The Department of Justice has also filed numerous briefs in subsequent cases, with some success, arguing that the *Totten* decision was wrongly decided.

Grassley 360 Will the Rockwell decision limit the number of qui tam whistleblower suits filed?

ANSWER: We do not believe the *Rockwell* decision will adversely impact the number of *qui tam* cases filed under the False Claims Act. While the *Rockwell* decision concluded that the relator in that case did not qualify as an original source, the Supreme Court's reasoning that the public disclosure provision must be applied on a claim-by-claim basis could potentially benefit many relators. For example, in *U.S. ex rel. Boothe v. Suncare*, 2007 WL 2247666 (10th Cir. Aug. 7, 2007), the 10th Circuit reversed a district court's dismissal of a *qui tam* action based on the district court's determination that some of the relator's claims were barred by the public disclosure provision. Relying on the *Rockwell* decision's requirement of a claim-by-claim analysis, the 10th Circuit held that the district court erroneously concluded that the relator's entire action was barred merely because some of the claims had been publicly disclosed.

Grassley 361 Has the Totten decision limited the ability of the Federal government to recover money lost to fraud of abuse by contractors working for government grantees?

ANSWER: As noted, the Department of Justice has filed briefs in various cases since the *Totten* decision was issued arguing successfully that the decision was wrongly decided. For example, the Department filed an amicus brief in the 6th Circuit in *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610 (6th Cir. 2006), *cert. granted*, 128 S. Ct. 491 (2007), a decision that disagreed with *Totten's* interpretation that 31 U.S.C. § 3729(a)(2) contains a presentment requirement. The Supreme Court has granted certiorari in that matter, and the Department recently filed an amicus brief supporting the 6th Circuit's ruling. Additionally, the United States has defeated attempts by defendants to expand *Totten* to require that the false claims be presented *by the defendant*. In *U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F.Supp.2d 719 (N.D. Ill. 2007), *appeal filed*, Nos. 07-2111, 07-2113 (7th Cir.), for example, where the United States and the State of Illinois collectively recovered $334.3 million, the district court rejected the defendants' contention that, because the defendant did not present any claims to the United States, *Totten* required dismissal of the Medicaid fraud claims at issue. Due in large part to such efforts, to date no False Claims Act case pursued by the Department since *Totten* has been dismissed on the basis of that decision.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00345 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.197

Grassley 362 Have these decisions hampered the ability of DOJ to go after bad actors?

ANSWER: For the reasons stated above, to date no case pursued by the Department of Justice has been precluded by either of these decisions.

Grassley 363 Would the Department support legislative efforts to correct any problems that may have arisen as a result of these decisions?

ANSWER: We have received and are currently reviewing proposed bills S. 2041 and H.R. 4854. We understand that both bills include proposed changes in response to the *Rockwell* and *Totten* decisions. We would be happy to discuss these proposed changes once we complete our review of the proposed legislation.

Grassley 364 On June 7, 2005, then Assistant Attorney General Peter Keisler told the Wall Street Journal that there were as many as 150 pending civil and criminal cases at the Department of Justice related to pharmaceutical fraud involving Medicare and Medicaid. As a senior member of the Judiciary Committee and as the Ranking Member of the Finance Committee, which has oversight authority over both programs, this outstanding caseload is of concern to me. Accordingly, I ask that you provide updated case statistics related to pending False Claims Act cases, including: How many outstanding False Claims Act cases are currently pending under seal with the Department of Justice?

ANSWER: According to current data, the Civil Division, together with the United States Attorneys' Offices, currently have approximately 1,000 *qui tam* cases which are under seal pending the United States' decision on whether to intervene. These cases are in various stages of investigation and include many in which the parties are actively discussing settlement following a partial lifting of the seal. Defendants have an incentive to settle cases before they are unsealed, so they can announce a settlement at the same time the allegations are made public. This process benefits both the United States and relators, even though it may have the effect of prolonging the seal in some cases.

Grassley 365 How many of these cases involve potential false claims to Medicare or Medicaid?

ANSWER: Of the approximately 1,000 *qui tam* cases that are pending under seal, approximately 630 allege health care fraud. Although Medicare and Medicaid are implicated in the overwhelming majority of these cases, the Department's records do not allow us to isolate cases on the basis of specific federal health care programs.

Grassley 366 How many of these cases involve pharmaceutical pricing fraud?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00346 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.198

ANSWER: Although the Department has resolved many *qui tam* cases involving pharmaceutical companies since June, 2005, many new cases have also been filed. Accordingly, of the approximately 1000 *qui tam* cases that are pending under seal, the number of cases alleging fraud in connection with the pricing and marketing of pharmaceuticals remains about 150.

Grassley 367 How many of these cases involve military construction contracts?

ANSWER: Of the approximately 1,000 *qui tam* cases that are pending under seal, approximately 230 allege procurement fraud, including approximately 135 cases in which the Department of Defense is the primary agency. The Department's records do not allow us to isolate cases involving military construction contracts.

Grassley 368 How many of these cases involve defense contractors?

ANSWER: As noted above, of the approximately 1,000 *qui tam* cases that are pending under seal, approximately 230 allege procurement fraud, including approximately 135 cases in which the Department of Defense is the primary agency. The Department's records do not identify defendants as "defense contractors" or allow us to isolate data on this basis.

Grassley 369 How many cases have been resolved in the last five years?

ANSWER: According to current data, the Civil Division, together with the United States Attorneys' Offices, have obtained approximately 650 settlements and judgments since fiscal year 2003 — about 500 in *qui tam* cases and 150 in other actions – totaling approximately $10 billion. In some instances, the underlying cases remain open pending appeal or outstanding claims against other defendants. Approximately an additional 1100 *qui tam* cases have been declined or dismissed during that same time period, and numerous non-*qui tam* matters have been completed as well.

Grassley 370 What is the average length of time that an FCA case is filed under seal with the Department?

ANSWER: According to current data, since fiscal year 2004, the average length of time from the Civil Division's receipt of a *qui tam* case until the Department notifies the court of its election is approximately 13 months. That does not mirror exactly the time a *qui tam* case remains under seal because our statistics use the date that the Civil Division receives the complaint, rather than the date the case was filed, and because the date on which a court orders a case unsealed may be days, weeks, or even months after the government notifies the court of its election, particularly in cases where the government declines to intervene. Accordingly, the average time that a *qui tam* case is investigated is more accurately measured by the time between the Civil Division's receipt of the case and the government's election, rather than by the length

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00347 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.199

of time a case remains under seal. Moreover, the timing of the government's election is influenced by a variety of factors, including the size and complexity of the case, the specificity of the *qui tam* complaint and the evidence the relator brings to the action, the ease of obtaining additional evidence needed to verify the allegations, the existence of related *qui tam* actions that implicate additional procedural and jurisdictional considerations, the existence of related criminal proceedings, and, significantly in cases that show promise, the ability of the parties to resolve the matter before intervention. As mentioned above, the United States often seeks a partial lifting of the seal to explore settlement possibilities before entering into active litigation, which can be prolonged and costly. Defendants have an incentive to settle cases before they are unsealed, so they can announce a settlement at the same time the allegations are made public. That incentive is lost once the case is unsealed. This process benefits both the United States and relators, even though it may have the effect of prolonging the government's election. Keeping these factors in mind, the Department's record of investigating *qui tam* cases is a good one.

Grassley 371 What can the Department do to speed up the resolution of these cases and, at the same time, obtain the full amount due and owed the Federal government as a result of the fraud? What, if any, consideration has been given to establishing a FCA support group designed to lend resources to high profile large scale fraud cases in an effort to resolve them in a timely fashion?

ANSWER: With respect to the first part of your question, please see the answer below to Question Number 375. With respect to the second part of your question, it is not clear what is meant by "a FCA support group." However, the Department's Civil Division already has a section of approximately 75 attorneys and additional support staff devoted to litigating False Claims Act cases. The section is headed by an SES Director, two Deputy Directors and other experienced supervisors, and is closely monitored and supervised by the Assistant Attorney General and a Deputy Assistant Attorney General. The attorneys in the section have the flexibility to handle fraud matters wherever they arise, and routinely assist U.S. Attorney's Offices in investigating and litigating False Claims Act cases. Large-scale fraud cases are staffed to ensure that the investigation and any ensuing litigation are handled efficiently and effectively. In addition, in the past fiscal year, additional resources for the U.S. Attorney's Offices and the Civil Division were made available by the Department to support health care fraud civil enforcement efforts.

Grassley 372 Please provide an estimate of the total potential recovery of all the current FCA cases pending against the pharmaceutical industry (including both sealed and non-sealed cases).

ANSWER: It would be inappropriate for the Department to speculate about potential recoveries in cases under investigation. Until the facts, allegations, and theories are fully developed and tested against any defenses the defendants may have, any estimate would be speculative, and would not provide a valid measure of potential recoveries.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00348 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.200

Grassley 373 Please provide an estimate of the total potential recover of all the current FCA cases pending against the defense industry (including both sealed and non-sealed cases).

ANSWER: Please see the preceding answer.

Grassley 374 Are there any legislative recommendations the Department has for improving the False Claims Act?

ANSWER: As noted, we have received and are currently reviewing proposed bills S. 2041 and H.R. 4854, and would be happy to discuss the proposed legislation once our review is completed.

Grassley 375 What, if anything, can Congress do to strengthen the hand of the Civil Division and the U.S. Attorney's offices in prosecuting and resolving outstanding FCA cases?

ANSWER: The major sources of funds for the Department's False Claims Act enforcement efforts include the Health Care Fraud and Abuse Control account ("HCFAC") and the Three Percent Fund. The HCFAC was established by the Health Insurance Portability and Accountability Act of 1996. The Three Percent Fund was established as part of the FY 1994 appropriation for the Departments of Commerce, Justice, and State. The FY 1994 appropriation allowed the Attorney General to use up to three percent of all amounts recovered by the Department's civil debt collection activities. False Claims Act litigation comprises the vast majority of the recoveries contributing to the Three Percent Fund.

The Department's base budget for the Civil Division is devoted almost exclusively to defensive litigation – cases that require representation to ensure that the government does not lose hundreds of billions of dollars in adverse judgments and settlements. As the number of defensive cases has outpaced the availability of appropriated funds, funding for affirmative cases has increasingly relied on non-appropriated sources such as the HCFAC and the Three Percent Fund. Over the last several years, the amounts available from these sources have failed to keep pace with the increasing costs of salaries and benefits, and other costs associated with the Department's fraud enforcement efforts. The HCFAC account is subject to a cap that has been frozen, and Three Percent Fund resources fluctuate in accordance with the level of recoveries which, while very substantial overall, can vary significantly from year to year.

Thus, a significant way that Congress can strengthen the Department's ability to vigorously pursue fraud cases is to raise the cap on the HCFAC account. We encourage Congress to support the Administration's efforts to increase funding in this important enforcement area.

Grassley 376 Does DOJ need additional resources for prosecuting and resolving pending FCA cases?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00349 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.201

ANSWER: Please see the preceding answer.

Grassley 377 What has the Department done to work with states who are seeking to enact a state false claims act under section 6032 of the Deficit Reduction Act of 2005 (DRA)?

ANSWER: We have coordinated closely with and advised the Inspector General of the Department of Health and Human Services as he renders formal guidance to states that endeavor to fulfill the mandate of the Deficit Reduction Act (DRA) and craft state false claims acts that are "at least as effective" as the federal False Claims Act "in rewarding and facilitating *qui tam* actions." This guidance typically takes the form of a letter from the Inspector General to a state in response to the state's request for a formal opinion on whether the state's statute qualifies under the terms of the DRA. We have exercised great care to assure that potential *qui tam* relators are accorded at least the same rights and incentives under proposed state laws as they are under the Federal law.

Grassley 378 What, if any, guidance has the Department provided in relation to section 6033 of the DRA, which requires employee FCA education for any government Medicaid contractor that receives more than $5 million annually from the Medicaid program?

ANSWER: At the request of the Centers for Medicare and Medicaid Services (CMS), the Department drafted language that ultimately was provided by CMS to Medicaid contractors receiving more than $5 million annually from the Medicaid program to educate their employees concerning the False Claims Act, as required under the Deficit Reduction Act. In addition, Department attorneys speaking at various health care conferences have reminded audiences of the DRA mandate to such Medicaid contractors to educate their employees about the provisions of the False Claims Act.

Grassley 379 The Federal False Claims Act was originally passed to deal with fraud and war profiteering. President Lincoln signed the FCA into law back in 1863 to prevent contractors from ripping off Union troops during the Civil War. That is why the FCA is referred to as Lincoln's Law. On June 20, 2007, The Boston Globe printed an article titled, Justice Department Opts out of Whistle-blower Suits: Cases Allege Fraud in Iraq Contracts. This article noted that the Department of Justice has declined to intervene in 10 False Claims Act whistleblower lawsuits that have raised allegations of fraud, waste, and abuse in contracts supporting our troops and providing for the construction of Iraq. Further, the article states that the Department has only reached two civil settlements with contractors in Iraq totaling $6.1 million. Given that Congress has appropriated hundreds of billions of dollars to fund our troops, support contractors, as well as reconstruction projects, I find it hard to believe that only $6.1 million has been lost to fraud or abuse by government contractors. In our own country that isn't at war, the general fraud rate for

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00350 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.202

the Medicaid program is around 3percent to 5percent, so I would imagine 5, 10, or even 15percent wouldn't be far off from the actual amount of fraud, but I'll leave the numbers to the experts. Attorney General Gonzales, how many False Claims Act cases alleging fraud in Iraq has the Department joined since 2003?

ANSWER: The Department has intervened in and is litigating one *qui tam* case involving the manufacture of flares used in Iraq and Afghanistan. In addition, we intervened in three *qui tam* cases for purposes of settlement. It is incorrect that the Department has reached only two civil settlements for $6.1 million. We have reached five False Claims Act settlements in connection with the war in Iraq resulting in the government recovering $16 million. We have additional cases under investigation, including matters in which criminal proceedings have been instigated.

Grassley 380 Is this article accurate in stating that the Department has declined intervention in 10 FCA cases alleging contracting fraud in Iraq?

ANSWER: The current figure is 12.

Grassley 381 Why has the Department declined intervention?

ANSWER: The United States declines intervention in *qui tam* cases for a number of reasons. We do not wish to affect in any way relators' rights going forward in declined cases, and therefore, as a matter of practice, we do not comment on our reasons for declining particular cases.

Grassley 382 Does the declination of intervention signal an unwillingness to pursue Iraq contracting fraud cases?

ANSWER: No. These cases are being aggressively pursued and if the investigations reveal wrongdoing, we take appropriate enforcement action, just as in any other case.

Grassley 383 How many other Iraq fraud contracting cases does the Department currently have under seal?

ANSWER: There are currently about 30 *qui tam* cases under investigation and under seal.

Grassley 386 I continue to await responses from the FBI on a number of issues, some of them months overdue. As the Department has oversight authority over the FBI, I ask that you ensure the prompt and expeditious delivery of all information requested. Often times when I inquire with the FBI about my requests, I'm informed that they have passed it along to the Department for approval. Are there currently any outstanding requests of mine pending approval at the Department level?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00351 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.203

ANSWER: The Department is working to complete our responses and will provide them to the Committee expeditiously.

Grassley 387 If so why are they delayed and when can I expect them?

ANSWER: The Department is working to complete our responses and will provide them to the Committee expeditiously.

Grassley 388 I asked FBI Director Mueller this same question at a FBI Oversight Hearing in March, I am still waiting for a response. Former FBI agent Jane Turner recently won a $565,000 verdict from a federal jury in Minnesota. The jury found that her supervisors had made false and misleading statements in her performance reviews in retaliation for her for filing an Equal Employment Opportunity claim. I wrote to FBI Director Mueller earlier this year asking what steps the FBI is going to take to discipline the supervisors responsible for the retaliation. However, all I got back was a letter saying that the FBI doesn't comment on personnel matters. Mr. Mueller said he won't tolerate retaliation, but here was a case where a jury found retaliation. The jury found that FBI supervisors retaliated against Agent Turner, why can't the FBI tell us whether they are taking any action to consider holding accountable the people who retaliated?

ANSWER: The jury found that two of Jane Turner's former supervisors in Minneapolis retaliated against her for her complaints of discrimination. One of them, former Supervisory Senior Resident Agent (SSRA) Craig R. Welken, retired from the FBI in 2001 and the other, former ASAC James H. Burrus, Jr., retired on May 1, 2007.

Some media accounts have incorrectly identified James Casey as one of the FBI supervisors who retaliated against Ms. Turner. Mr. Casey was not assigned to the Minneapolis Division and his only involvement arose from his participation in the October 1999 inspection of the Minneapolis Division, which included the Minot Resident Agency (RA), Ms. Turner's office of assignment. That inspection resulted in Ms. Turner's "loss of effectiveness" transfer from the Minot RA back to the Minneapolis headquarters office, which the jury specifically found did not constitute retaliation.

Grassley 389 I understand the FBI may appeal the decision. Will the Department represent the FBI? Is this a wise use of FBI and Department resources?

ANSWER: The FBI, in conjunction with DOJ's Civil Division is currently evaluating an appeal of the verdict. As explained in the FBI's post-trial motions filed with the court, the jury disregarded both facts to which the parties had stipulated and the unrebutted testimony of one of the government's witnesses. In light of the jury's clear disregard of the evidence, the government believes the jury's award of lost wages and damages is unsupported by the facts and the law. After careful consideration by DOJ, the judgment was not appealed. In light of the jury's verdict, DOJ determined that an appeal was not in the best interests of the United States.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00352 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.204

Grassley 390 Another issue I have requests outstanding for is the FBI investigation into the anthrax attacks of 2001. I was pleased the FBI provided a briefing to Senators, but I still have concerns and questions that have gone unanswered. I have learned from depositions in the lawsuit that Stephen Hatfill filed against the FBI, that FBI Director Mueller denied the lead investigator's request to polygraph FBI agents. The lead investigator said he wanted to do that in order to get to the bottom of who in the FBI was leaking information about the case to the press. I also learned that instead, Director Mueller ordered the three squads working on the case not to talk to each other – to put up stovepipes to prevent sharing information. Why wouldn't Mueller allow the investigators to do what they felt was necessary to find out who at the FBI was leaking?

ANSWER: The FBI Director has a clear policy against the leaking of confidential law enforcement information, and his communications with those involved in the anthrax investigation were consistent with this policy. As indicated in the Director's deposition, he believes that generally the use of polygraph examinations is productive in investigations involving a narrow universe of individuals to be examined. That was not the case regarding the anthrax investigation leaks, where the universe of possible leak sources included the FBI, the U.S. Postal Service, Congress, and others. More central to this particular case, though, is that the leak investigation was handled by DOJ's OPR, not by the anthrax investigation team. In fact, we presume DOJ's OPR would have objected to outside activities that might impact their investigation.

Grassley 391 Did the FBI take any other steps to find out who was responsible? For example, were the telephone records of agents with access to the information examined to find out if they had been talking to the reporters who published sensitive information? If not, why not?

ANSWER: The FBI cooperated fully with the investigation by DOJ's OPR. FBI defers to DOJ's OPR with respect to the acquisition of telephone records and other investigative steps.

Grassley 392 Rick Lambert, the former lead investigator, testified that putting up walls between the investigators working different aspects of the case risked keeping the FBI from "connecting the dots" like before 9/11. Given his strong concerns, why did Director Mueller overrule him and direct that he "compartmentalize" the case?

ANSWER: It is critical that investigators have access to all relevant information when they are seeking to identify relationships among various facts. Particularly since the attacks of September 11, 2001, the FBI has placed great emphasis on information sharing, and has instituted numerous mechanisms to ensure that we "share by rule and withhold by exception." One "exception" (meaning, one circumstance in which information sharing is not appropriate) is when such sharing would not benefit the investigation at issue, such sharing may adversely affect that investigation (such as by encouraging or contributing to information leaks), and the absence of such sharing is not likely to adversely affect other investigations. This was such a case.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00353 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.205

Grassley 393 Also in the deposition transcripts in the Hatfill lawsuit, there is an indication that the FBI did some kind of background records check on constituents who wrote to their member of Congress about the case and whose letter had been referred to the FBI for comment by the Member of Congress. Does the Department routinely do these records checks on citizens who contact their elected representatives to inquire about an FBI matter?

ANSWER: According to the referenced transcript, the deposition witness indicates that when we receive constituent and similar inquiries the FBI queries "ACS." Although the witness indicates that Automated Case Support (ACS) is "the system that the FBI employs and generates peoples' criminal background history," this is not the case. The FBI's ACS system contains FBI-generated documents, including investigative information and other FBI documents uploaded pursuant to FBI policy. While ACS is queried by those familiar with its contents and uses to address the substance of an inquiry (typically by obtaining either substantive case information or the identity of a subject-matter expert who can assist in responding to the inquiry), FBI practice is not to use ACS to obtain information regarding the person making the inquiry, such as a constituent.

Grassley 394 Were records checks performed on all constituent mail referred to the FBI, or only on those involving the Amerithrax investigation? Were records checks performed only on authors of letters critical of the FBI or supportive of Stephen Hatfill?

ANSWER: ACS queries are conducted for the purpose of obtaining substantive information to respond to constituent inquiries, not to obtain information about the constituents themselves. This is the case regardless of whether the inquiry concerns the anthrax investigation or otherwise.

Grassley 395 Are Members of Congress given any notice that referring a constituent letter to the FBI may result in an FBI records check on their constituent?

ANSWER: Referring a constituent letter to the FBI does not result in an FBI records check on the constituent.

Grassley 396 On January 23, 2006, I wrote to FBI Director Mueller regarding the Office of Professional Responsibility (OPR) and a discrepancy in disciplinary sanctions between rank-and-file agents and supervisors. Specifically, I noted the case of Special Agent Cecilia Woods who was retaliated against after becoming suspicious about her supervisors affair with an FBI informant. Ms. Woods was given 24 days of suspension for unauthorized disclosures to her attorney and an acquaintance, which was 10 more than her supervisor who was having an affair with an informant. I, have repeatedly asked for documents in the matter and was informed on March 8, 2006, by the FBI that "the FBI a

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00354 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.206

party in a pending administrative proceeding relating to the allegations raised by Ms. Woods. Given that, and considering the confidentiality of the administrative process, it would be inappropriate for us to comment further" It is my understanding that recently the pending administrative proceeding was closed, however, I have not received any new documents of information. Will you personally ensure that the FBI is responsive to my requests regarding Cecilia Woods now that the pending administrative proceeding is closed?

ANSWER: We are not certain to what March 8, 2006, response the question refers, but the FBI did respond to a Question for the Record (QFR) based on the May 2, 2006, hearing using language similar to that quoted above. We are now able to provide a substantive response to that QFR, which was: "Have any of those conclusions been re-examined in light of her former supervisor's deposition testimony in her EEOC case, in which Woods alleges he admitted to sexual activity with an individual who was a paid informant and a foreign national?"

The FBI's Office of Professional Responsibility (OPR) reviewed this matter. Ms. Woods' supervisor did not admit to engaging in sexual activity with an informant during his deposition in her EEOC case. The supervisor admitted to engaging in extramarital affairs with three Panamanian nationals, none of whom was the informant. OPR's inquiry of the supervisor substantiated that he had engaged in a sexual relationship with a Panamanian national. After the closure of the OPR case, the FBI's Security Division, as part of a security reinvestigation, conducted a polygraph examination of the supervisor, during which he admitted having sex with two additional Panamanian nationals. After revealing his affairs with these three women, the supervisor was polygraphed on the question of whether he had engaged in sexual relations with any other foreign nationals. His negative response to this question was found to be not indicative of deception.

Grassley 397 On March 19, 2007, I wrote to FBI Director Mueller regarding the Justice Department Inspector General's report, "A Review of the Federal Bureau of Investigation's Use of National Security Letters." In this letter I focused upon the page 86, which had a subtitle, "Using 'Exigent Letters' rather than ECPA National Security Letters." This section described how FBI headquarters division known as the Communications Analysis Unit (CAU) obtained information using 739 so-called "exigent letters". Accordingly, I requested all unclassified e-mails related to the exigent letters issued by the CAU. To date, I have not received a response to this request, despite having sent a letter, and asked Director Mueller in person on March 27, 2007. Further, this request was joined at the hearing by Chairman Leahy. Will you personally ensure that the FBI will immediately respond to this request and provide this information to me expeditiously?

ANSWER: The Department is working to complete our response and will provide it to the Committee expeditiously.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00355 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.207

Grassley 402 In March of 2007, The Inspector General issued a progress report on the development of the Integrated Wireless Network in the Department of Justice. The report exposed the inadequacies of DOJ's communication systems, which currently operate on technology that is more than a decade old and has very little functionality. Even more disturbing is the fact that most agencies within DOJ operate on different frequencies. As a result, there is little to no interoperability between communication systems. This lack of interoperability could be problematic in the event of another terrorist attack or natural disaster that requires a coordinated emergency response by DOJ. What progress has been made on the development of an Integrated Wireless Network since the Inspector General's report in March of 2007?

ANSWER: The Department continues to advance the Integrated Wireless Network (IWN) work which began in the Pacific Northwest. The IWN is operational from Blaine, WA (US-Canadian Border) moving south to the Portland, OR metropolitan area along the Interstate 5 (I-5) Corridor and 23 sites on the Olympia Peninsula. The final Washington/Oregon system (which will be fully operational by July 2008) will provide interoperable communications coverage over 200,000 square miles from the Canadian to the Northern California Border. The system supports 800 users represented by the following:

- Bureau of Alcohol, Tobacco, Firearms and Explosives
- Drug Enforcement Administration
- Federal Bureau of Investigation
- US Attorney Portland
- United States Marshals Service
- Treasury Inspector General Tax Administration
- Internal Revenue Service, Criminal Investigations
- Immigration and Customs Enforcement
- Federal Emergency Management Agency
- United States Coast Guard
- Social Security Administration, Office of the Inspector General
- NOAA Office for Law Enforcement

When complete, the system will support 1000 or more Federal law enforcement personnel in Washington/Oregon and will enable interoperability to key State and Local Public Safety Agencies such as:

- King County, WA
- Pierce County, WA
- Port of Seattle, WA
- Snohomish County, WA
- Washington State Patrol
- City of Portland, OR
- Oregon State Police
- Multnomah County

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00356 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.208

The Department is also working to ensure sufficient coverage and capacity for the 2008 Olympic Trials in Eugene, OR as well as support for the 2010 Olympics in Vancouver, Canada.

In 2008 the Department will complete its High-Risk metropolitan Areas Interoperability Assistance Project "25 Cities". The 25 Cities Project was developed at the request of the House/Senate CJS Appropriations Subcommittee staff in 2003. The project provides Federal law enforcement/homeland security agencies with the ability to inter-connect and also communicate with key local authorities (*e.g.*, fire police, emergency medical services) in 25 high-risk metropolitan areas. Several cities (New York, Denver, Atlanta) are undergoing expansion and/or enhancements to increase capabilities as requested by partner agencies in those cities. With the Presidential elections fast approaching and the Democratic and Republican National Conventions planned for Summer of 2008, the Wireless Management Office, at the request of the Department's components, has initiated a solution for Minneapolis and St. Paul, MN while simultaneously providing enhancements in Denver, CO to ensure reliable radio coverage and daily interoperability operations as required.

Several cities have reported positive communication improvements during national events and emergencies: Super Bowl 2006-Detroit, MI; Super Bowl 2005-Jacksonville, FL; National Labor Relations Board office hostage incident (2006)-Phoenix, AZ; Multi-jurisdictional pursuits on Atlanta, GA area interstates.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00357 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.209

High-Risk Metropolitan Areas Interoperability Assistance Project
"25 Cities"

Atlanta, GA	Miami, FL
Baltimore, MD	Minneapolis/St. Paul, MN
Boston, MA	New Orleans, LA
Charlotte, NC	New York, NY
Chicago, IL	Philadelphia, PA
Dallas, TX	Phoenix, AZ
Denver, CO	Portland, OR
Detroit, MI	San Diego, CA
Hampton Roads, VA	San Francisco, CA
Honolulu, HI	Seattle, WA
Houston, TX	St. Louis, MO
Jacksonville, FL	Tampa, FL
Los Angeles, CA	Washington, DC

Since the March 2007 OIG Report, the Department has completed a competitive acquisition process in order to identify a lead IWN Systems Integrator. General Dynamics was notified in April 2007 of the down-select decision and a subsequent Task Order was awarded in August 2007. Initial tasks include standing up a Project Management Office and developing the national IWN Architecture, Implementation Plan and Cost Model. The Department is positioned to execute on the IWN Program across the country, provided that adequate funding can be obtained to move beyond the pilot stage. Simultaneously, the Department is working with its law enforcement components to implement an interim strategy to mitigate the inadequacies of the existing legacy systems until the IWN is deployed to critical areas around the country.

In addition, the Department sponsored a two-day Wireless Summit which was held on September 17th and 18th. At his meeting attended by all DOJ components, the parties refined the overall strategy and priorities for the IWN program. All areas including management, operations, contracts, technology and integration were covered. The PMO is in the process of documenting the results and validating the path forward for the program.

Grassley 403 Has the Department of Justice reached an agreement with the Department of Homeland Security and the Department of the Treasury on a unified program approach to the Integrated Wireless Network?

ANSWER: Yes, the Department has negotiated a new MOU with DHS and Treasury. The three Departments remain committed to the objectives of an integrated wireless environment across the three agencies, including: (1) effective interoperability amongst Federal law enforcement/homeland security agents; (2) interoperability between the Federal agencies and the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00358 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.210

State and local agencies with which we partner; (3) interagency leveraging of Federal investments in communications infrastructure; and, (4) support for and endorsement of standards-based technologies that stimulate improved interoperability, functionality and market competition. The DOJ Deputy Attorney General and DHS Deputy Secretary have both signed a new MOU outlining those commitments. The MOU is presently being staffed for the Treasury Deputy Secretary's signature.

Nonetheless, the DOJ and DHS do have different perspectives on the requirements and strategies for fulfilling them and the best means to provide tactical wireless communications for our respective field agents and officers. These perspectives are driven by the subtle but important differences between the missions, and the methods and areas of operation for each Department. The new MOU recommits the Departments to the objectives stated above, while providing each with the flexibility needed to continue operations in the field. The DOJ strategy is to deploy a network that consists of a combination of trunked, conventional, and transportable land mobile radios which will be integrated with 3G and 4G commercial wireless communications that are augmented to meet DOJ security, reliability and functional requirements. This hybrid approach will allow the Department to meet component communication needs in a flexible and cost effective way that leverages all aspects of the continuously evolving wireless industry, and also maintain interoperability and compatibility with our federal partners through the use of standards based technologies.

A copy of the text from the almost final MOU is attached to provide an indication of the level of cooperation that has been agreed upon by the three Departments.

Grassley 404 If not, does the Department of Justice plan to move forward with an Integrated Wireless Network program as a single department program? Why or why not?

ANSWER: The Department of Justice plans to move forward on IWN, as it is a critical need for our law enforcement personnel. The older systems are beyond their useful life and must be upgraded and/or replaced. If adequate funding for IWN is provided, the plan is to increase functionality beyond the current capabilities of analog radio systems to improve the communication (and interoperability) that is deployed to the users across the country.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00359 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.211

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing July 24, 2007 (Part 1)

Answer #149 Attachment

38236.212

09/27/07

VOTING CASES IN WHICH THE UNITED STATES' PARTICIPATION BEGAN SINCE OCTOBER 1, 1976

I. Plaintiff

A. Section 2

1.	U.S. v. St. Landry Parish School Board	W.D. La.	10/06/76
2.	U.S. v. City of Kosciusko [Also states a claim under Section 5]	N.D. Miss.	05/09/77
3.	U.S. v. City Commission of Texas City	S.D. Tex.	05/12/77
4.	U.S. v. Uvalde Consolidated ISD	W.D. Tex.	09/19/77
5.	U.S. v. Temple Independent School District	W.D. Tex.	01/12/78
6.	U.S. v. Town of Bartelme[1/]	E.D. Wis.	02/15/78
7.	U.S. v. State of South Dakota (Shannon County)[2/]	D.S.D.	04/04/78
8.	U.S. v. Marengo County Commission	S.D. Ala.	08/25/78
9.	U.S. v. Thurston County[3/]	D. Neb.	08/30/78
10.	U.S. v. Humboldt County[4/]	D. Nev.	09/07/78
11.	U.S. v. City of Hattiesburg	S.D. Miss.	10/02/78
12.	U.S. v. Dallas County Commission & School Board	S.D. Ala.	10/19/78
13.	U.S. v. San Juan County[5/]	D.N.M.	06/21/79
14.	U.S. v. State of South Carolina	D.S.C.	04/18/80
15.	U.S. v. Clarke County Commission [Also states a claim under Section 5]	S.D. Ala.	09/02/80

1/ This case was brought by the Civil Rights Division's former Office of Indian Rights.

2/ This case was brought by the Civil Rights Division's former Office of Indian Rights.

3/ This case was brought by the Civil Rights Division's former Office of Indian Rights.

4/ This case was brought by the Civil Rights Division's former Office of Indian Rights.

5/ This case was brought by the Civil Rights Division's former Office of Indian Rights.

38236.213

16.	U.S. v. Halifax County	E.D.N.C.	10/06/83
17.	U.S. v. Conecuh County	S.D. Ala.	10/21/83
18.	U.S. v. Lowndes County	M.D. Ga.	10/27/83
19.	U.S. v. San Juan County	D. Utah	11/22/83
20.	U.S. v. City of Bessemer	N.D. Ala.	04/10/84
21.	U.S. v. Pike County	M.D. Ala.	05/11/84
22.	U.S. v. Dorchester County	D. Md.	12/05/84
23.	U.S. v. City of Cambridge	D. Md.	12/05/84
24.	U.S. v. Wilkes County Board of Education	S.D. Ga.	01/10/85
25.	U.S. v. Chaves County	D.N.M.	01/10/85
26.	U.S. v. City of Roswell Ind. School District[6/]	D.N.M.	03/12/85
27.	U.S. v. Darlington County	D.S.C.	08/21/85
28.	U.S. v. City of Los Angeles	C.D. Cal.	11/26/85
29.	U.S. v. McKinley County	D.N.M.	01/09/86
30.	U.S. v. City of Demopolis	S.D. Ala.	01/16/86
31.	U.S. v. Town of Indian Head	D. Md.	03/24/86
32.	U.S. v. Wilson County Board of Education	E.D.N.C.	08/22/86
33.	U.S. v. Mississippi County	E.D. Ark.	10/15/86
34.	U.S. v. City of Augusta	S.D. Ga.	01/08/87
35.	U.S. v. City of Roanoke	M.D. Ala.	02/02/87
36.	U.S. v. Granville County Board of Education	E.D.N.C.	04/30/87
37.	U.S. v. City of Spartanburg	D.S.C.	05/26/87
38.	U.S. v. State of Mississippi	S.D. Miss.	07/09/87
39.	U.S. v. Laurens County	D.S.C.	07/10/87

[6/] Claim against the City of Roswell Independent School District was included as part of the Chaves County complaint; the court severed the two claims on March 12, 1985.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00362 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.214

40.	U.S. v. Washington County	N.D. Miss.	07/30/87
41.	U.S. v. Wicomico County	D. Md.	09/24/87
42.	U.S. v. Bladen County Board of Education	E.D.N.C.	10/21/87
43.	U.S. v. Lenoir County Board of Education	E.D.N.C.	10/21/87
44.	U.S. v. City of Aiken	D.S.C.	11/24/87
45.	U.S. v. Los Angeles County	C.D. Cal.	09/08/88
46.	U.S. v. State of New Mexico and Sandoval County [Also states a claim under Section 203]	D.N.M.	12/05/88
47.	U.S. v. State of Arizona [Also states a claim under Section 4(f)(4)]	D. Ariz.	12/08/88
48.	U.S. v. Sampson County	E.D.N.C.	12/16/88
49.	U.S. v. City of Bennettsville	D.S.C.	09/26/89
50.	U.S. v. City of Magnolia	W.D. Ark.	04/26/90
51.	U.S. v. Brooks County	M.D. Ga.	08/10/90
52.	U.S. v. State of Georgia	N.D. Ga.	08/09/90
53.	U.S. v. City of Memphis	W.D. Tenn.	02/15/91
54.	U.S. v. Walthall County	S.D. Miss.	11/04/91
55.	U.S. v. State of Florida [Also states a claim under Section 5]	N.D. Fla.	06/23/92
56.	U.S. v. Screven County	S.D. Ga.	12/16/92
57.	U.S. v. City of Selma	S.D. Ala.	05/18/93
58.	U.S. v. Anson County Board of Education	W.D.N.C.	07/01/93
59.	U.S. v. Johnson County	S.D. Ga.	09/08/93
60.	U.S. v. Randolph County	M.D. Ga.	09/08/93
61.	U.S. v. Talbot County	M.D. Ga.	09/08/93
62.	U.S. v. Jones	S.D. Ala.	09/10/93

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00363 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.215

63.	U.S. v. Cibola County[7/] [Also states claims under Section 203, NVRA and HAVA]	D.N.M.	09/27/93
64.	U.S. v. Socorro County [Also states a claim under Section 203]	D.N.M.	10/22/93
65.	U.S. v. Tallapoosa County	M.D. Ala.	11/12/93
66.	U.S. v. City of Monroe [Also states a claim under Section 5]	M.D. Ga.	06/02/94
67.	U.S. v. Attala County	N.D. Miss.	07/26/94
68.	U.S. v. City of Newport News	E.D. Va.	10/26/94
69.	U.S. v. Alameda County [Also states a claim under Section 203]	N.D. Cal.	04/13/95
70.	U.S. v. Lee County	N.D. Miss.	05/16/95
71.	U.S. v. City of Baton Rouge	M.D. La.	01/24/96
72.	U.S. v. New Roads	M.D. La.	09/19/96
73.	U.S. v. Board of Elections in the City of New York[8/]	S.D.N.Y.	04/03/97
74.	U.S. v. Bernalillo County [Also states a claim under Section 203]	D.N.M.	02/06/98
75.	U.S. v. City of Lawrence [Also states a claim under Section 203]	D. Mass.	11/05/98
76.	U.S. v. Day County and Enemy Swim Sanitary Dist. [Also states a claim under 42 U.S.C. 1971(a)]	D.S.D.	05/10/99
77.	U.S. v. Passaic City and Passaic County [Also states claims under Sections 203 and 208]	D.N.J.	06/02/99
78.	U.S. v. Marion County	M.D. Ga.	10/21/99
79.	U.S. v. Blaine County	D. Mont.	11/16/99
80.	U.S. v. City of Passaic	D.N.J.	02/03/00
81.	U.S. v. Benson County	D.N.D.	03/06/00

7/ Claims under the NVRA and HAVA were added in an Amended Complaint filed on January 31, 2007.

8/ This case was brought by the U.S. Attorney's Office for the Southern District of New York.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00364 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.216

82.	U.S. v. Town of Cicero	N.D. Ill.	03/13/00
83.	U.S. v. Roosevelt County	D. Mont.	03/24/00
84.	U.S. v. State of South Dakota	D.S.D.	03/28/00
85.	U.S. v. City of Santa Paula	C.D. Cal.	04/06/00
86.	Grieg v. City of St. Martinville	W.D. La.	06/02/00
87.	U.S. v. Morgan City	W.D. La.	06/27/00
88.	U.S. v. Upper San Gabriel Valley Municipal Water District	C.D. Cal.	07/21/00
89.	U.S. v. City of Hamtramck	E.D. Mich.	08/04/00
90.	U.S. v. Charleston County	D.S.C.	01/17/01
91.	U.S. v. Crockett County	W.D. Tenn.	04/17/01
92.	U.S. v. Alamosa County	D. Colo.	11/27/01
93.	U.S. v. Osceola County [Also states a claim under Section 208]	M.D. Fla.	06/28/02
94.	U.S. v. Berks County [Also states claims under Sections 4(e) and 208]	E.D. Pa.	02/25/03
95.	U.S. v. Brown (Noxubee County) [Also states a claim under Section 11]	S.D. Miss	02/17/05
96.	U.S. v. Osceola County	M.D. Fla.	07/18/05
97.	U.S. v. City of Boston [Also states a claim under Section 203]	D. Mass.	07/29/05
98.	U.S. v. Long County	S.D. Ga.	02/08/06
99.	U.S. v. City of Euclid	N.D. Ohio	07/10/06
100.	U.S. v. Village of Port Chester	S.D.N.Y.	12/15/06
101.	U.S. v. City of Philadelphia[9/] [Also states claims under Sections 4(e), 203 and 208, the NVRA and HAVA]	E.D. Pa.	04/26/07

[9/] Claims under Sections 2 and 4(e), the NVRA and HAVA were added in an amended complaint filed on April 26, 2007. The original complaint, raising claims under Sections 203 and 208, was filed on October 13, 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00365 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.217

B. Section 5 enforcement

1.	U.S. v. Board of Commissioners of Sheffield	N.D. Ala.	08/09/76
2.	U.S. v. Board of Trustees of Westheimer ISD	S.D. Tex.	01/20/77
3.	U.S. v. Board of Trustees of Midland ISD	W.D. Tex.	03/24/77
4.	U.S. v. Hawkins ISD	E.D. Tex.	03/26/77
5.	U.S. v. Board of Trustees of Trinity ISD	S.D. Tex.	03/28/77
6.	U.S. v. Board of Trustees of Chapel Hill ISD	E.D. Tex.	05/06/77
7.	U.S. v. City of Kosciusko [Also states a claim under Section 2]	N.D. Miss.	05/09/77
8.	U.S. v. Village of Dickinson	S.D. Tex.	02/17/78
9.	U.S. v. Board of Trustees of Somerset ISD	W.D. Tex.	03/10/78
10.	U.S. v. County Council of Chester County	D.S.C.	06/01/78
11.	U.S. v. Sumter County Council	D.S.C.	06/02/78
12.	U.S. v. County Council of Charleston County	D.S.C.	06/02/78
13.	U.S. v. Bd. of Commissioners of Colleton County	D.S.C.	06/02/78
14.	U.S. v. Barbour County Commission	M.D. Ala.	09/08/78
15.	U.S. v. Tripp County[10/]	D.S.D.	11/01/78
16.	U.S. v. City of Houston	S.D. Tex.	12/13/78
17.	U.S. v. Pike County Commission	M.D. Ala.	05/29/79
18.	U.S. v. State of South Dakota[11/]	D.S.D.	06/26/79
19.	U.S. v. State of South Carolina & Horry County	D.S.C.	12/21/79
20.	U.S. v. County School Trustees of Harris County	S.D. Tex.	01/18/80
21.	U.S. v. City of Port Arthur	E.D. Tex.	03/14/80

[10/] This case was brought by the Civil Rights Division's former Office of Indian Rights.

[11/] This case was brought by the Civil Rights Division's former Office of Indian Rights.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00366 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.218

22.	U.S. v. Clarke County Commission [Also states a claim under Section 2]	S.D. Ala.	09/02/80
23.	U.S. v. Sumter County	N.D. Ala.	07/14/81
24.	U.S. v. Louisville M.S.S.D.	N.D. Miss.	12/01/81
25.	U.S. v. St. George	D.S.C.	07/20/83
26.	U.S. v. Lawrence County	S.D. Miss.	07/23/83
27.	U.S. v. City of Barnwell	D.S.C.	10/22/84
28.	U.S. v. Orangeburg County Council	D.S.C.	11/21/84
29.	U.S. v. State of Texas	W.D. Tex.	07/19/85
30.	U.S. v. Houston County	M.D. Ala.	07/31/85
31.	U.S. v. Victoria Independent School District	S.D. Tex.	04/04/86
32.	U.S. v. State of North Carolina	E.D.N.C.	12/09/86
33.	U.S. v. Cochise County	D. Ariz.	02/20/87
34.	U.S. v. Town of Summerville	D.S.C.	05/13/87
35.	U.S. v. Onslow County	E.D.N.C.	12/30/87
36.	U.S. v. State of Mississippi	S.D. Miss.	12/30/87
37.	U.S. v. City of Chester	D.S.C.	06/24/88
38.	U.S. v. City of Zebulon	N.D. Ga.	11/06/89
39.	U.S. v. LaVernia ISD	W.D. Tex.	03/02/90
40.	U.S. v. State of South Carolina	D.S.C.	04/09/90
41.	U.S. v. State of Texas	S.D. Tex.	11/27/90
42.	U.S. v. City of Houston	S.D. Tex.	10/17/91
43.	U.S. v. Autauga County Board of Education	M.D. Ala.	05/27/92
44.	U.S. v. State of Florida [Also states a claim under Section 2]	N.D. Fla.	06/23/92
45.	U.S. v. Yuma County	D. Ariz.	10/29/92
46.	U.S. v. Graham County	D. Ariz.	09/16/93

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00367 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.219

47.	U.S. v. City of Wilmer	N.D. Tex.	01/18/94
48.	U.S. v. City of Monroe [Also states a claim under Section 2]	M.D. Ga.	06/02/94
49.	U.S. v. Lee County	D.S.C.	06/06/94
50.	U.S. v. State of Arizona	D. Ariz.	09/06/94
51.	U.S. v. Moses	S.D. Tex.	03/29/95
52.	U.S. v. State of Mississippi [Also states a claim under the NVRA]	S.D. Miss.	04/20/95
53.	U.S. v. State of Georgia	N.D. Ga.	03/21/96
54.	U.S. v. State of Louisiana	W.D. La.	08/12/96
55.	U.S. v. State of Alabama	M.D. Ala.	10/19/98
56.	U.S. v. New York City Board of Elections [Also states a claim under UOCAVA]	S.D.N.Y.	10/28/98
57.	U.S. v. North Harris Montgomery Community College District	S.D. Tex.	07/27/06
C.	Section 11		
1.	U.S. v. North Carolina Republican Party	E.D.N.C.	02/26/92
2.	U.S. v. Brown (Noxubee County) [Also states a claim under Section 2]	S.D. Miss.	02/17/05
D.	Section 202		
1.	U.S. v. County of Santa Clara	N.D. Cal.	11/04/80
2.	U.S. v. State of New York	N.D.N.Y.	11/01/88
E.	Section 4(e), 4(f)(4) or 203		
1.	U.S. v. City and County of San Francisco[12/] [States a claim under Section 203]	N.D. Cal.	10/27/78
2.	U.S. v. San Juan County[13/] [States a claim under Section 203]	D.N.M.	06/21/79

[12/] This case was brought by the U.S. Attorney's Office for the Northern District of California.

[13/] This case was brought by the Civil Rights Division's former Office of Indian Rights.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00368 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.220

3.	U.S. v. San Juan County [States a claim under Section 203]	D. Utah	11/22/83
4.	U.S. v. McKinley County [States a claim under Section 203]	D.N.M.	01/09/86
5.	U.S. v. State of New Mexico and Sandoval County [States claims under Sections 2 and 203]	D.N.M.	12/05/88
6.	U.S. v. State of Arizona [States claims under Sections 2 and 4(f)(4)]	D. Ariz.	12/08/88
7.	U.S. v. Metropolitan Dade County [States a claim under Section 203]	S.D. Fla.	03/11/93
8.	U.S. v. Cibola County[14/] [States claims under Sections 2 and 203, the NVRA and HAVA]	D.N.M.	09/27/93
9.	U.S. v. Socorro County [States claims under Sections 2 and 203]	D.N.M.	10/22/93
10.	U.S. v. Alameda County [States claims under Sections 2 and 203]	N.D. Cal.	04/13/95
11.	U.S. v. Bernalillo County [States claims under Sections 2 and 203]	D.N.M.	02/06/98
12.	U.S. v. City of Lawrence [States claims under Sections 2 and 203]	D. Mass.	11/05/98
13.	U.S. v. Passaic City and Passaic County [States claims under Sections 2, 203 and 208]	D.N.J.	06/02/99
14.	U.S. v. Orange County [States a claim under Section 203]	M.D. Fla.	06/28/02
15.	U.S. v. Berks County [States claims under Sections 2, 4(e), and 208]	E.D. Pa.	02/25/03
16.	U.S. v. Brentwood Union Free School District [States a claim under Section 203]	E.D.N.Y.	06/04/03
17.	U.S. v. San Benito County [States claims under Section 203 and HAVA]	N.D. Cal.	05/26/04
18.	U.S. v. San Diego County [States a claim under Section 203]	S.D. Cal.	06/23/04
19.	U.S. v. Suffolk County [States a claim under Section 203]	E.D.N.Y.	06/29/04

[14/] Claims under the NVRA and HAVA were added in an amended complaint filed on January 31, 2007.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00369 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.221

20.	U.S. v. Yakima County [States a claim under Section 203]	E.D. Wash.	07/06/04
21.	U.S. v. Ventura County [States a claim under Section 203]	C.D. Cal.	08/04/04
22.	U.S. v. Westchester County [States claims under Section 203 and HAVA]	S.D.N.Y.	01/19/05
23.	U.S. v. City of Azusa [States a claim under Section 203]	C.D. Cal.	07/14/05
24.	U.S. v. City of Paramount [States a claim under Section 203]	C.D. Cal.	07/14/05
25.	U.S. v. City of Rosemead [States a claim under Section 203]	C.D. Cal.	07/14/05
26.	U.S. v. City of Boston [States claims under Sections 2 and 203]	D. Mass	07/29/05
27.	U.S. v. Ector County [States a claim under Section 4(f)(4)]	W.D. Tex.	08/23/05
28.	U.S. v. Hale County [States claims under Sections 203 and 208]	N.D. Tex.	02/27/06
29.	U.S. v. Cochise County [States claims under Section 203 and HAVA]	D. Ariz.	06/16/06
30.	U.S. v. Brazos County [States claims under Sections 4(f)(4) and 208]	S.D. Tex.	06/28/06
31.	U.S. v. City of Springfield [States claims under Sections 203 and 208]	D. Mass.	08/02/06
32.	U.S. v. City of Philadelphia[15/] [States claims under Sections 2, 4(e), 203 and 208, the NVRA and HAVA]	E.D. Pa.	10/13/06
33.	U.S. v. City of Walnut [States a claim under Section 203]	C.D. Cal.	04/12/07
34.	U.S. v. Galveston County [States claims under Section 4(f)(4) and HAVA]	S.D. Tex.	07/16/007
35.	U.S. v. City of Earth [States a claim under Section 203]	N.D. Tex.	07/16/07
36.	U.S. v. Littlefield Independent School District [States a claim under Section 203]	N.D. Tex.	07/16/07

[15/] Claims under Sections 2 and 4(e), the NVRA, and HAVA were added in an amended complaint filed on April 26, 2007.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00370 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.222

37.	U.S. v. Post Independent School District [States a claim under Section 203]	N.D. Tex.	07/16/07
38.	U.S. v. Seagraves Independent School District [States a claim under Section 203]	N.D. Tex.	07/16/07
39.	U.S. v. Smyer Independent School District [States a claim under Section 203]	N.D. Tex.	07/16/07
40.	U.S. v. County of Kane [States claims under Sections 203 and 208]	N.D. Ill.	09/26/07

F. Section 208

1.	U.S. v. State of Arkansas	E.D. Ark.	10/30/84
2.	U.S. v. Passaic City and Passaic County [Also states claims under Sections 2 and 203]	D.N.J.	06/02/99
3.	U.S. v. Miami-Dade County	S.D. Fla.	06/07/02
4.	U.S. v. Osceola County [Also states a claim under Section 2]	M.D. Fla.	06/28/02
5.	U.S. v. Berks County [Also states claims under Sections 2 and 4(e)]	E.D. Pa.	02/25/03
6.	U.S. v. Hale County [Also states a claim under Section 203]	N.D. Tex.	02/27/06
7.	U.S. v. Brazos County [Also states a claim under Section 4(f)(4)]	S.D. Tex.	06/28/06
8.	U.S. v. City of Springfield [Also states a claim under Section 203]	D. Mass.	08/02/06
9.	U.S. v. City of Philadelphia[16/] [Also states claims under Sections 2, 4(e), and 203, the NVRA and HAVA]	E.D. Pa.	10/13/06
10.	U.S. v. County of Kane [Also states a claim under Section 203]	N.D. Ill.	09/26/07

G. Section 301

1.	U.S. v. State of Texas (Waller County)	S.D. Tex.	10/14/76

[16/] Claims under Sections 2 and 4(e), the NVRA, and HAVA were added in an amended complaint filed on April 26, 2007.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00371 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.223

H. Overseas Citizens Voting Rights Act/
Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)

1.	U.S. v. New York State Board of Elections	N.D.N.Y.	10/30/76
2.	U.S. v. State of Florida	N.D. Fla.	11/06/80
3.	U.S. v. State of Colorado	D. Colo.	10/29/82
4.	U.S. v. State of Colorado	D. Colo.	09/20/84
5.	U.S. v. State of Wisconsin	W.D. Wis.	10/31/84
6.	U.S. v. State of Alabama	M.D. Ala.	10/31/84
7.	U.S. v. State of Montana	D. Mont.	10/31/84
8.	U.S. v. State of Minnesota	D. Minn.	11/01/84
9.	U.S. v. State of Arkansas	E.D. Ark.	11/01/84
10.	U.S. v. State of New Hampshire	D.N.H.	11/02/84
11.	U.S. v. State of Hawaii	D. Haw.	11/04/86
12.	U.S. v. New York City Board of Elections	S.D.N.Y.	11/07/86
13.	U.S. v. Commonwealth of Pennsylvania	M.D. Pa.	04/22/88
14.	U.S. v. State of Idaho	D. Idaho	05/20/88
15.	U.S. v. State of Michigan	W.D. Mich.	07/28/88
16.	U.S. v. State of Wyoming	D. Wyo.	08/15/88
17.	U.S. v. State of Oklahoma	W.D. Okla.	08/22/88
18.	U.S. v. State of Mississippi	S.D. Miss.	09/25/89
19.	U.S. v. State of New Jersey	D.N.J.	06/05/90
20.	U.S. v. State of Tennessee	M.D. Tenn.	08/01/90
21.	U.S. v. State of Colorado	D. Colo.	08/10/90
22.	U.S. v. State of Tennessee	M.D. Tenn.	11/05/90
23.	U.S. v. State of Texas	W.D. Tex.	05/13/91
24.	U.S. v. State of Wisconsin	W.D. Wis.	04/06/92

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00372 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.224

25.	U.S. v. State of New Jersey	D.N.J.	06/02/92
26.	U.S. v. State of Michigan	W.D. Mich.	08/03/92
27.	U.S. v. State of Delaware	D. Del.	09/11/92
28.	U.S. v. New York City Board of Elections	S.D.N.Y.	09/11/92
29.	U.S. v. State of Michigan	W.D. Mich.	12/03/93
30.	U.S. v. State of New Jersey	D.N.J.	06/07/94
31.	U.S. v. Orr	N.D. Ill.	12/11/95
32.	U.S. v. State of Mississippi	S.D. Miss.	03/11/96
33.	U.S. v. State of Oklahoma	W.D. Okla.	09/15/98
34.	U.S. v. New York City Board of Elections [Also states a claim under Section 5]	S.D.N.Y.	10/28/98
35.	U.S. v. State of Michigan	W.D. Mich.	08/08/00
36.	U.S. v. State of Texas	W.D. Tex.	03/22/02
37.	U.S. v. State of Oklahoma	W.D. Okla.	09/12/02
38.	U.S. v. Commonwealth of Pennsylvania	M.D. Pa.	04/15/04
39.	U.S. v. State of Georgia	N.D. Ga.	07/13/04
40.	U.S. v. State of Alabama	M.D. Ala.	03/09/06
41.	U.S. v. State of North Carolina	E.D.N.C.	03/16/06
42.	U.S. v. State of Connecticut	D. Conn.	08/01/06
I.	National Voter Registration Act (NVRA)		
1.	Wilson v. U.S.[17]	N.D. Cal.	12/20/94
2.	Condon v. Reno[18]	D.S.C.	01/24/95
3.	U.S. v. State of Illinois	N.D. Ill.	01/23/95
4.	U.S. v. Commonwealth of Pennsylvania	E.D. Pa.	01/23/95

[17] United States became a third party plaintiff after originally being named a defendant.

[18] United States became a third party plaintiff after originally being named a defendant.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00373 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.225

5.	U.S. v. State of Mississippi [Also states a claim under Section 5]	S.D. Miss.	04/20/95
6.	Commonwealth of Virginia v. U.S.[19]	E.D. Va.	05/05/95
7.	U.S. v. State of Michigan	W.D. Mich.	06/12/95
8.	U.S. v. State of New York	E.D.N.Y.	11/13/96
9.	U.S. v. City of St. Louis	E.D. Mo.	08/14/02
10.	U.S. v. State of Tennessee	M.D. Tenn.	09/27/02
11.	U.S. v. State of New York	N.D.N.Y	04/15/04
12.	U.S. v. Pulaski County	E.D. Ark.	04/16/04
13.	U.S. v. State of Missouri	W.D. Mo.	11/23/05
14.	U.S. v. State of Indiana	S.D. Ind.	06/27/06
15.	U.S. v. State of Maine [Also states a claim under HAVA]	D. Me.	07/28/06
16.	U.S. v. State of New Jersey [Also states a claim under HAVA]	D.N.J.	10/12/06
17.	U.S. v. Cibola County[20] [Also states claims under Sections 2 and 203 and HAVA]	D.N.M.	01/31/07
18.	U.S. v. City of Philadelphia[21] [Also states claims under Sections 2, 4(e), 203 and 208, and HAVA]	E.D. Pa.	04/26/07

J. Voting Accessibility for the Elderly & Handicapped Act

K. Help America Vote Act (HAVA)

1.	U.S. v. San Benito County [Also states a claim under Section 203]	N.D. Cal.	05/26/04

---

[19] On July 6, 1995, the United States became a third party plaintiff after originally being named a defendant.

[20] The NVRA and HAVA claims were added in an amended complaint filed on January 30, 2007. The original complaint, raising claims under Sections 2 and 203, was filed on September 27, 1993.

[21] Claims under Sections 2 and 4(e), the NVRA and HAVA were added in an amended complaint filed on April 26, 2007. The original complaint, raising claims under Sections 203 and 208, was filed on October 13, 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00374 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.226

2.	U.S. v. Westchester County [Also states a claim under Section 203]	S.D.N.Y.	01/19/05
3.	U.S. v. New York State Board of Elections	N.D.N.Y.	03/01/06
4.	U.S. v. State of Alabama	M.D. Ala.	05/01/06
5.	U.S. v. Cochise County [Also states a claims under Section 203]	D. Ariz.	06/16/06
6.	U.S. v. State of Maine [Also states a claim under the NVRA]	D. Me.	07/28/06
7.	U.S. v. State of New Jersey [Also states a claim under the NVRA]	D.N.J.	10/12/06
8.	U.S. v. Cibola County[22/] [Also states claims under Sections 2 and 203 and the NVRA]	D.N.M.	01/31/07
9.	U.S. v. City of Philadelphia[23/] [Also states claims under Sections 2, 4(e), 203 and 208, and the NVRA]	E.D. Pa.	04/26/07

L. Other

1.	U.S. v. City of Cambridge	D. Md.	11/25/85
2.	U.S. v. State of Georgia [States a claim under 42 U.S.C. § 1974]	N.D. Ga.	10/12/06

II. Plaintiff-Intervenor

A. Section 2

1.	Brown v. Bd. of School Comm'rs of Mobile Co.	S.D. Ala.	11/07/80
2.	Bolden v. City of Mobile	S.D. Ala.	05/08/81
3.	Sanchez v. King (State of New Mexico)	D.N.M.	03/10/82
4.	Ketchum v. Byrne (City of Chicago)	N.D. Ill.	09/15/82
5.	Clayton v. City of Laurel	S.D. Miss.	09/20/83
6.	Shakopee v. City of Prior Lake	D. Minn.	09/22/83

[22/] The NVRA and HAVA claims were added in an amended complaint filed on January 30, 2007. The original complaint, raising claims under Sections 2 and 203, was filed on September 27, 1993.

[23/] Claims under Sections 2 and 4(e), the NVRA and HAVA were added in an amended complaint filed on April 26, 2007. The original complaint, raising claims under Sections 203 and 208, was filed on October 13, 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00375 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.227

7.	Jordan v. City of Greenwood	N.D. Miss.	12/28/83
8.	Chisom v. Roemer (State of Lousiana)	E.D. La.	08/08/88
9.	Teague v. Attala County	N.D. Miss.	09/12/94
B.	Section 5 enforcement		
1.	Garcia v. Uvalde County	W.D. Tex.	12/09/76
C.	Defend constitutionality of redistricting plan		
1.	Smith v. Beasley[24] (State of South Carolina)	D.S.C.	05/01/97
D.	Defend constitutionality of Voting Rights Act		
1.	James v. City of Sarasota	M.D. Fla.	02/03/83
2.	Williams v. City of Leesburg	M.D. Fla.	10/05/83
3.	McCord v. City of Ft. Lauderdale	S.D. Fla.	02/03/84
4.	Sierra v. El Paso Independent School District	W.D. Tex.	03/14/84
5.	Knox v. Milwaukee County	E.D. Wis.	04/23/84
6.	Montano v. City of Portales	D.N.M.	06/08/84
7.	Baker v. Gay (Camden Co.)	S.D. Ga.	06/08/84
8.	Simkins v. Guilford County	M.D.N.C.	06/08/84
9.	Chavez v. Clovis Municipal School District	D.N.M.	06/18/84
10.	McNeil v. City of Springfield	C.D. Ill.	01/17/86
11.	Askew v. City of Rome	N.D. Ga.	02/24/95
12.	Johnson v. Hamrick	N.D. Ga.	03/30/01
13.	Large v. Fremont County	D. Wyo.	12/14/06

[24] The United States originally sought to participate as amicus. On April 14, 1997, the court ordered the United States to participate as a party. On May 1, 1997, we sought to intervene and filed a complaint stating a claim under Section 5. The court never ruled on the motion to intervene.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00376 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.228

E. National Voter Registration Act (NVRA)

1.	Common Cause of Vermont v. Dean	D. Vt.	07/18/96

III. Amicus Curiae

A. Section 2:

1.	Brooks v. State Board of Elections	S.D. Ga.	07/25/89
2.	Slaughter v. City of Birmingham	N.D. Ala.	08/24/89
3.	Southern Christian Leadership Conf. v. Siegelman	M.D. Ala.	08/13/90
4.	Campos v. City of Houston	S.D. Tex.	11/09/91
5.	Terrazas v. Slagle (state legislative redistricting)	W.D. Tex.	12/06/91
6.	Dallas County Board of Education v. Jones	S.D. Ala.	03/31/93
7.	Ruiz v. City of Santa Maria	C.D. Cal.	02/16/94
8.	Knight v. McKeithen [Also addresses issues under Section 5]	M.D. La.	08/19/94
9.	Stovall v. City of Cocoa	M.D. Fla.	02/24/99
10.	Johnson v. Governor of Florida	M.D. Fla.	09/21/00

B. Section 5 enforcement

1.	McCray v. Hucks (Horry County)	D.S.C.	12/28/76
2.	Gomez v. Galloway (Bee County)	S.D. Tex.	03/21/77
3.	Williams v. Sclafani (State of New York)	S.D.N.Y.	09/09/77
4.	Berry v. Doles (Peach County)	M.D. Ga.	01/11/78
5.	Arriola v. Harville (Jim Wells County)	S.D. Tex.	08/04/78
6.	Calderon v. McGee (Waco Ind. School Dist.)[25]	W.D. Tex.	02/09/78
7.	Escamilla v. Stavley (Terrell County, Texas)	W.D. Tex.	01/26/79
8.	Stokes v. Warren County Bd. of Election Supervisors	S.D. Miss.	09/09/79

[25] Date of amicus participation in the 5th Circuit.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00377 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.229

9.	Forte v. Barbour County Commission	M.D. Ala.	01/02/80
10.	McRae v. Board of Education of Henry County	N.D. Ga.	03/13/80
11.	Garcia v. Decker (Medina County)	W.D. Tex.	03/18/80
12.	Garza v. Gates (Atascosa County)	W.D. Tex.	03/18/80
13.	Head v. Henry County Board of Commissioners	N.D. Ga.	03/28/80
14.	Miller v. Daniels (City of New York)	S.D.N.Y.	02/09/81
15.	Edge v. Sumter County	M.D. Ga.	03/13/81
16.	Herron v. Koch (City of New York)	S.D.N.Y.	09/08/81
17.	Terrazas v. Clements (State of Texas)	N.D. Tex.	02/11/82
18.	Flateau v. Anderson (State of New York)	S.D.N.Y.	03/25/82
19.	Fluker v. Conecuh County	S.D. Ala.	07/15/82
20.	Cavanagh v. Brock (State of North Carolina)	E.D.N.C.	04/05/83
21.	Lucas v. Bolivar County	N.D. Miss.	07/15/83
22.	Warren v. Krivanek (Hillsborough County)	N.D. Fla.	08/24/84
23.	McLaurin v. Sunflower County	N.D. Miss.	05/14/86
24.	Cobbs v. Grenada County	N.D. Miss.	06/25/87
25.	Lucas v. Townsend (Bibb County)	M.D. Ga.	11/01/88
26.	East Jefferson Parish Coalition v. Jefferson Parish	E.D. La.	02/21/90
27.	Mack v. Russell County Commission	M.D. Ala.	03/26/90
28.	Clark v. Roemer[26] (State of Louisiana)	M.D. La.	09/27/90
29.	Dupree v. Mabus (City of Hattiesburg)	S.D. Miss.	03/25/91
30.	Tisdale v. Sheheen (State of South Carolina)	D.S.C.	05/17/91
31.	Watkins v. Fordice (State of Mississippi)	S.D. Miss.	07/15/91

[26] On December 21, 1990, the United States intervened to defend the constitutionality of Section 5 of the Voting Rights Act as applied by the Attorney General to the State of Louisiana.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00378 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.230

32.	Jordan v. Fancher	N.D. Miss.	11/05/91
33.	LULAC of Texas v. Richards	W.D. Tex.	02/21/92
34.	Terrazas v. Slagle (Texas state senate)	W.D. Tex.	08/17/92
35.	Reyna v. Castro County	N.D. Tex.	11/17/93
36.	White v. Alabama	M.D. Ala.	03/04/94
37.	Statewide Reapprnt. Adv'ry Comm. v. Campbell	D.S.C.	03/31/94
38.	Lopez v. Monterey County	N.D. Cal.	06/01/94
39.	Glasper v. City of Baton Rouge and East Baton Rouge Parish	M.D. La.	06/24/94
40.	Knight v. McKeithen (State of Lousiana) [Also addresses issues under Section 2]	M.D. La.	08/19/94
41.	Sullivan v. DeLoach (Waynesboro)	S.D. Ga.	10/31/95
42.	LULAC v. State of Texas	W.D. Tex.[27]	12/17/96
43.	Cotera v. State of Texas	W.D. Tex.	10/28/98
44.	Boxx v. Bennett (Jefferson County)	M.D. Ala.	12/10/98
45.	Marascalco v. City of Grenada	N.D. Miss.	04/27/00
46.	Love v. Putnam County Board of Registrars	M.D. Ga.	07/14/00
47.	Bone Shirt v. Hazeltine (State of South Dakota)	D.S.D.	01/29/02
48.	Navajo Nation v. Arizona Ind. Redistrict. Comm.	D. Ariz.	05/20/02
49.	Martinez v. Bush (State of Florida)	S.D. Fla.	07/08/02
50.	Cannon v. City of Tallulah	W.D. La.	10/28/02
51.	Myers v. City of McComb	S.D. Miss.	03/01/07

C. National Voter Registration Act (NVRA)

1.	Brenda K. v. Hooks	D.N.J.	05/15/98
2.	Clay v. City of St. Louis	E.D. Mo.	11/04/02

[27] Our Fifth Circuit participation began on December 17, 1996.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00379 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.231

D. Defend constitutionality of redistricting plan

1.	Shaw v. Hunt	E.D.N.C.	03/01/94
2.	Quilter v. Voinovich	N.D. Ohio	11/17/94
3.	Cleveland County Association v. Cleveland County, North Carolina Board of Commissioners	D.D.C.	04/30/97
4.	Cromartie v. Hunt	E.D.N.C.	06/20/98
5.	Fouts v. Mortham	S.D. Fla.	04/14/99

E. Other (district court)

1.	Leroy v. City of Houston (attorney's fees)	S.D. Tex.	03/29/85
2.	City of Franklin v. State Board of Elections	E.D. Va.	04/04/86
3.	Alexander v. Martin (State of North Carolina)	E.D.N.C.	03/09/87
4.	State of Alabama v. City of Bessemer	N.D. Ala.	03/25/87
5.	Kirksey v. Mabus & Martin v. Mabus	S.D. Miss.	12/29/88

F. Other (state court)

1.	Singer v. City of Alabaster	Ala. Cir. Ct.	09/18/00
2.	Singer v. City of Alabaster	Ala. Sup. Ct.	12/29/00

IV. Defendant

A. Section 5 declaratory judgment

1.	Hale County, Alabama v. U.S.	D.D.C.	02/16/77
2.	City of Rome, Georgia v. U.S. [Also contains bailout claim under Section 4]	D.D.C.	05/09/77
3.	Horry County, South Carolina v. U.S.	D.D.C.	09/27/77
4.	Apache County, Arizona High School District No. 90 v. U.S.	D.D.C.	10/20/77
5.	Donnell v. U.S. (Warren County, Mississippi)	D.D.C.	03/07/78
6.	Charlton County School Board, Georgia v. U.S.	D.D.C.	03/29/78
7.	State of Mississippi v. U.S.	D.D.C.	08/01/78

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00380 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.232

8.	City of Dallas, Texas v. U.S.	D.D.C.	09/05/79
9.	State of Mississippi v. U.S.	D.D.C.	12/27/79
10.	Comm'rs Court of Medina County, Texas v. U.S.	D.D.C.	01/25/80
11.	City of Lockhart, Texas v. U.S.	D.D.C.	01/25/80
12.	City of Port Arthur, Texas v. U.S.	D.D.C.	03/12/80
13.	State of South Dakota v. U.S.	D.D.C.	08/06/80
14.	City of Pleasant Grove, Alabama v. U.S.	D.D.C.	10/09/80
15.	Colleton County, South Carolina v. U.S.	D.D.C.	11/04/81
16.	Senate of the State of California v. U.S.	D.D.C.	11/17/81
17.	Busbee (State of Georgia) v. Smith	D.D.C.	03/08/82
18.	Sumter County, South Carolina v. U.S.	D.D.C.	04/01/82
19.	State of Mississippi v. U.S. (cong. redistricting)	D.D.C.	04/07/82
20.	State of Mississippi v. U.S. (legis. redistricting)	D.D.C.	09/20/82
21.	Baldwin County, Georgia, School District v. Smith	D.D.C.	10/31/83
22.	State of South Carolina v. U.S.	D.D.C.	12/06/83
23.	Halifax County, North Carolina v. U.S.	D.D.C.	05/17/84
24.	Brunswick-Glynn Co. Charter Comm'n, Ga. v. U.S.	D.D.C.	02/03/86
25.	State of North Carolina v. U.S.	D.D.C.	05/30/86
26.	Grenada County, Mississippi. v. U.S.	D.D.C.	04/07/87
27.	Bladen County, North Carolina v. U.S.	D.D.C.	11/03/87
28.	State of Mississippi v. U.S.	D.D.C.	12/21/87
29.	City Council of Augusta & Richmond Co., Ga. v. U.S.	D.D.C.	01/24/90
30.	State of Georgia v. Reno	D.D.C.	08/24/90
31.	State of Louisiana v. U.S.	D.D.C.	01/18/91
32.	Bolivar County, Mississippi v. U.S.	D.D.C.	08/26/91
33.	State of Texas v. U.S.	D.D.C.	09/20/91

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00381 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.233

34.	Walker v. U.S. (Gregg County, Texas)	D.D.C.	02/24/92
35.	Ellis County, Texas v. Barr	D.D.C.	05/11/92
36.	Calhoun County, Texas v. U.S.	D.D.C.	08/18/92
37.	Lee County, Mississippi v. U.S.	D.D.C.	04/06/93
38.	Monterey County, California v. U.S.	D.D.C.	08/11/93
39.	Castro County, Texas v. U.S.	D.D.C.	08/25/93
40.	State of Texas v. U.S. (Edwards Underground Water District)	D.D.C.	03/09/94
41.	Bossier Parish Louisiana School Board v. Reno	D.D.C.	07/11/94
42.	State of Texas v. United States (judgeships)	D.D.C.	07/14/94
43.	Baton Rouge and Parish of E. Baton Rouge v. U.S.	D.D.C.	09/23/94
44.	State of Arizona v. U.S. (judgeships)	D.D.C.	09/26/94
45.	State of New York v. U.S.	D.D.C.	10/13/94
46.	State of Georgia v. Reno (II)	D.D.C.	06/01/95
47.	State of Georgia v. Reno (III)	D.D.C.	07/25/95
48.	City of Andrews, Texas v. U.S.	D.D.C.	08/07/95
49.	State of Alabama v. Reno	D.D.C.	02/20/96
50.	City of Baton Rouge, Louisiana v. U.S.	D.D.C.	04/29/96
51.	State of Texas v. U.S.	D.D.C.	06/07/96
52.	State of Mississippi v. Reno	D.D.C.	07/23/96
53.	State of Louisiana v. U.S.	D.D.C.	02/04/97
54.	Commonwealth of Virginia v. Reno	D.D.C.	04/17/00
55.	City of Zachary, Louisiana v. Reno	D.D.C.	09/07/00
56.	State of Georgia v. Ashcroft	D.D.C.	10/10/01
57.	Louisiana House of Representatives v. Ashcroft	D.D.C.	01/14/02
58.	State of Florida by Butterworth v. Ashcroft	D.D.C.	05/14/02
59.	North Carolina State Board of Elections v. U.S.	D.D.C.	06/13/02

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00382 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.234

60.	State of North Carolina v. Ashcroft	D.D.C.	11/26/03

B. Bailout – Section 4

1.	El Paso County, Colorado v. U.S.	D.D.C.	02/01/77
2.	City of Rome, Georgia v. U.S. [Also includes a claim for declaratory judgment under Section 5]	D.D.C.	05/09/77
3.	State of Alaska v. U.S.	D.D.C.	03/21/78
4.	State of Idaho and Elmore County v. U.S.	D.D.C.	06/25/82
5.	Campbell County, Wyoming v. U.S.	D.D.C.	07/02/82
6.	State of Massachusetts v. U.S.	D.D.C.	03/31/83
7.	State of Connecticut v. U.S.	D.D.C.	10/20/83
8.	State of Alaska v. U.S.	D.D.C.	05/03/84
9.	Board of Comm'rs of El Paso County, Colo. v. U.S.	D.D.C.	05/25/84
10.	Waihee (State of Hawaii) v. U.S.	D.D.C.	06/01/84
11.	City of Fairfax, Virginia v. Reno	D.D.C.	09/25/97
12.	Frederick County, Virginia v. Reno	D.D.C.	04/14/99
13.	Shenandoah County, Virginia v. Reno	D.D.C.	04/21/99
14.	Roanoke County, Virginia v. Reno	D.D.C.	09/06/00
15.	City of Winchester, Virginia v. Reno	D.D.C.	12/22/00
16.	City of Harrisonburg, Virginia v. Ashcroft	D.D.C.	02/14/02
17.	Rockingham County, Virginia v. Ashcroft	D.D.C.	02/28/02
18.	Warren County, Virginia v. Ashcroft	D.D.C.	08/30/02
19.	Greene County, Virginia v. Ashcroft	D.D.C.	09/08/03
20.	Pulaski County, Virginia v. Gonzales	D.D.C.	06/22/05
21.	Augusta County, Virginia v. Gonzales	D.D.C.	09/23/05
22.	City of Salem, Virginia v. Gonzales	D.D.C.	05/25/06

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00383 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.235

23.	Northwest Austin Municipal Utility District No. 1 v. Gonzales [Also challenges constitutionality of Section 5]	D.D.C.	08/04/06
24.	Botetourt County, Virginia v. Gonzales	D.D.C.	08/11/06
25.	Essex County, Virginia v. Gonzales	D.D.C.	09/21/06
26.	Middlesex County, Virginia v. Gonzales	D.D.C.	08/17/07
C.	Bailout – Section 203		
1.	Doi v. Bell	D. Haw.	07/14/77
2.	County of Placer v. U.S.	E.D. Cal.	02/20/80
D.	Defend constitutionality of Voting Rights Act		
1.	Boone v. United States	E.D. Pa.	09/21/04
2.	Northwest Austin Municipal Utility District No. 1 v. Gonzales [Also includes a bailout claim under Section 4]	D.D.C.	08/04/06
E.	Defend constitutionality of NVRA		
1.	Amalfitano v. U.S.	S.D.N.Y.	04/27/00
2.	Kalson v. U.S.	S.D.N.Y.	08/27/04
F.	Section 5 enforcement		
1.	Rosso v. Henigan (California)	D.D.C.	10/11/77
2.	Blanding v. DuBose (Sumter County)	D.S.C.	05/12/78
3.	Lenud v. Bell (Alabama)	D.D.C.	07/25/78
4.	Brown v. City of Shreveport	W.D. La.	10/07/96
5.	Wilson v. Jones (Dallas County)	S.D. Ala.	10/25/96
6.	Dawson v. U.S. Department of Justice (Delhi)	W.D. La.	07/21/04
7.	Coward v. Dickens (Delhi)	W.D. La.	10/14/04
8.	Reaves v. U.S. Department of Justice (S.C.)	D.D.C.	10/22/04
9.	Allan v. City of Laurel	S.D. Miss.	12/29/06

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00384 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.236

G. Defend constitutionality of redistricting plan

1.	Thornton v. Molpus	S.D. Miss.	10/11/94
2.	Elliot v. United States Department of Justice	M.D. Fla.	06/12/96

H. HAVA

1.	Loeber v. Spargo	N.D.N.Y.	11/21/05
2.	Forjone v. Election Assistance Commission[28]	N.D.N.Y.	08/17/06
3.	Fitzgerald v. Berman	N.D.N.Y.	04/07/06
4.	Taylor v. Onorato	W.D. Pa.	04/13/06
5.	Morales-Garza v. Lorenzo-Giguere	S.D. Tex.	03/01/07

I. Other

1.	Independent School District of Tulsa v. Bell (Section 203)	N.D. Okla.	11/12/77
2.	Reich v. Larson and Civiletti (Section 203)	E.D. Cal.	04/03/80
3.	NAACP v. Town of Hilton Head	D.S.C.	08/16/83
4.	Baham v. Treen (St. Tammany Parish)	M.D. La.	09/27/83
5.	Carr v. Broom (St. Tammany Parish)	E.D. La.	12/13/83
6.	Clark v. United States Attorney (City of Houston)	S.D. Tex.	11/01/85
7.	East Flatbush Election Committee v. Cuomo	E.D.N.Y.	04/29/86
8.	Groce v. McDaniel (Montgomery County)	S.D. Tex.	08/19/86
9.	Abramson v. Wynne	E.D. Va.	04/18/88
10.	Hunter v. United States Attorney	D.S.C.	12/08/89
11.	Hannah v. Cheney	S.D. Tex.	05/07/91
12.	Shaw v. Britt	E.D.N.C.	03/12/92
13.	Wetherell v. Barr	N.D. Fla.	04/10/92
14.	Medders v. Autauga County	M.D. Ala.	04/21/92

[28] Originally filed as Forjone v. California (W.D.N.Y. filed Feb. 6, 2006); transferred to Northern District of New York on August 14, 2006.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00385 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.237

15.	Golding v. Barr	E.D. Va.	05/29/92
16.	Scott v. United States Department of Justice	M.D. Fla.	04/14/94
17.	Giles v. Ashcroft	S.D. Miss.	05/21/01
18.	Giles v. Ashcroft	D.D.C.	01/23/02
19.	Landes v. Tartaglione	E.D. Pa.	07/08/04

V. Defendant-Intervenor

A. Defend constitutionality of redistricting plan

1.	Hays v. State of Louisiana[29/]	W.D. La.	09/29/92
2.	Vera v. Richards[30/]	S.D. Tex.	03/02/94
3.	Johnson v. Miller	S.D. Ga.	03/30/94
4.	Johnson v. Smith	N.D. Fla.	07/18/94
5.	Perschall v. State of Louisiana	E.D. La.	05/22/95
6.	PAC for Middle America v. State Bd. of Elections	N.D. Ill.	10/19/95
7.	Johnson v. Miller (III)	S.D. Ga.	04/09/96
8.	Theriot v. Jefferson Parish	E.D. La.	05/02/96
9.	Able v. Wilkins	D.S.C.	05/03/96
10.	Cook v. Marshall County, Miss.	N.D. Miss.	07/18/96

B. Section 5

1.	Davis v. Ieyoub	W.D. La.	10/05/94

VI. Other

A. Response to Subpoena

1.	Cofield v. City of LaGrange, Georgia	D.D.C.	06/05/95
2.	Smith v. Beasley (South Carolina)	D.D.C.	03/12/96

29/ Originally participated as amicus; motion to intervene as defendant granted on July 6, 1994.

30/ Originally participated as amicus; motion to intervene as defendant granted on May 20, 1994

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00386 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.238

B. Miscellaneous

1.	Rubalcaba v. City of Raymondville	S.D. Tex.	04/20/99

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00387 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.239

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing July 24, 2007 (Part 1)

Answer #152 Attachment

38236.240

Employment Litigation Section

Between January 19, 1993, and the present, the Employment Litigation Section has filed the following lawsuits:

United States v. Missouri Elementary and Secondary

Complaint filed January 19, 1993, in the Eastern District of Missouri alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on January 19, 1993.

United States v. Ohio Dept of Corrections and Rehabilitation

Complaint filed May 5, 1993, in the Northern District of Ohio alleging that the Defendant engaged in sex discrimination in violation of Sections 706 and 707 of Title VII. Resolved through the entry of a consent decree in December 1993.

United States v. Nassau County Police Department

Complaint filed May 7, 1993, in the Eastern District of New York alleging that the Defendant engaged in sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on June 2, 1993.

United States v. U.S. Virgin Islands

Complaint filed May 25, 1993, in the District of the Virgin Islands alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on May 25, 1993.

United States v. Texas Department of Transportation

Complaint filed May 28, 1993, alleging that the Defendant engaged in discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 30, 1993.

United States v. Washington D.C. Metropolitan Police Department

Complaint filed June 8, 1993, in the District of the District of Columbia alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. File closed on June 4, 1994.

United States v. City of Torrance

Complaint filed July 14, 1993, in the Central District of California alleging that the Defendant engaged in race, sex, and national origin discrimination in violation of Section 707 of Title VII. Closed after verdict entered against the United States.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00389 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.241

United States v. Wright State University

Complaint filed July 14, 1993, in the Southern District of Ohio alleging that the Defendant engaged in retaliation discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on July 14, 1993.

United States v. New York City Transit Auth.

Complaint filed July 22, 1993, in the Southern District of New York alleging that the Defendant engaged in retaliation in violation of Section 706 of Title VII.

United States v. Brownsville

Complaint filed September 14, 1993, in the Southern District of Texas alleging that the Defendant engaged in sex discrimination and retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on December 8, 1993.

United States v. Denver Housing

Complaint filed September 22, 1993, in the District of Colorado alleging that the Defendant engaged in sex discrimination and retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on January 4, 1994.

United States v. Belleville

Complaint filed November 10, 2003, in the Southern District of Illinois alleging that the Defendant engaged in race and sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on August 8, 1995.

United States v. Arizona Regents

Complaint filed November 23, 1993, in the District of Arizona alleging that the Defendant engaged in national origin discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on November 23, 1993.

United States v. North Carolina Dept. of Corrections

Complaint filed December 7, 1993, in the Eastern District of North Carolina alleging that the Defendant engaged in sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on September 10, 1999.

United States v. Palm Beach Gardens

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00390 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.242

Complaint filed December 7, 1993, in the Southern District of Florida alleging that the Defendant engaged in race and sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on August 3, 1995.

United States v. Cherokee County

Complaint filed December 8, 1993, in the Northern District of Alabama alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on December 28, 1993.

United States v. Tipton

Complaint filed December 16, 1993, in the Western District of Tennessee alleging that the Defendant engaged in retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on December 16, 1993.

United States v. Shelby County

Complaint filed December 22, 1993, in the Western District of Tennessee alleging that the Defendant engaged in retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on December 22, 1993.

United States v. Illinois

Complaint filed December 28, 1993, in the Northern District of Illinois alleging that the Defendant engaged in discrimination in violation of the Americans with Disabilities Act. Transferred to the Disability Rights Section.

United States v. Ridley Township

Complaint filed January 11, 1994, in the Eastern District of Pennsylvania alleging that the Defendant engaged in race discrimination in violation of Section 707 of Title VII. Closed on August 4, 1998.

United States v. Caddo Parish

Complaint filed January 26, 1994, in the Western District of Louisiana alleging that the Defendant engaged in sex discrimination in violation of Section 706 and 707 of Title VII. Resolved through the entry of a consent decree on October 4, 1996.

United States v. McHenry County

Complaint filed March 9, 1994, in the Northern District of Illinois alleging that the Defendant engaged in sex discrimination and retaliation in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on September 6, 1996.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00391 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.243

United States v. Port Arthur Housing Auth.

Complaint filed March 10, 1994, in the Eastern District of Texas alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 22, 1994.

United States v. Skagit County

Complaint filed April 28, 1994, in the Western District of Washington alleging that the Defendant engaged in sex discrimination and retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on January 17, 1995.

United States v. Nashville-Davidson County Police Dept.

Complaint filed May 4, 1994, in the Middle District of Tennessee alleging that the Defendant engaged in race discrimination in violation of Section 706 and 707 of Title VII. Resolved through the entry of a consent decree on May 25, 1995.

United States v. City of Hialeah

Complaint filed June 7, 1994, in the Southern District of Florida alleging that the Defendant engaged in race discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on December 9, 1994.

United States v. State of New Jersey Department of Corrections

Complaint filed June 28, 1994, in the District of New Jersey alleging that the Defendant engaged in race discrimination in violation of Section 706 and 707 of Title VII. Resolved through the entry of a consent decree on January 19, 1996.

United States v. Winter Haven

Complaint filed August 29, 1994, in the Middle District of Florida alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on October 13, 1994.

United States v. New Jersey Dept. of Corrections

Complaint filed September 27, 1994, in the District of New Jersey alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree January 19, 1996.

United States v. Assumption Parish

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00392 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.244

Complaint filed November 15, 1994, in the Eastern District of Louisiana alleging that the Defendant engaged in sex discrimination in violation of Sections 706 and 707 of Title VII. Resolved through the entry of a consent decree on March 7, 1996.

United States v. City of Pontiac

Complaint filed December 14, 1994, in the Eastern District of Michigan alleging that the Defendant engaged in discrimination in violation of Section 706 of Title VII and the Americans with Disabilities Act. Transferred to the Disability Rights Section.

United States v. City of Phoenix

Complaint filed December 15, 1994, in the District of Arizona alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on August 15, 1995.

United States v. City of Slidell

Complaint filed December 20, 1994, in the Eastern District of Louisiana alleging that the Defendant engaged in discrimination in violation of Section 706 of Title VII and the Americans with Disabilities Act. Resolved through the entry of a consent decree on January 14, 1995.

United States v. Kansas Dept. of Corrections

Complaint filed January 5, 1995, in the District of Kansas alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on January 9, 1995.

United States v. Ill. State Univ.

Complaint filed January 11, 2001, in the Central District of Illinois alleging that the Defendant engaged in race and sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 28, 1997.

United States v. Ormond Beach

Complaint filed April 20, 1995, in the Middle District of Florida, alleging that the Defendant engaged in sex discrimination in violation of Section 707 of Title VII. Closed on February 5, 1998.

United States v. Glassboro

Complaint filed April 21, 1995, in the District of New Jersey, alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 19, 1996.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00393 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.245

United States v. Mississippi Housing Auth.

Complaint filed May 12, 1995, in the Southern District of Mississippi alleging that the Defendant engaged in retaliation in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on July 17, 1995.

United States v. Steubenville Board of Education

Complaint filed May 19, 1995, in the Southern District of Ohio alleging that the Defendant engaged in sex discrimination in violation of Section 706 and Section 707 of Title VII. Resolved through the entry of a consent decree on June 1, 1995.

United States v. New York City Department of Corrections

Complaint filed September 8, 1995, in the Southern District of New York alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on September 14, 1995.

United States v. Arkansas Dept. of Corrections

Complaint filed September 11, 1995, in the Eastern District of Arkansas alleging that the Defendant engaged in sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on June 19, 1997.

United States v. New Jersey Department of Human Services

Complaint filed September 22, 1995, in the District of New Jersey alleging that the Defendant engaged in race discrimination in violation of Section 706 and Section 707 of Title VII. Resolved through the entry of a consent decree on September 28, 1995.

United States v. Maury County

Complaint filed September 29, 1995, in the Middle District of Tennessee alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on May 12, 1997.

United States v. City of Phoenix

Complaint filed January 25, 1996, in the District of Arizona alleging that the Defendant engaged in retaliation discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on November 16, 1998.

United States v. New York City Board of Education

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00394 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.246

Complaint filed January 30, 1996, in the Southern District of New York alleging that the Defendant engaged in race, national origin, and sex discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on February 9, 2000. Subject of additional litigation after entry of decree.

United States v. Beaumont Housing Authority

Complaint filed February 1, 1996, in the Eastern District of Texas alleging that the Defendant engaged in race discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on October 27, 1996.

United States v. Virgin Islands Housing Authority

Complaint filed February 28, 1996, in the District of the Virgin Islands alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on February 28, 1996.

United States v. Spring Independent School District

Complaint filed May 9, 1996, in the Southern District of Texas alleging that the Defendant engaged in race discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on May 13, 1996.

United States v. California University of Pennsylvania of the State System of Higher Education, et. al

Complaint filed April 17, 1996, in the Western District of Pennsylvania alleging that the Defendant engaged in sexual harassment discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on October 23, 1996.

United States v. Alabama State Docks Dept.

Complaint filed June 11, 1996, in the Southern District of Alabama alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 14, 1996.

United States v. New York City Police Dept.

Complaint filed June 7, 1996, in the Southern District of New York alleging that the Defendant engaged in sexual harassment discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 10, 1998.

United States v. Louisiana State Police

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00395 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.247

Complaint filed August 29, 1996, in the Middle District of Louisiana alleging that the Defendant engaged in race discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on September 3, 1996.

United States v. Hutcheson Medical Center

Complaint filed August 14, 1996, in the Northern District of Georgia alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on August 19, 1996.

United States v. Canton Police Department

Complaint filed October 16, 1996, in the Southern District of Mississippi alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII.

United States v. City of Wilmington

Complaint filed September 11, 1996, in the District of Delaware alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 7, 1997.

United States v. S.E. Dubois School Corporation

Complaint filed November 7, 1996, in the Southern District of Indiana alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on July 19, 1997.

United States v. City of Forney

Complaint filed November 20, 1996, in the Northern District of Texas alleging that the Defendant engaged in race discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 25, 1997.

United States v. Regents of University of California

Complaint filed January 6, 1997, in the Northern District of California alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on January 24, 1997.

United States v. Southeastern Pennsylvania Transportation Authority

Complaint filed February 18, 1997, in the Eastern District of Pennsylvania alleging that the Defendant engaged in sex discrimination in violation of Section 707 of Title VII. Decision in favor of the Defendant after trial in January 1998, remanded with instructions. Second decision in favor of Defendant after trial, upheld on appeal.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00396 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.248

United States v. East Baton Rouge

Complaint filed April, 1997, in the Middle District of Louisiana alleging that the Defendant engaged in race discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on June 20, 1997.

United States v. Metro Dade Corrections

Complaint filed May 27, 1997, in the Southern District of Florida alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 12, 1997.

United States v. Arkansas State University

Complaint filed November 19, 1997, in the Eastern District of Arkansas alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on November 19, 1997.

United States v. Fullerton.

Complaint filed July 8, 1997, in the Central District of California alleging that the Defendant engaged in race and national origin discrimination in violation of Section 707 of Title VII. Resolved through the entry of a consent decree on July 8, 1997, and November 17, 1997.

United States v. Willis

Complaint filed January 30, 1998, in the Southern District of Texas alleging that the Defendant engaged in race and sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 3, 1999.

United States v. Garland

Complaint filed February 2, 1998, in the District of New Mexico alleging that the Defendant engaged in race and national origin discrimination in violation of Section 707 of Title VII. Decision in favor of the Defendant after trial on April 2, 2004.

United States v. Florida Department of Corrections

Complaint filed February 12, 1998, in the Southern District of Florida alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through an out of court settlement on June 10, 1998.

United States v. New Baltimore

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00397 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.249

Complaint filed August 4, 1998, in the District of Maryland alleging that the Defendant engaged in race discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on August 10, 1998.

United States v. School City of East Chicago

Complaint filed September 15, 1998, in the Northern District of Indiana alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on September 30, 1998.

United States v. Sheriff of Hampshire County

Complaint filed September 28, 1999, in the Northern District of West Virginia alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on September 30, 1999.

United States v. Sheriff of McLennan

Complaint filed September 30, 1998, in the Western District of Texas alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on October 2, 1998.

United States v. North Little Rock

Complaint filed February 18, 1999, in the Eastern District of Arkansas alleging that the Defendant engaged in retaliation and sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on April 2, 2001.

United States v. Columbus County

Complaint filed March 16, 1999, in the Eastern District of North Carolina alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on March 23, 1999.

United States v. Erie County

Complaint filed March 25, 1999, in the Western District of New York alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Closed on April 13, 1999.

United States v. Belen

Complaint filed April 8, 1999, in the District of New Mexico alleging that the Defendant engaged in retaliation and sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on June 21, 2000.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00398 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.250

United States v. City of Winter Springs

Complaint filed August 4, 1999, in the Middle District of Florida alleging that the Defendant engaged in religious discrimination in violation of Section 706 of Title VII. Resolved through a consent decree dated August 7, 2000.

United States v. City of Dallas

Complaint filed October 19, 1999, in the Northern District of Texas alleging that the Defendant engaged in retaliation in violation of Title VII. Resolved through the entry of a consent decree on April 10, 2004.

United States v. Mecklenburg

Complaint filed August 29, 1999, in the Western District of North Carolina alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on May 8, 2000.

United States v. Alma and Bacon County

Complaint filed November 11, 1999, in the Southern District of Georgia alleging that the Defendant engaged in sex discrimination in violation of Section 706 of Title VII. Resolved through the entry of a consent decree on November 18, 1999.

United States v. Lumberton Municipal Utility District.

On April 7, 2000, we filed a complaint in the United States District Court for the Eastern District of Texas pursuant to §706 of Title VII, alleging that the Lumberton Municipal Utility District discriminated against four women on the basis of their sex by subjecting them to sexual harassment by their male supervisor and by failing or refusing to take appropriate action to remedy the effects of the discriminatory treatment. This suit was resolved through entry of a consent decree on April 18, 2000.

United States v. Harris County Justice of the Peace.

On May 12, 2000, we filed a complaint under § 706 of Title VII of the Civil Rights Act of 1964, as amended, against H.N. McElroy, an elected Justice of the Peace in Harris County, Texas (in his official capacity), and Harris County. We alleged that McElroy discriminated against a former employee and similarly situated black females on the basis of their race and sex by subjecting them to sexual harassment. We additionally alleged that because of the harassment to which she was subjected, the former employee was constructively discharged. This suit was resolved through entry of a consent decree on May 1, 2002.

United States v. City of Newark.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00399 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.251

On May 16, 2000, we filed a complaint under § 706 of Title VII of the Civil Rights Act of 1964, as amended, against the City of Newark, New Jersey. We alleged that the City denied an accommodation to Kevin Rhodes, Anthony Kerr, and similarly-situated police officers to wear beards in compliance with their religious observances, practices, and beliefs as Muslims. While demanding that Muslim officers shave their facial hair, the City permitted undercover officers and those afflicted with a particular skin condition to wear beards. The complaint also alleged that Rhodes, Kerr, and other Muslim police officers were threatened with termination and subjected to other adverse treatment because of these observances, practices, and beliefs. This suit was resolved through entry of a consent decree on February 27, 2002.

United States v. Tennessee Department of Transportation (TDOT).

On August 3, 2000, we filed a complaint in the United States District Court for the Middle District of Tennessee, pursuant to Section 707 of Title VII. The complaint alleged that TDOT discriminated against female applicants for employment in two highway maintenance positions statewide by using word-of-mouth recruiting methods, relying on subjective and undefined hiring criteria, and otherwise depending on practices that disproportionately excluded women from these positions. This suit was resolved through entry of a consent decree on August 3, 2000.

Owen v. L'Anse Area Schools.

On September 20, 2000, the United States filed a motion to intervene as plaintiff, based on a certification of public importance. The court accepted our complaint in intervention. This is a Section 706 of Title VII case against a public school district in the Upper Peninsula of Michigan. The plaintiff in this action, Louis Owen, a Jewish former public high school teacher with L'Anse, alleged that he was subjected to egregious harassment, originated by his students, on the basis of his religion and/or national origin, and that the school district failed to appropriately respond to such harassment or to take any systemic, proactive action to prevent future harassment. This suit was resolved through entry of a consent decree on April 12, 2002.

United States v. Calcasieu Parish School Board.

On September 25, 2000, the United States filed a complaint in the United States District Court for the Western District of Louisiana pursuant to Section 706 of Title VII, alleging that the School Board discriminated against a female teacher, Dorenda Turner, by refusing to consider her for a vacant assistant principal position on the basis of her sex. A consent decree was tendered by the parties by joint motion that was filed simultaneously with the filing of our complaint on September 25, 2000.

United States v. Arkansas Department of Correction.

On October 26, 2000, we filed a complaint in the United States District Court for the Eastern District of Arkansas alleging that the Arkansas Department of Correction violated Section 703(a)

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00400 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.252

of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-2(a), among other ways, by failing to consider Linda S. Finley for hire and terminating Vickie R. Finley without ever seeking to accommodate the Finleys' desire to observe a day of rest as required by their Seventh-day Adventist religion. This suit was resolved through entry of a consent decree on October 31, 2000.

United States v. New Mexico Department of Public Safety.

On November 22, 2000, we filed a complaint in the United States District Court of New Mexico against the New Mexico Department of Public Safety, pursuant to Section 706 of Title VII. The complaint alleged the defendant subjected Crystel L. Menefee to discrimination in employment on the basis of her sex in violation of Title VII by creating an intimidating, hostile, or offensive work environment and which adversely affected the terms, conditions, and privileges of Ms. Menefee's employment. This suit was resolved through entry of a consent decree on October 17, 2001.

United States v. State of Delaware.

On January 10, 2001, we filed a complaint in the United States District Court for the District of Delaware against the State of Delaware, pursuant to Section 707 of Title VII. The complaint alleged that the defendant's use of certain written examinations for the selection of entry-level state troopers had an unlawful disparate impact against blacks and was not job-related and consistent with business necessity, as required by Title VII. This suit was brought to trial and successfully prosecuted by the Division.

United States v. Village of Cuba, New Mexico.

On January 12, 2001, we filed a complaint in the United States District Court for the District of New Mexico against the Village of Cuba, New Mexico, pursuant to Section 706 of Title VII. The complaint alleged that the defendant discriminated against three female charging parties by failing or refusing to increase their hourly compensation at the same rate as the increase in hourly compensation given to male hourly employees. This suit was resolved through the entry of a consent decree in November 2001.

United States v. Matagorda County, Texas, and Sheriff James D. Mitchell.

On January 12, 2001, we filed a complaint in the United States District Court for the Southern District of Texas against Matagorda County, Texas, and Sheriff James D. Mitchell pursuant to Section 706 of Title VII. The complaint alleged that the Defendants discriminated against a charging party on the basis of his race. This case was resolved through the entry of a consent decree on January 19, 2002.

United States v. City of Sulphur, Oklahoma.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00401 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.253

On January 18, 2001, we filed a complaint in the United States District Court for the Eastern District of Oklahoma against the City of Sulphur, Oklahoma, pursuant to Section 706 of Title VII. The complaint alleged that the defendant discriminated against a charging party on the basis of his national origin when it refused to employ him as a supervisor in the city's sanitation department. This case was resolved through the entry of a consent decree on February 23, 2001.

United States v. City of Bastrop, Louisiana.

On January 19, 2001, we filed a complaint in the United States District Court for the Western District of Louisiana, pursuant to Section 706 of Title VII. The complaint alleged that the defendant subjected the charging party to racial and sexual harassment while she was employed by the City. This case was resolved through the entry of a consent decree on October 1, 2001.

United States v. New York City Housing Authority.

On May 31, 2001, the Assistant Attorney General for the Civil Rights Division authorized the United States Attorney's Office for the Southern District of New York to file a complaint against the New York City Housing Authority, pursuant to Section 706 of Title VII. The complaint alleged that the complainants, female participants in the City's Work Experience Program (WEP), were subjected to a hostile work environment on the basis of race or sex and that one of the complainants was retaliated against because of her complaints of sexual harassment. This case was resolved through the entry of a consent decree on May 12, 2006.

United States v. Northwest New Mexico Regional Solid Waste Authority.

On March 20, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Northwest New Mexico Regional Solid Waste Authority (Authority), pursuant to Section 706 of Title VII. The complaint alleged that the Authority racially and sexually harassed a Native-American female and other similarly situated females. The complaint also alleged that the Authority created a work environment that was so racially and/or sexually hostile that female employees were forced to resign from their jobs. This case was resolved through the entry of a consent decree on February 3, 2003.

United States v. New York City Department of Parks and Recreation.

On June 19, 2002, a complaint, authorized by the Assistant Attorney General of the Civil Rights Division, was filed by the United States Attorney's Office for the Southern District of New York against the City of New York and the New York City Department of Parks and Recreation, pursuant to Section 707 of Title VII. The complaint alleged that the City of New York and its Parks Department engaged in a pattern or practice of discrimination against black and Hispanic employees in the Parks Department on the basis of their race and/or national origin in making promotion decisions. This case was resolved through the entry of a consent decree on June 8, 2005.

United States v. Zuni Public School District .

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00402 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.254

On August 23, 2002, we filed a complaint in the United States District Court for the District of New Mexico against the Zuni Public School District, pursuant to Section 706 of Title VII. The complaint alleged that the District subjected a female teacher to sexual harassment that created a hostile work environment and that adversely affected the terms, conditions, and privileges of her employment, and that the District failed to take appropriate action to remedy the effects of the discriminatory treatment. This case was resolved through the entry of a consent decree on September 9, 2002.

United States v. Fort Lauderdale.

On September 9, 2002, we filed a complaint in the United States District Court for the Southern District of Florida against the City of Fort Lauderdale, Florida, pursuant to Section 706 of Title VII. The complaint alleged that the City violated Title VII by refusing to promote the charging party to the position of Engineering Inspector I because of his race and by subjecting the charging party to retaliatory harassment. This case was resolved through the entry of a consent decree on January 13, 2003.

United States v. Indiana Department of Transportation.

On September 25, 2002, we filed a complaint in the United States District Court for the Southern District of Indiana against the Indiana Department of Transportation (IDOT), pursuant to Section 706 of Title VII. The complaint alleged that the IDOT failed or refused to promote the charging party because of his national origin. This case was resolved through the entry of a consent decree on September 3, 2003.

United States v. Prince George's County Fire Department.

On October 30, 2002, we filed a complaint in the United States District Court for the District of Maryland against Prince George's County, Maryland, pursuant to Section 706 of Title VII. The complaint alleged that the County discriminated against a female formerly employed as a fire technician in the County's Fire Department by subjecting her to a hostile work environment based on her sex and also by retaliating against her for her complaints of sex discrimination. This case was resolved through the entry of a consent decree on October 23, 2003.

United States v. Regents of the University of California.

On March 4, 2003, we filed a complaint in the United States District Court for the Eastern District of California against the Regents of the University of California, pursuant to Section 706 of Title VII. The complaint alleged that the Regents at the University of California Davis Medical Center engaged in unlawful retaliation against the charging party and a similarly situated individual after these individuals complained of conduct that they reasonably believed to be sexual harassment. This case was resolved through the entry of a consent decree on March 13, 2003.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00403 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.255

United States v. University of Guam.

On June 30, 2003, we filed a complaint in the United States District Court for the District of Guam against the University of Guam, pursuant to Section 706 of Title VII. The complaint alleged that 11 individuals who had filed charges against the University with the EEOC suffered discriminatory terms, conditions, and privileges of employment and discharge, constructive discharge, or refusal to renew their contracts because of their national origin and/or race or in retaliation for complaining about what they reasonably believed to be employment discrimination prohibited by Title VII. This case was resolved through the entry of a consent decree on July 3, 2003.

United States v. Town of West Terre Haute.

On July 11, 2003, we filed a complaint in the United States District Court for the Southern District of Indiana against the Town of West Terre Haute, Indiana, pursuant to Section 706 of Title VII. The complaint alleged that the Town discriminated against a former 911 dispatcher with the Town's Police Department by subjecting her to sexual harassment for a period of approximately two years, which created a hostile work environment and resulted in her constructive discharge. The complaint specifically alleged that the former head of the Police Department repeatedly subjected the charging party to harassing and unwelcome conduct of a sexual nature, including, but not limited to, unwanted touching, obscene gestures, lewd comments about her sexual partners, crude comments about her body, and threatening remarks. The complaint further alleged that the Town failed to investigate or take any action in response to the charging party's complaints about the sexual harassment. This case was resolved through the entry of a consent decree on April 9, 2004.

United States v. Greenwood Community School Corporation.

On July 18, 2003, we filed a complaint in the United States District Court for the Southern District of Indiana against the Greenwood Community School Corporation, pursuant to Section 706 of Title VII. The complaint alleged retaliation against the charging party, a current employee of the school district, because he previously had filed a charge of sex discrimination against Greenwood with the EEOC. This case was resolved through the entry of a consent decree on July 28, 2003.

United States v. City of Erie.

On January 8, 2004, we filed a complaint in the United States District Court for the Western District of Pennsylvania against the City of Erie, Pennsylvania, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of gender-based employment discrimination against women in the hiring of entry-level police officers by using a physical agility test that resulted in a disparate impact against women and did not otherwise meet the requirements of Title VII. The Section successfully prosecuted this case.

United States v. University of Medicine and Dentistry of New Jersey.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00404 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.256

On February 13, 2004, we filed a complaint in the United States District Court for the District of New Jersey against the University of Medicine and Dentistry of New Jersey (UMDNJ), pursuant to Section 706 of Title VII. The complaint alleged that the UMDNJ unlawfully failed to promote a senior housekeeper to the position of housekeeping supervisor in retaliation for bringing an earlier Title VII claim against the UMDNJ. This case was resolved through the entry of a consent decree on March 18, 2005.

Bond & United States v. City of Baltimore Department of Public Works.

On March 8, 2004, we filed a complaint in intervention in the United States District Court for the District of Maryland against the City of Baltimore, pursuant to Section 706 of Title VII. The complaint alleged that the charging party was subjected to sexual harassment by her supervisor and coworkers at the City's Department of Public Works (DPW) and that, despite receiving numerous complaints, the DPW failed to take appropriate action to remedy the situation. This case was resolved through the entry of a consent decree on November 29, 2004.

United States v. University of New Mexico.

On March 16, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the University of New Mexico, pursuant to Section 706 of Title VII. The complaint alleged that the University violated Title VII by refusing to provide modified-duty assignments to three pregnant women, even though it provided modified-duty assignments to employees who were not pregnant. The complaint also alleged that the University terminated one of the three women after she announced that she was pregnant and requested a modified-duty assignment. This case was resolved through the entry of a consent decree on May 3, 2004.

Lemons & United States v. Pattonville FPD.

On July 13, 2004, we filed a complaint in intervention in the United States District Court for the Eastern District of Missouri against the Pattonville-Bridgeton Fire Protection District (Pattonville FPD), pursuant to Section 706 of Title VII. The complaint in intervention alleged that the only black firefighter at the Pattonville FPD between 1989 and 2003 was the victim of racial harassment. The complaint also alleged that the Pattonville FPD constructively discharged the charging party. This case was resolved through the entry of a consent decree on August 16, 2005.

Jane Doe I, II, III & United States v. District of Columbia.

On August 5, 2004, we filed complaints in intervention in three cases in the United States District Court for the District of Columbia against the District of Columbia, pursuant to Section 706 of Title VII. The cases involved three female plaintiffs who alleged that they were discriminated against on the basis of their sex, in violation of Title VII. Our complaints in intervention sought: (1) compensatory damages on behalf of the plaintiffs and similarly situated individuals; and (2) to enjoin the District of Columbia from failing to or refusing to provide

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00405 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.257

remedial, make-whole relief to the plaintiffs. This case was resolved through the entry of a consent decree on September 6, 2005.

United States v. Los Angeles Metropolitan Transit Authority.

On September 16, 2004, we filed a complaint in the United States District Court for the Central District of California against the Los Angeles Metropolitan Transportation Authority (MTA), pursuant to Sections 706 and 707 of Title VII. The complaint alleged that the MTA engaged in a pattern or practice of discrimination by failing or refusing to reasonably accommodate employees and applicants for employment who, in accordance with their religious observances, practices, and/or beliefs, need accommodation because they are unable to comply with a requirement applied by MTA management that employees in the MTA's Operations Division be available to work weekends, on any shift, at any location. The complaint further alleged that the MTA discriminated against a member of the Jewish faith and former bus operator trainee for the MTA by failing or refusing reasonably to accommodate his religious observance, practice, and/or belief of observing the Sabbath from sundown on Friday until sundown on Saturday and by subsequently discharging him from employment. This case was resolved through the entry of a consent decree on October 4, 2005.

United States v. City of Gallup.

On September 29, 2004, we filed a complaint in the United States District Court for the District of New Mexico against the City of Gallup, New Mexico, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of employment discrimination in hiring against American Indians based on race. This case was resolved through the entry of a consent decree on October 27, 2004.

United States v. New York Metropolitan Transportation Authority & New York City Transit Authority.

On September 30, 2004, we filed a complaint in the United States District Court for the Eastern District of New York against the New York Metropolitan Transportation Authority (MTA) and New York City Transit Authority (NYCTA), pursuant to Section 707 of Title VII. The complaint alleged that the MTA and the NYCTA engaged in a pattern or practice of employment discrimination in violation of Section 707 of Title VII against Muslim and Sikh train and bus operators who wear religious head coverings. This case is currently being litigated.

United States v. City of Elsa.

On February 1, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the City of Elsa, Texas, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by removing the charging party's duties as bailiff and warrant officer because of her sex and by retaliating against three former City employees for filing charges of discrimination as well as for opposing conduct

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00406 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.258

that they reasonably and in good faith believed to be unlawful under Title VII. This case was resolved through the entry of a consent decree on December 15, 2005.

United States v. Escambia County Board of Education.

On March 1, 2005, we filed a complaint in the United States District Court for the Southern District of Alabama against the Escambia County, Alabama, Board of Education, pursuant to Section 706 of Title VII. The complaint alleged that the Board engaged in unlawful employment discrimination by subjecting the charging party, a female formerly employed as a custodian at one of the Board's schools, to a sexually hostile working environment and by terminating her employment in retaliation for her complaining of what she reasonably believed to be sexual harassment against her. This case was resolved through the entry of a consent decree on August 14, 2006.

United States v. City of Cairo.)

On March 3, 2005, we filed a complaint in the United States District Court for the Southern District of Illinois against the City of Cairo, Illinois, pursuant to Section 706 of Title VII. The complaint alleged that the City engaged in unlawful employment discrimination by subjecting the charging party, a former communications dispatcher in the City's police department, to sexual harassment by her supervisor, the assistant chief of police. This case was resolved through the entry of a consent decree on August 28, 2006.

Colon Ortiz v. International Ethical Laboratories, Inc.

On March 9, 2005, we filed a complaint in the United States District Court for the District of Puerto Rico against International Ethical Laboratories (IEL). The complaint alleged that IEL violated the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) by denying the plaintiff reemployment rights upon his return from military service and by discharging him. This case was resolved through the entry of a consent decree on July 24, 2006.

Goodreau v. Bridgestone/Firestone North America Tire, LLC.

On March 29, 2005, we filed a complaint in the United States District Court for the Middle District of Tennessee against Bridgestone/Firestone North America Tire Co. (Bridgestone). The complaint alleged that Bridgestone violated USERRA by failing to advance the plaintiff on its progressive pay schedule during a period of approximately 15 months during which he was serving on active military duty. This case was resolved through the entry of a consent decree on April 4, 2005.

Villalobos v. Gulfstream Academy of Aeronautics, Inc..

On April 18, 2005, we filed a complaint in the United States District Court for the Southern District of Florida against Gulfstream Academy of Aeronautics, Inc., Thomas L. Cooper,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00407 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.259

Thomas P. Cooper, and Mark Ottosen. The complaint alleged that the defendants violated USERRA by denying the plaintiff retention in employment and instead discharging him because of his military service. The plaintiff withdrew his claims and complaint after the lawsuit was filed.

Lincoln v. First Express, Inc..

On May 27, 2005, we filed a complaint in the United States District Court for the District of New Jersey against First Express, Inc. The complaint alleged that First Express violated USERRA by denying the plaintiff prompt reemployment and the wages he would have earned from such prompt reemployment after his completion of active military service in the uniformed services. This case was resolved through the entry of a consent decree on July 28, 2005.

United States v. Weimar Independent School District.

On June 23, 2005, we filed a complaint in the United States District Court for the Southern District of Texas against the Weimar Independent School District (Weimar ISD), pursuant to Section 706 of Title VII. The complaint alleged that Weimar ISD failed to hire the charging party for a high school principal position because of her race. This case was resolved through the entry of a consent decree on June 27, 2005.

United States v. Pontiac, Michigan, Fire Department.

On July 26, 2005, we filed a complaint in the United States District Court for the Eastern District of Michigan against the City of Pontiac, Michigan, pursuant to Section 707 of Title VII. The complaint alleged that the City engaged in a pattern or practice of discrimination on the basis of race and sex by creating and maintaining dual hiring and promotional systems in its Fire Department. More specifically, the complaint alleged that, since 1984, the City has maintained collective bargaining agreements with Local 376, Fire Fighters Union, that require the City to use dual hiring and promotional eligibility lists, with one list including all candidates in rank order and a second list of only "minority" candidates, including women, in rank order. This case was resolved through the entry of a consent decree on September 28, 2006.

Veryzer v. Mills & Murphy Software Systems, Inc..

On August 5, 2005, we filed a complaint in the United States District Court for the Middle District of Florida against Mills & Murphy Software System, Inc. (Mills). The complaint alleged that Mills violated USERRA by terminating the plaintiff's employment due to her active military service in the Georgia Air National Guard and by failing to re-employ her after completion of her active military service. This case was resolved through a settlement agreement on October 13, 2006.

United States v. Indiana Department of Correction.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00408 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.260

On August 10, 2005, we filed a complaint in the United States District Court for the Southern District of Indiana against the Indiana Department of Correction (IDOC). The complaint alleged that IDOC violated USERRA when, upon the charging party's return from active military duty, IDOC suspended him from employment, terminated him with loss of pay, seniority, and related benefits, and refused to pay him for the period he was not allowed to work due to his termination. This case was resolved through the entry of a consent decree on August 10, 2005.

United States v. State of Ohio Environmental Protection Agency.

On August 26, 2005, we filed a complaint in the United States District Court for the Southern District of Ohio against the State of Ohio, the Ohio Environmental Protection Agency, and the Ohio Department of Administrative Services, pursuant to Sections 706 and 707 of Title VII. The complaint alleged both a pattern or practice of discrimination and discrimination against the charging party on the basis of religion. This case was resolved through the entry of a consent decree on September 5, 2006.

McCullough v. City of Independence, Missouri.

On October 7, 2005, we filed a complaint in the United States District Court for the Western District of Missouri against the City of Independence, Missouri. The complaint alleged that the City violated USERRA by requiring the plaintiff to provide official military orders or an official memorandum or letter to indicate that he was absent for military purposes, suspending him from employment, placing him on a six month probationary period, refusing to pay McCullough for the period he was not allowed to work due to his suspension, and failing and refusing to clear his personnel file of wrongdoing in the matter. This case was resolved through the entry of a consent decree on December 26, 2005.

White v. SOG Specialty Knives.

On October 27, 2005, we filed a complaint in the United States District Court for the Western District of Missouri alleging that S.O.G. Specialty Knives (SSK) violated USERRA (1) by considering the plaintiff's military service and deployment to Iraq as motivating factors in SSK's decision to immediately discharge him from his position; (2) by reemploying the plaintiff upon his return from active duty in a position that was not of like seniority, status, and pay, the duties of which the plaintiff was qualified to perform; and (3) by discharging the plaintiff, within one year of his reemployment, without cause. This case was resolved through the entry of a consent decree on November 2, 2005.

Woodall, McMahon & Madison v. American Airlines.

On January 12, 2006, we filed a class-action complaint in the United States District Court for the Northern District of Texas against American Airlines, Inc., alleging violations of USERRA. This lawsuit is the first class-action complaint filed by the United States under USERRA. The complaint charges that American Airlines violated USERRA by denying pilots employment benefits during their military service.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00409 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.261

The complaint alleged that American Airlines conducted an audit of the leave taken for military service by its pilots in 2001. The complaint further alleged that based on the results of that audit, American Airlines reduced the employment benefits of those of its pilots who had taken military leave, while not reducing the same benefits of those of its pilots who had taken similar types of non-military leave. This case is currently being litigated.

United States v. Southern Illinois University.

On February 8, 2006, we filed a complaint in the United States District Court for the Southern District of Illinois against Southern Illinois University (SIU) pursuant to Section 707 of Title VII. The complaint alleged that SIU violated Title VII by maintaining three paid graduate fellowship programs that were open only to students who either were of a specified race or national origin or were female. Participants in these programs were employed by SIU as part of the fellowship. While denying that it violated Title VII, SIU admitted that it limited eligibility for and participation in the paid fellowship programs on the basis of race and sex. This case was resolved through the entry of a consent decree on February 9, 2006.

U.S. v. Langston University.

On February 24, 2006, we filed a complaint in the United States District Court for the Western District of Oklahoma against Langston University pursuant to Section 706 of Title VII. The complaint alleged that Langston University violated Title VII by paying the plaintiff less than comparably situated faculty members at the University due to her race. This case was resolved through the entry of a consent decree on February 27, 2006.

Bower v. Roadway Express.

On March 1, 2006, the Division filed a complaint in the United States District Court for the District of Oregon on behalf of the plaintiff against Roadway Express, Inc. (Roadway), alleging violations of USERRA. The complaint alleged that Roadway willfully violated USERRA when it refused to reinstate and reasonably accommodate the plaintiff upon his return from active military service in the United States Army. The complaint sought declaratory relief, reinstatement, and back pay. This case was resolved through a settlement agreement on November 3, 2006.

United States v. Alcalde De Vega Alta.

On March 21, 2006, we filed a complaint against the Municipio de Vega Alta, Puerto Rico, in the United States District Court for the District of Puerto Rico, pursuant to Section 706 of Title VII. The complaint alleges that Vega Alta, in its police department, engaged in gender discrimination and retaliation in violation of Title VII of the Civil Rights Act, as amended, by excluding females from regular police officer duties. The duties from which females were excluded include driving patrol cars and other motorized vehicles, conducting investigations commensurate with their previous work experience, and working as shift supervisors. The

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00410 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.262

complaint further alleges that the female officers were assigned instead to clerical, dispatch, and school guard duties because of their sex. The complaint also alleged that Vega Alta retaliated against a male police officer because he participated in the EEOC investigation of a charge or charges filed by one or more of the affected female police officers. This case is being litigated.

United States v. City of Virginia Beach.

On April 3, 2006, we filed a complaint in the United States District Court for the Eastern District of Virginia against the City of Virginia Beach, Virginia, pursuant to Section 707 of Title VII. The complaint alleges that the City engaged in a pattern or practice of discrimination on the basis of race and national origin by screening applicants for entry-level police officer positions in a manner that had an unlawful disparate impact on African-American and Hispanic applicants. This case was resolved through the entry of a consent decree on July 24, 2006.

United States v. City of Chesapeake.

On July 24, 2006, we filed a complaint in the United States District Court for the Eastern District of Virginia against the City of Chesapeake, Virginia, pursuant to Section 707 of Title VII. The complaint alleges that the City engaged in a pattern or practice of discrimination on the basis of race and national origin by screening applicants for entry-level police officer positions in a manner that has an unlawful disparate impact on African-American and Hispanic applicants. On June 15, 2007, the court provisionally entered a consent decree in the City of Chesapeake litigation. Under the decree, the City will create a fund to provide back pay to African-American and Hispanic applicants who were denied employment solely because of the City's use of a math test as a pass/fail screening device. The City also will provide priority job offers for African-American and Hispanic applicants who are currently qualified for the entry-level police officer job but were screened out solely because of their performance on the math test. The City will provide retroactive seniority to such hires when they complete the training academy. In addition, the City agreed that, while it will still use scores on the mathematics test in combination with applicants' scores on other tests, it will not prospectively use the mathematics test as a stand alone pass/fail screening device.

United States v. San Antonio.

On September 29, 2006, we filed a complaint in the United States District Court for the Western District of Texas against the City of San Antonio, Texas, pursuant to Section 706 of Title VII. The complaint alleges that the city unlawfully discriminated against a detective on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964 when the city's police department forced her to take a light-duty position under the department's mandatory maternity light-duty policy, despite the detective's ability to perform her job in her full-duty capacity. This case is currently being litigated.

United States v. Board of Directors of Tallahassee Community College.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00411 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.263

On November 2, 2006, we filed a complaint in the United States District Court for the Northern District of Florida against the Board of Directors of Tallahassee Community College pursuant to Section 706 of Title VII. In our complaint, we alleged that the defendant discriminated against the charging party on the basis of his race when he was not promoted to a particular position. This case was resolved through the entry of a consent decree on November 7, 2006.

Donelan v. City of Highland Heights.

On December 21, 2006, the Division filed a complaint on behalf of the plaintiff in the United States District Court for the Eastern District of Kentucky, alleging that his employment as a patrol officer with the City of Highland Heights was terminated in violation of USERRA. The complaint alleged that, from the time the plaintiff informed the police chief that he was considering joining the U.S. Air Force Reserve through the time his employment was terminated, the chief discriminated against the plaintiff by making hostile remarks about the plaintiff's military service and subjecting him to hostile actions. The complaint also alleged that the chief terminated the plaintiff's employment without just cause shortly after the plaintiff returned from military training. This case is currently being litigated.

Ellias v. Scoggins.

On January 27, 2007, we filed on behalf of Samuel Ellias a complaint against Don Scoggins d/b/a/ Five Star Janitorial Supply. The complaint alleged that Five Star, in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), had wrongly discharged Ellias from his job as a Five Star sales representative in response to his request for leave to attend training for his position in the Louisiana National Guard. The case was resolved through the entry of a consent decree on January 31, 2007.

United States v. Hayti Heights.

On February 16, 2007, we filed a complaint under section 706 of Title VII of the Civil Rights Act of 1964, as amended, (Title VII) against the City of Hayti Heights, Missouri, alleging that the City violated Title VII by discriminating against Johnnie Small, including by discharging her because of her sex. This case is currently being litigated.

United States v. New York City and New York Department of Transportation.

On March 12, 2007, suit was filed under Section 707 of Title VII alleging that the defendants have engaged in a pattern or practice of employment discrimination against women on the basis of sex in hiring for the position of bridge painter. According to the complaint, the defendants employ approximately 100 individuals as bridge painters but they have never hired, extended an offer to, or employed a woman in that position. This suit is being handled by the United States Attorney's office for the Southern District of New York.

United States v. New York City Department of Correctional Services.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00412 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.264

On March 15, 2007, suit was filed in under Section 707 of Title VII alleging that the defendant has engaged in a pattern or practice of employment discrimination on the basis of religion by failing or refusing reasonably to accommodate those uniformed security personnel who are unable to comply with the defendant's uniform or grooming requirements because of their religious observances, practices, and/or beliefs. The suit is being handled by the United States Attorney's office for the Southern District of New York.

McKeage v. Town of Stewartstown.

On March 27, 2007, suit was filed on behalf of New Hampshire National Guardsman Brendon McKeage, alleging violations of USERRA. McKeage was employed by the Town of Stewartstown as a part-time police chief before being deployed with his National Guard unit in Iraq. McKeage's complaint alleged that upon his return from Iraq, Stewartstown unlawfully denied him reemployment and discriminated against him in violation of USERRA because of his decision to fulfill his military obligation. This case was resolved through entry of a consent decree on March 28, 2007.

Earl G. Brantner v. Total Logistic Control, Inc.

On April 4, 2007, the Department of Justice filed suit on behalf of Earl G. Brantner against Total Logistic Control, alleging that TLC violated USERRA by discharging Brantner and by denying him reemployment because he attended military training relating to his service in the California Air National Guard. On May 15, 2007, the judge entered a consent decree resolving the matter.

United States v. Ville Platte.

On May 1, 2007, we filed suit against the City of Ville Platte, Louisiana, under section 706 of Title VII of the Civil Rights Act of 1964, as amended, alleging discrimination on the basis of pregnancy. At the same time as the complaint was filed, we submitted to the court for approval and entry of a consent decree agreed to between the parties in resolution of the suit.

United States v. City of New York.

On May 21, 2007, we filed suit alleging that, since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York (FDNY) in violation of Title VII. Specifically, the complaint alleged that the City's use of two written examinations as pass/fail screening devices and the City's rank-order processing of applicants from its firefighter eligibility lists based on applicants' scores on the written examinations (in combination with scores on a physical performance test) have resulted in disparate impact against black and Hispanic applicants and are not job related and consistent with business necessity. The complaint was filed pursuant to Sections 706 and 707 of Title VII, and was expanded to include discrimination against Hispanics as a result of the Division's investigation.

United States v. Village of Woodmere.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00413 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.265

On May 25, 2007, the Division filed a lawsuit against the Village of Woodmere (Woodmere), Ohio, alleging that Woodmere discriminated against former Woodmere police officers Amy Mengay and Timothy Ellis on the basis of their race in violation of § 706 of Title VII of the Civil Rights Act of 1964, as amended.

United States v. City of Indianapolis.

On July 11, 2007, we filed suit alleging that the City of Indianapolis violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating on the basis of race and/or sex against eight charging parties and similarly situated police officers who sought promotions to the merit ranks of Sergeant or Lieutenant. The enforcement action resulted from eight charges of discrimination, as well as class allegations, referred to the Department of Justice with cause determinations by the Equal Employment Opportunity Commission (EEOC). The complaint alleges that the charging parties and similarly situated police officers were discriminated against on the basis of race and/or sex with respect to promotions to Sergeant in 2005, and on the basis of sex with respect to promotions to Lieutenant in 2005.

United States v. Robertson Fire Protection District.

On July 18, 2007, we filed suit against Robertson Fire Protection District (Robertson FPD) under Section 706 of Title VII, alleging that Robertson FPD discriminated against African-American former employees, Ephraim Woods, Jr., and Lamont Downer, on the basis of their race and in retaliation for engaging in protected activity when they were demoted from fire inspector to firefighter in March 2004.

United States v. University of North Carolina.

On August 7, 2007, we filed a complaint alleging that the University of North Carolina, at its component institution North Carolina Agricultural and Technical State University (North Carolina A&T), violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating against employee Tasha Murray and former employee Mattie Smith because of their sex. Our complaint alleges that North Carolina A&T discriminated against Murray and Smith by subjecting them to sexual harassment that created a hostile work environment and failing to take appropriate action to remedy the discrimination while they were employed in the Department of Police and Public Safety at North Carolina A&T.

Bernard Woodruff v. DTI & Associates, Inc.

On August 7, 2007, we filed a complaint on behalf of Bernard Woodruff against DTI & Associates, Inc., alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994. The complaint alleges that DTI failed to reemploy Woodruff, a Navy reservist, when he returned from a period of active duty. The complaint seeks reinstatement of the veteran together with back wages, interest, and remedial measures.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00414 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.266

United States v. Spartanburg County.

On August 13, 2007, we filed a complaint alleging that Spartanburg County, violated Title VII of the Civil Rights Act of 1964, as amended, by discriminating against former employee Jennifer Fowler because of her sex. Our complaint alleges that the county discriminated against Ms. Fowler by subjecting her to sexual harassment that created a hostile work environment and by failing to take appropriate action to remedy the discrimination while she was employed in the Roads and Bridges Department.

United States v. Palm Beach County.

On August 27, 2007, we filed a complaint alleging that Palm Beach County discriminated against William Stewart in violation of section 706 of Title VII of the Civil Rights Act of 1964, when it failed to provide him with an accommodation for his religious observance, practice, and/or belief of attending Church and refraining from work on Sundays. At the same time as the complaint was filed, we submitted to the court and the court approved the entry of a consent decree agreed to between the parties in resolution of the suit.

Jared Caldwell v. Acme Towing.

On September 24, 2007, we filed a complaint alleging that Acme Towing, Inc. violated the Uniformed Services Employment and Reemployment Rights Act of 1994 by demoting Mr. Caldwell from a supervisory position and then terminating his employment due to his active military service in the United States Army Reserve. The complaint seeks back pay and prejudgment interest.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00415 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.267

Department of Justice Responses to Questions for the Record posed to Attorney General Alberto Gonzales Senate Judiciary Committee Oversight Hearing July 24, 2007 (Part 1)

Answers #336 and 338 Attachments

38236.288

Whether the Office of the Vice President is an "Agency" for Purposes of the Freedom of Information Act

The Office of the Vice President is not an "agency" for purposes of the Freedom of Information Act.

February 14, 1994

MEMORANDUM OPINION FOR THE
COUNSEL AND DIRECTOR OF ADMINISTRATION
OFFICE OF THE VICE PRESIDENT

This memorandum responds to your request for the opinion of the Office of Legal Counsel as to whether the Office of the Vice President ("OVP") is an "agency" for purposes of the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). For the reasons set forth below, we conclude that it is not.

The FOIA definition of "agency" includes an "establishment in the executive branch of the Government (including the Executive Office of the President)." *Id.* § 552(f)(1). Relying on the conference committee report explaining the 1974 amendment to the definition, the Supreme Court has held that the term "agency" does not cover "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.'" *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)).

As a threshold matter, we note that a court might decide that the OVP, which is only a small personal staff for the Vice President, does not even qualify as an "establishment." We believe that is a reasonable position, although the law is unsettled as to the definition of "establishment." There is no need to rely on that position, however, because in our opinion the following analysis, based on case law, definitively establishes that the OVP is not an "agency."

The OVP clearly satisfies the Supreme Court's "sole function" test, because the Vice President and his staff do not have "substantial independent authority in the exercise of specific functions," *Soucie v. David*, 448 F.2d 1067, 1073 (D.C. Cir. 1971), but rather have the sole function of advising and assisting the President. *See generally Meyer v. Bush*, 981 F.2d 1288, 1295 (D.C. Cir. 1993). The Vice President has no constitutional or statutory responsibilities as an executive branch officer,[1] and the common understanding that his executive role is limited to advising and assisting the President (as determined by each President) is confirmed by the statute authorizing appropriations and other assistance and services for the Vice

[1] There is no need, of course, to consider the Vice President's responsibilities as the President of the Senate, *see* U.S. Const. art. I, § 3, cl. 4, because the FOIA does not apply to Congress.

HeinOnline -- 18 Op. Off. Legal Counsel 10 1994

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00417 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.289

President: "In order to enable the Vice President to provide assistance to the President in connection with the performance of functions specially assigned to the Vice President by the President in the discharge of executive duties and responsibilities." 3 U.S.C. § 106(a).[2]

Indeed, because of the constitutional status of the Vice President, a court might decide that it is not even necessary to consider whether the OVP satisfies the "sole function" test. In holding that the President is not an agency for purposes of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), the Supreme Court adopted an "express statement" rule:

> The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992). Because the Vice President is also a constitutional officer, *see* U.S. Const. art. II, § 1, cl. 1, the same "express statement" rule should apply in the present context, which would necessitate an express reference to the Vice President rather than the general "establishment in . . . the Executive Office of the President" formulation. Thus, the absence of such an express statement in the FOIA definition of "agency" requires the conclusion that Congress did not intend to subject the Vice President and his Office to the FOIA.

The understanding that the Vice President and his staff, like the President and his staff, are outside the coverage of the FOIA is confirmed by the treatment of the OVP under the Presidential Records Act, 44 U.S.C. §§ 2201-2207 ("PRA"). These two statutes are "in pari materia" and should be construed together. The PRA covers all EOP records that are not covered by the FOIA. *See* H.R. Rep. 95-

[2] The OVP thus appears to present almost as straightforward and simple a case as the Office of the President (i.e., the White House Office) with respect to satisfying the "sole function" test. "The legislative history [of FOIA's 'agency' definition] is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President." *Kissinger*, 445 U.S. at 156 (holding that Henry Kissinger's notes in capacity of Assistant to the President were not "agency records"). More difficult questions are presented by the larger Executive Office of the President ("EOP") units with more diverse responsibilities, such as the Council on Environmental Quality, which has been held to be a FOIA agency, *see Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980), or the National Security Council ("NSC"), the FOIA status of which is being litigated, *see Armstrong v. Executive Office of President*, 1 F.3d 1274, 1296 (D.C. Cir. 1993), and which this Office has recently opined is not a FOIA agency, *see* Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser, NSC, from Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Status of NSC as an "Agency" under FOIA* (Sept. 20, 1993).

HeinOnline -- 18 Op. Off. Legal Counsel 11 1994

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00418 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.270

1487, at 3 (1978) ("The definition of Presidential records was designed to encompass those records which currently fall outside the scope of the [FOIA].") *reprinted in* 1978 U.S.C.C.A.N. 5732, 5734; 44 U.S.C. § 2201(2)(B)(i) ("Presidential records" do not include "official records of an agency (as defined in [the FOIA]).").
The PRA contains an express statement that OVP records are presidential records rather than agency records. 44 U.S.C. § 2207 ("Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential records."). *See generally Armstrong v. Bush*, 924 F.2d 282, 286 n.2 (D.C. Cir. 1991) (explaining that components of the EOP fall into two categories — those that create presidential records subject to the PRA and those that create federal (i.e., agency) records subject to the Federal Records Act and the FOIA; OVP is in former category).

For the foregoing reasons, we conclude that the Office of the Vice President is not an "agency" for purposes of the Freedom of Information Act.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

HeinOnline -- 18 Op. Off. Legal Counsel 12 1994

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00419 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.271

Jan. 19, 1955

Robert W. Minor,
Office of Deputy Attorney General

J. Lee Rankin, Assistant Attorney General,
Office of Legal Counsel

Eligibility of the President to Civil Service Retirement Benefits

You have asked my view as to whether the President is eligible for benefits under the Civil Service Retirement Act. Under existing law the President and the Vice President, being "elective officers in the executive branch of the Government" are excluded from such benefits (5 U.S.C. 693). The applicable provision reads in pertinent part:

> "This chapter [Retirement of Civil Service Employees] shall apply to all officers and employees in or under the executive, judicial, and legislative branches of the United States Government, and to all officers and employees of the municipal government of the District of Columbia, exept elective officers in the executive branch of the Government, * * *." (Italics supplied.)

The origin of this provision goes back to the Act of January 24, 1942, of the 77th Congress, which amended in full the early Civil Service Retirement Act of May 29, 1930 (46 Stat. 468). Section 3 of the 1942 legislation (56 Stat. 15) made provision for the application of retirement benefits to -

> "* * * all officers and employees in or under the executive, judicial and legislative branches of the United States Government, all elective and appointive officers in or under the said branches. * * *" (Italics supplied.)

Thus, the President and Vice President were included. The provision was short-lived, however, and the Congress reversed its action in the same Congress with the enactment less than three months later of the following provision, which was a part of Section 16 of the Act of March 7, 1942 (56 Stat. 147). This provision specifically amended the earlier legislation of January 24, 1942. It provided -

> "This Act shall apply to all officers and employees in or under the executive, judicial and legislative branches of the United States Government, and to all officers and employees of the municipal government of the District of Columbia, except elective officers and heads of executive departments * * *."

With respect to the foregoing section, which was a conference amendment agreed to by both Houses, no doubt was left as to the Congressional meaning. Thus, the spokesman for the Senate Conference group reported (88 Cong. Rec. 1824):

> "* * * under the Senate amendment, not only are the President and his cabinet, the Vice President and members of the House excluded from the coverage of the Retirement Act, but also the heads of agencies * * *
>
> " * * * It is perhaps important to have this statement in the Record, both in the House and in the Senate, so that in the future, if efforts are made to interpret the law, it will appear what was the intention of the House and Senate when the conference report was accepted."

The legislation was later amended to permit heads of executive departments to obtain retirement benefits (60 Stat. 659). Still later, by provision in the Legislative Reorganization Act, members of Congress were admitted to participation (60 Stat. 850). Pursuant to the terms of the latter Act (Sec. 602(a)), the phrase "in the executive branch of the Government" was inserted to follow the words "except elective officers". Thus it was made certain that the President and Vice President survive as the two elective officers who are ineligible to Civil Service retirement benefits.

It should be noted that 5 U.S.C. 693 contains, in addition to the provision above quoted, the following proviso:

> "Provided, That this chapter shall not apply to any such officer or employee of the United States * * * subject to another retirement system for such officers and employees * * *."

With respect to application of the proviso, consideration should be given to the possibility that retirement benefits may have been carried over from a retirement system under which an elective officer in the executive branch has previously served which may be continued.

March 9, 1961

MEMORANDUM FOR THE VICE PRESIDENT

Re: Participation by the Vice President in the affairs of the Executive Branch.

This memorandum is in response to your recent request concerning the extent to which the Vice President may properly perform functions in the Executive Branch of the Government.

The Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the Government (Art. I, sec. 3) but neither grants nor forbids him functions in the conduct of affairs of the Executive Branch. The extent to which he may properly take part in those affairs must be assessed primarily in terms of historical precedents. /1/ The courts have not had occasion to consider this matter and judicial precedents do not exist.

1. Presidential Powers of Delegation. As will be seen below, the role of the Vice President in the Executive Branch has varied greatly through the years and at any given time has been determined largely by the President. A brief reference to the latter's powers of delegation is thus pertinent. It has long been recognized that the President has the power to delegate tasks for which he is responsible and that "in general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President." 7 Op. A.G. 453, 467 (1855). In 1950 Congress expressly gave the President broad authority to delegate to department and agency heads, and to certain lesser officials, functions

/1/ There is no inherent conflict between the legislative role given to the Vice President by the Constitution and any executive duties he may be called upon to carry out. As pointed out by one writer, "The Founding Fathers never intended to immobilize the second officer in the chair of the Senate, for they empowered that body to choose 'a President pro tempore, in the absence of the Vice President. . . .'" Williams, The American Vice Presidency: New Look (1954), p. 70. Nixon once estimated that he spent only 10 per cent of his time presiding over the Senate. U.S. News & World Report, June 26, 1953, p. 71.

38236.274

vested in him by law if such law did not affirmatively prohibit delegation. 64 Stat. 419, 3 U.S.C. §§ 301-303. This legislation, which was designed to lighten the burden of the President by permitting him to slough off without question a substantial number of tasks thought by some authorities to require his personal attention, 2/ recognized the "inherent right of the President to delegate the performance of functions vested in him by law" and specifically disavowed any intention to limit or derogate from that right. 3 U.S.C. § 302. Thus, there is no general bar, either of a Constitutional or statutory nature, against the President's transfer of duties to the Vice President. It remains to be noted, however, that

> "where . . . from the nature of the case, or by express constitutional or statutory declaration, it is evident that the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else." Willoughby, Constitutional Law of the United States (2d ed. 1929), Vol. III, p. 1482.

The President's obligation to pass on bills sent to him by Congress is one example of a non-delegable duty. The exercise of judgment required by 49 U.S.C. § 1461 in the matter of the certification of overseas air transport routes may well be another.

2. History. The history of the Vice Presidency begins with the last period of the Constitutional Convention of 1787. 3/ During most of the Convention the delegates had sought to perfect a plan whereby the Congress would elect the President and, if necessary, his successor to fill an unexpired term. However, dissatisfaction with this method ultimately led to the creation of the Electoral College and the office of Vice President. Under the original provisions of the Constitution (Art. II, sec. 1) each elector voted for two persons for President, and the person receiving the highest number of votes became President if such

2/ S. Rept. 1867, 81st Cong., 2d sess.

3/ The brief history set forth in the following portion of this memorandum has been digested mainly from the work of Irving G. Williams cited in footnote 1 above and a later and expanded work by the same author, The Rise of the Vice Presidency (1956). Attached as an appendix to this memorandum is a list containing other recent source material bearing on the office of the Vice Presidency.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00423 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.275

number was a majority of the whole number of electors appointed by the States. The runnerup in the balloting became Vice President. The present system of separate electoral balloting for the offices of President and Vice President was established following the tie in the electoral vote of 1800 between Jefferson, who was the first choice of the Republican Party of the day, and Burr, also a Republican, intended by his Party for the Vice Presidency. Burr's refusal to step aside together with the tactics of the strong Federalist bloc in the "lame duck" House of Representatives into which the election was thrown necessitated 36 ballots before Jefferson was elected. This crisis, which was the outcome of the unforeseen growth of the party system, four years later produced the Twelfth Amendment requiring the members of the Electoral College to vote for one individual for President and another for Vice President.

John Adams, the first Vice President, was one of the most influential. He originally conceived of his Constitutional duties in the Chair of the Senate as tantamount to leadership, and, to some extent because of the great number of casting votes occasioned by the small roster of the Senate, played a decisive part in its work during the first few years of its existence. Later, as it increased in membership and its organization and procedures were strengthened, his influence was greatly diminished. On the executive side, he enjoyed Washington's confidence and was consulted by him frequently, particularly in regard to diplomatic matters. However, despite his extensive experience in diplomacy abroad, Adams in 1794 rejected a suggestion that he travel to England to negotiate a commercial treaty, taking the position that the Constitution required him to preside over the Senate. In addition, he questioned the propriety of leaving the country in view of the necessity of his taking over the Presidency in case the office became vacant. This dubious precedent, followed in 1797 by a similar refusal by Jefferson to carry on diplomatic negotiations in France when he was Vice President under Adams, held good until 1936 when Garner made trips to the Far East and to Mexico on official business.

The Twelfth Amendment had a prompt and unfortunate effect on the Vice Presidency as appears from the contrast between the abilities and attainments of Adams, Jefferson and Burr, who held it prior to the adoption of the Amendment, and the lackluster

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00424 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.276

of Clinton, Gerry, and Tompkins, who served during the next two decades. Calhoun and Van Buren, the next occupants of the office, lent great prestige to it, but not Van Buren's successor, Richard M. Johnson, whose main claim to distinction seems to be that he failed of a majority in the Electoral College and became the only Vice President in the country's history to be elected by the Senate. John Tyler, the next Vice President, served a term of one month, succeeding to the Presidency upon the death of William Henry Harrison on April 4, 1841, the first of a Chief Executive in office. Tyler took the Presidential oath believing and contending that the office of President had devolved on him and not merely its powers and duties. 4/ Many members of the Congress and others, including former President John Quincy Adams, took sharp issue and argued that Tyler was merely "acting" President. Whatever the merits of the controversy, Tyler's position prevailed. All Vice Presidents succeeding to the Presidency after him followed his lead, and his view was written into the Constitution by the language of the Twenty-second Amendment.

From Tyler's time to that of Woodrow Wilson, the office of the Vice Presidency by and large played an unimportant part in the Government except for providing Fillmore, Andrew Johnson, Arthur and Theodore Roosevelt as successors to the Presidency upon the deaths of Taylor, Lincoln, Garfield and McKinley.

Thomas R. Marshall, Vice President during both of Wilson's terms, brought the office back into public esteem and ultimately became the most popular Vice President up to his time. The first after Calhoun to win reelection, Marshall was also the first after John Adams to attend a Cabinet meeting. Adams had sat in at a meeting in 1791 on Washington's request while the latter was on a tour of the South. Similarly, at the request of Wilson, concurred in by the Cabinet, Marshall presided over its meetings during Wilson's attendance at the Paris Peace Conference. The temporary seat in the Cabinet afforded to Marshall became Coolidge's permanent seat at the invitation of Harding. On the

4/ Art. II, sec. 1, of the Constitution provides that "In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President. . . ." Tyler took the position that the word "same" related back to the word "Office".

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00425 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.277

other hand, Dawes, who was Vice President during Coolidge's elected term, refused to follow his example and attended no meetings of the Cabinet whatever. Curtis was not asked to sit during Hoover's term and it was only after the election of Franklin D. Roosevelt, and beginning in 1933 with Garner, that participation by the Vice President in the deliberations of the Cabinet became a matter of course.

What has been called the "contemporary renaissance" of the Vice Presidency/5/ stems in large part from the second Roosevelt's reliance on the men who served in that office during his administrations. Garner's aid to Roosevelt was important in his first term, particularly in the area of Congressional liaison. Garner also made his presence felt in the Cabinet and, further, was often asked by Roosevelt for his views on matters of foreign policy. As mentioned above, Garner broke the negative precedent set by the first Adams, and in 1936 became the first Vice President in office to travel beyond the country's borders in an official capacity.

By the end of his first term, Garner began to have misgivings about the New Deal and by the middle of his second he was completely out of sympathy with Roosevelt's policies. In the last days of 1938 both Roosevelt and he recognized that they had come to the parting of the ways and at the close of 1939 Garner announced himself a candidate for the Presidency in the election of the following year. Although Garner continued to attend Cabinet meetings until the expiration of his second term, he obviously was little more than an observer after 1938. Thus, the powerful and useful partnership of the President and Vice President, probably without prior parallel except for the Washington-Adams relationship, came to an unfortunate end after some five years and the Executive Branch reverted to a sole proprietorship.

During Roosevelt's third term the Executive partnership with the Vice Presidency was revived and Wallace received responsibility and power in measures never known to a Vice President before and, in certain aspects, not known to one since. Only in the more or less traditional task of Congressional liaison were Wallace's activities limited -- and then not because of

4/ ## FNS

4/5/ Williams, The American Vice Presidency: New Look, p. 9.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00426 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.278

a Presidential interdiction but rather by reason of Wallace's lack of talent for and interest in this facet of the Vice President's work.

Wallace's major duties in the Executive Branch began on July 30, 1941 when the President issued Executive Order No. 8839 (6 F.R. 3823) creating the Economic Defense Board composed of the Vice President, who was designated Chairman, and several Cabinet officers. The stated purpose of the Board was to develop and coordinate plans, policies and programs designed to strengthen the international economic relations of the United States in the interest of national defense. Four weeks later, Executive Order No. 8875 of August 28, 1941 (6 F.R. 4483) created the Supply Priorities and Allocations Board (SPAB), consisting of the Chairman of the Economic Defense Board (Wallace), a number of Cabinet officers, and the heads of a number of emergency agencies. Wallace was named Chairman of the SPAB presumably to coordinate the domestic and international economic defense programs. Finally, Wallace was made a member of a Presidential advisory committee on atomic energy created in October 1941, together with Secretary of War Stimson, Chief of Staff Marshall, Dr. Vannevar Bush, and Dr. James B. Conant. According to Stimson, this committee was the basic agency for making major policy decisions on the development and use of atomic energy.

Wallace's work on the SPAB was of relatively short duration because the Agency was abolished shortly after Pearl Harbor and replaced by the greatly expanded War Production Board with Donald Nelson, the Executive Director of the superseded SPAB, as its full time Chairman. Wallace's membership on the atomic energy committee continued throughout his whole term but because of the secret nature of the committee it is of course impossible to evaluate his contribution to its work.

It was in the first of his major Executive Branch assignments, the Economic Defense Board (renamed the Board of Economic Warfare (BEW) a few days after Pearl Harbor), that Wallace had responsibilities and carried out duties unique in the history of the Vice Presidency. The order setting up the Board had directed that the administration of economic defense activities in the international field by the various Government departments and agencies "shall conform to the policies formulated or approved by the Board." Thus, owing to the scope of the activities embraced within the concept of "economic defense," Wallace in a

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00427 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.279

variety of situations became the superior of every Cabinet officer and most of the important independent agency heads. The ubiquity of the BEW and the boldness and tenacity of its staff embroiled it soon after Pearl Harbor in a series of running battles over policy with other Government agencies, including specifically the Department of State and the Reconstruction Finance Corporation. The course of these battles need not be detailed here and it is enough to note that conflicts with the latter two powerful agencies led to the BEW's downfall. In the summer of 1943 the President removed Wallace as its Chairman and then terminated it.

It is generally agreed that the BEW performed its work well and substantially furthered the war effort. Its demise is therefore not to be laid to any difficulties inherent in the dual role of Vice President and Chairman played by Wallace. The real trouble was frequent policy disagreement reflecting a clash of Wallace's liberal views with the relatively conservative views of Secretary of State Hull and RFC Chairman Jones.

In addition to his domestic duties Wallace undertook tasks farther afield. Continuing Garner's example, he made several trips to Latin America as a good-will ambassador and in 1944 traveled to the Far East on a combined political and good-will mission.

Following Wallace, Truman sat with the Cabinet during his short service as Vice President, as did Barkley after he became Vice President in 1949. In the same year Congress at the request of Truman made the Vice President a statutory member of the National Security Council. 63 Stat. 579, 50 U.S.C. § 402(a). Thus the combination of Cabinet and National Security Council service placed the Vice President in a position to keep informed about the most important affairs of the Nation and to join in the making of policy at the highest levels.

Nixon carried out perhaps a greater variety of duties than any of his predecessors. In his first year of office he became and thereafter remained Chairman of the President's Committee on Government Contracts. He attended and in the absence of the President presided at Cabinet meetings and meetings of the National Security Council. He acted as a "trouble-shooter" for the White House in its dealings with Congress and in matters political. And he was prominent in the field of foreign relations, traveling in other lands to an extent much greater than

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00428 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.280

any of his predecessors and apparently having a significant voice from time to time in the Eisenhower Administration's formulation of foreign policy.

From this brief outline of the history of the Vice Presidency, it is apparent that during the past half century, and markedly since 1933, the office has moved closer and closer to the Executive. This development, aided by the deference of the party nominating conventions to their Presidential nominees in the selection of running mates, is easily understandable when related to the enormous increase in the responsibilities and burdens of the Presidency which took place concurrently.

3. Limits of Vice President's Part in Work of Executive Branch. In considering what the proper limits of the role of the Vice President in the Executive Branch may be, it is convenient to discuss separately the two areas of foreign affairs and domestic administration. In the former area, it is evident that at the will and as the representative of the President, the Vice President may engage in activities ranging into the highest levels of diplomacy and negotiation and may do so anywhere in the world. /6/ The refusal of John Adams during the Washington Administration to engage in such activities abroad cannot be given any weight at the present time. His reasons, good or bad as they were, have been obviated by the fact that lengthy absences of the Vice President from the Senate have become the custom and not the exception and the fact that even if abroad, the Vice President would today be able to return to the seat of Government within hours in the event the office of President became vacant. Indeed, Adams either advanced the reasons merely as an excuse or soon changed his mind, for the day before his own Presidential administration began he asked Vice President-elect Jefferson to undertake the same kind of task he himself had declined. Jefferson's rejection of the request, ostensibly based on Adams' own grounds, was really motivated by political considerations. /7/ At any rate, aside from location, the propriety of assignments to

4/ ##FN6

/6/ For a discussion of the President's right to employ diplomatic agents without the concurrence of the Senate despite his obligation under Art. II, sec. 2, cl. 2 of the Constitution to submit for its advice and consent his nominations of "Ambassadors, other public Ministers and Consuls," see Corwin, Constitution of the United States, Annotated (1952), pp. 447 - 449.

4/ /7/ Williams, The American Vice Presidency: New Look, p. 24.

##FN7

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00429 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.281

the Vice President in the field of foreign relations was plainly taken for granted in the beginning years of our history and justifiably so in the absence of any Constitutional proscription, express or implied. Nothing that has occurred since then suggests that this earlier assumption was incorrect.

In matters of domestic administration, the nature and number of the Vice President's executive duties, with the recent and important exception of statutory membership in the National Security Council, are, as a practical matter, within the discretion of the President. Since the Vice President is not prevented either by the Constitution or by any general statute from acting as the President's delegate, the range of transferrable duties would seem to be co-extensive with the scope of the President's power of delegation. The outer limits of that range were approached, if not touched, by Wallace's post as Chairman of the BEW. Although that Presidential assignment was the outgrowth of war, there is no visible bar to commensurate posts for the Vice President in other times.

The Vice President's formal domestic assignments from the President in recent years -- that is, his seat with the Cabinet and his chairmanship of the Committee on Government Contracts -- are beyond doubt consistent with the Constitution and laws. The statutory duty of the Vice President as a member of the National Security Council is to advise the President. 50 U.S.C. § 402(a). Thus, the Vice President's affiliation with that body partakes of the same character as his service with the Cabinet and raises no Constitutional questions. The same would be true of his statutory membership on the advisory National Aeronautics and Space Council (42 U.S.C. § 2471) if, as the President recently stated he would recommend to Congress, 8/ the latter body were to amend the present law to provide for such membership.

A caveat is appropriate with respect to bestowals of functions upon the Vice President by Congress. To the extent that legislation might attempt to place power in the Vice President to be wielded independently of the President, it no doubt would run afoul of Article II, section 1 of the Constitution, which provides flatly that "the executive power shall be vested in a President of the United States." Furthermore, since the

##FN8

8/ Press Conference of the President, March 1, 1961.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00430 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.282

Vice President is an elective officer in no way answerable or subordinate to the President, the practical difficulties which might arise from such legislation are as patent as the Constitutional problem.

4. Separation of Powers. In the course of the brief discussion of the office of the Vice President at the Constitutional Convention some of the delegates complained that making him the presiding officer of the Senate would blur the separation of powers between the Executive and Legislative Branches. In particular, they seemed to fear that the President would somehow gain ascendance over the Senate through the Vice President.[9] Inasmuch as the chair of the Senate has had a relatively unimportant part in its proceedings since the time it was held by John Adams, this complaint has proved groundless. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter his service in the Senate would diminish the powers of the Legislature. However, in the event that the Senate were to take up a bill affecting a specific Executive activity the Vice President was engaged in, it would of course be the better part of decorum and prudence for him to absent himself from the chair.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members.[10] Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress. His office was created by Article II of the Constitution dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legis-

9/ Williams, The Rise of the Vice Presidency, p. 19.

10/ Art. I, sec. 6, cl. 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, clauses 1 and 2 of Art. I, sec. 5, which provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00431 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.283

lative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether the President or Congress may designate the Vice President to undertake Executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."11/ If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent. In short, theoretical arguments drawn from the doctrine of separation of powers merit little attention in the face of history, like that to the present, disclosing that the Office of the Vice President has become a useful adjunct to the Office of the President without causing harm to the Legislative Branch.

5. Conclusion. To sum up, what was once essentially a bare waiting room for the Presidency has become a lively office participating more and more in the affairs of the Executive. Such participation has not threatened the unity of the Executive. Unless it should do so in the future, it will not meet a Constitutional bar.

Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

Attachment

11/ Springer v. Philippine Islands, 277 U.S. 189, 209 (1928), dissenting opinion.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00432 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

April 18, 1961

APR 18 61

MEMORANDUM FOR THE VICE PRESIDENT

Re: Constitutionality of the Vice President's service as chairman of the National Aeronautics and Space Council.

H.R. 6169, 87th Congress, introduced at the request of the President, would amend section 201 of the National Aeronautics and Space Act of 1958 (42 U.S.C. § 2471) to remove the President and certain other persons from membership on the National Aeronautics and Space Council and make the Vice President a member and chairman. The function of the reconstituted Council, as stated in the bill, would be "to advise and assist the President, as he may request, with respect to the performance of functions in the aeronautics and space field."

The question has arisen whether there is any Constitutional bar to the proposed service of the Vice President on the Council.

Although the Constitution allots specific functions to the Vice President in the transaction of business by the Legislative Branch of the Government (Art. I, sec. 3), it neither grants nor forbids him functions in the conduct of affairs of the Executive Branch. The courts have never had occasion to consider the extent to which he may properly take part in those affairs. It is necessary therefore to look mainly to historical precedents for guidance.

The role of the Vice President in the Executive Branch has varied greatly through the years and in any given Administration has been determined largely by the President. In general, however, the role was not a significant one until 1933, when Roosevelt and Garner took office. Until then, for example, only three Vice Presidents had ever sat with the Cabinet: Adams on one occasion in 1791 during Washington's

38236.285

absence, Marshall on a few occasions while Wilson attended the Paris Peace Conference and Coolidge regularly, at Harding's invitation. Beginning with Garner, participation by the Vice President in the deliberations of the Cabinet became a matter of course. Garner was also consulted by the President on foreign policy matters and in 1936 became the first Vice President in office to travel beyond the country's borders on an official mission. Since then it has become commonplace for the Vice President to undertake assignments abroad ranging from good will trips to missions as a diplomatic agent of the President.

The Office of Vice President experienced perhaps its greatest growth as a consequence of World War II. By order of President Roosevelt, Wallace served as chairman of the powerful Board of Economic Warfare and for a period of two years was the superior of a number of department and agency heads in connection with a variety of economic defense activities in the international field. He also served pursuant to a Presidential executive order as chairman of the Supply Priorities and Allocations Board until it was replaced by the War Production Board shortly after Pearl Harbor. And together with the Secretary of War, the Chief of Staff and others, he was named by Roosevelt in October 1941 to a Presidential advisory committee which participated in the making of the major policy decisions on the development and use of atomic energy.

More recently, Vice President Nixon acted from 1953 to 1961 as chairman of the President's Committee on Government Contracts and of course the Vice President is now chairman of the successor President's Committee on Equal Employment Opportunity.

In addition to his Presidential assignments, the Vice President presently has two functions prescribed by statute. One, which dates back more than a century but is of little interest here, consists of membership in the Smithsonian Institution and on its Board of Regents (20 U.S.C. §§ 41, 42). The other, instituted in 1949, is membership on the National Security Council (50 U.S.C. § 402(a)).

Since the Vice President is not prevented by the Constitution or, it might be added, by any general statute, from acting as the President's delegate, the range of duties he may undertake at the instance of the President would seem to be co-extensive with the latter's power of delegation. But in considering

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00434 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.286

Congressional, as distinguished from Presidential, bestowals of functions it is necessary to advert to a limiting provision of the Constitution (Article II, section 1) which declares flatly that "the executive power shall be vested in a President of the United States." Legislation which might threaten the unity of the Executive by attempting to place power in the Vice President to be wielded independently of the President would undoubtedly run afoul of this provision. As for H.R. 6169 specifically, however, it would not contravene the provision since it would mark the duties of the National Aeronautics and Space Council, and thus of its chairman, as purely advisory. Furthermore, the bill is supported, as a matter of historical precedent, by the more than a decade of Vice Presidential service on the advisory National Security Council.

The doctrine of separation of powers needs to be mentioned by reason of the Vice President's designation by the Constitution as the presiding officer of the Senate. At first glance it might seem that any close affiliation with the Executive Branch would be inconsistent with this function. However, except for a very few years during the incumbency of the first Vice President, the chair of the Senate has had a relatively unimportant part in its proceedings. Thus, active as a Vice President may be in the conduct of the business of the Executive, it is difficult to perceive that as a practical matter he would be in a position to diminish the powers of the Legislature.

Aside from practicalities, it does not appear that doctrinal considerations block the Vice President's performance of important functions in the Executive Branch. Despite his position as President of the Senate, he is certainly not one of its members. 1/ Nor can he be convincingly described as a third member of the Legislative Branch alongside the two Houses of Congress.

1/ Art. I, sec. 6, cl. 2 of the Constitution provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Since the Vice President holds "an Office under the United States," it would do violence to this language to argue that the Founding Fathers conceived of him as a member of the Senate. Moreover, clauses 1 and 2 of Art. I, sec. 5, which provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them, plainly do not apply to the Vice President.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00435 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.287

His office was created by Article II of the Constitution dealing with the Executive Branch, and section 4 of that Article makes him, just as the President, subject to impeachment by the Legislative Branch. Since the power of impeachment is a check devised to safeguard the principle of separation of powers against depredations by the Executive, it is troublesome conceptually to categorize the Vice President as a member of the Legislature.

Perhaps the best thing that can be said is that the Vice President belongs neither to the Executive nor to the Legislative Branch but is attached by the Constitution to the latter. Whatever the semantic problems, however, they would not seem to be especially relevant to the question whether Congress may designate the Vice President to undertake Executive responsibilities. As Mr. Justice Holmes once noted in a similar context, "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other." 2/ If a judicial test of the employment of the Vice President in the affairs of the Executive were ever to occur, there is little reason to think that it would be decided purely on the basis of abstractions. To the contrary, the comparative silence of the Constitution in regard to the Office of the Vice President virtually guarantees that the decision would be based primarily on considerations of practice and precedent and that theoretical arguments drawn from the doctrine of separation of powers would gain little attention.

Consistent with the foregoing, I am of the opinion that service of the Vice President as chairman of the National Aeronautics and Space Council under the provisions of H.R. 6169 would not violate the Constitution.

/s/ Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

2/ Springer v. Philippine Islands, 277 U.S. 189, 209 (1928), dissenting opinion.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00436 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.288

June 22, 1961

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Delegation of Presidential Powers to the Vice President.

You have inquired as to the extent the President might, in the event of his absence from the country or for other reasons, delegate to the Vice President certain of his powers as President. In a memorandum for the Vice President dated March 9, 1961, (attached hereto) I stated that the range of powers which the President might so delegate "would seem to be coextensive with the scope of the President's power of delegation." While I believe this conclusion to be correct, I think it wise to proceed with some caution.

As you know, the Vice President occupies a unique position under the Constitution, and there has been no judicial test of a delegation of Presidential functions to the Vice President, or the extent to which he may properly be regarded as an officer within the executive branch. There is a good deal of judicial authority relating to the delegation of Presidential powers, but this authority deals with delegations to the heads of executive departments and to officers appointed with the advice and consent of the Senate. While I do not believe the lack of judicial precedent or the Constitutional position of the Vice President would stand in the way of an increasing participation by him under delegations made to him by the President, there is perhaps some reason to proceed on a case to case basis, thus testing its political acceptability, rather than through a general delegation of a variety of functions.

In recent years, notably beginning with Vice President Wallace, there has been an increasing collection of precedents in which executive powers have been conferred upon the Vice President. President Roosevelt made Wallace Chairman of the

38236.289

Economic Defense Board and of a successor organization, the Board of Economic Warfare. In 1949, Congress, at the request of President Truman, made the Vice President a statutory member of the National Security Council. (50 U.S.C. 402(a)). It later made the Vice President a member of the National Aeronautics and Space Council. (42 U.S.C. 2271). Eisenhower named Nixon Chairman of the President's Committee on Government Contracts, and, as you know, President Kennedy has conferred a similar function upon Vice President Johnson. In addition, both Nixon and Johnson have executed significant duties in the field of foreign affairs.

The creation of such assignments has tended to increase the identification of the Vice President with the executive branch and the general acceptability of a delegation of executive functions to him. I am unable to see why these precedents would not justify further delegations in the circumstances which you describe. At the same time, there are obviously certain Presidential powers which, even though legally delegable, should for political reasons be exercised only by the President.

In addition, there are certain powers of the President, vested in him by the Constitution, which have long been considered nondelegable. These limitations extend to the Vice President in common with others. The most important of these involve: (1) nominations of persons requiring the confirmation of the Senate, or withdrawal of such nominations; (2) approval, veto, or memorandum of disapproval of legislation; (3) transmission of treaties to the Senate and proclamations of ratification; (4) the exercise of executive clemency; (5) acceptance of resignations from presidential appointees or orders removing them from office; (6) commissions for ambassadors and ministers, etc., and authorizations to the Secretary of State to appoint foreign service officers or to the Postmaster General to commission Postmasters; (7) promotions and tours of duty of officers of the Armed Forces; and (8) the issuance of most types of Executive orders.

Unless the statutory authority requires the President to act personally--which is very rarely the case--I believe

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00438 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.290

other powers may be delegated, and I believe, where appropriate, these powers may be delegated to the Vice President. I would, for example, see no objection to a delegation from the President to the Vice President to sign proclamations which do not have legal effect, or even to approve international agreements not requiring Senate ratification. I am sure there are a variety of other functions which with equal propriety could be delegated to him, but it would be necessary to examine each specific proposal for delegation against the Constitution and the relevant statutes.

Finally, I would like to note that a separate problem is raised by the President's inability to act himself, even though such inability results from sickness. I am sending you a more detailed memorandum on this subject. The problem is not one of delegation, but whether or not the Vice President succeeds permanently to the Presidency in such event. Very briefly, the difficulty lies in the dispute among constitutional experts as to whether, in the event of Presidential inability (Art. II, Section 1, clause 5), the Vice President is vested with the "office of President" or merely with the "powers of the Presidency." Most scholars take the latter view, and see no difficulty in the Vice President acting for the President in the event of Presidential inability, and would support an arrangement similar to that entered into by President Eisenhower and Vice President Nixon as being within the terms of the Constitution. A minority who take the former view hold that it is impossible to authorize the Vice President to exercise the President's non-delegable functions without making him President, and thus cast doubt on the constitutional ability of the President to resume office after the period of inability. It is the existence of this latter view which argues for a constitutional amendment on the subject of Presidential inability.

I see no impropriety in the President's making an arrangement, similar to that made by the past administration, with Vice President Johnson. I think it would be desirable to take squarely the position that we view the exercise of Presidential powers by the Vice President as merely the exercise of powers and not an entering into the office of the President. We could at the same time support an appropriate constitutional amendment

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00439 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.291

to remove all possible doubt. I believe, however, that it would be unwise for the President to attempt to invest any of the non-delegable powers in the Vice President in any event other than a literal physical inability to act. The extent to which he vested delegable powers from time to time in the Vice President would be basically a matter of political judgment.

Nicholas deB. Katzenbach
Assistant Attorney General
Office of Legal Counsel

Attachment

July 24, 1962

4

Honorable Walter Jenkins
Administrative Assistant
Office of the Vice President
Washington, D. C.

Dear Mr. Jenkins:

The District of Columbia Income and Franchise Tax Act of 1947 (61 Stat. 331; D.C. Code § 47-1551) imposes, with the usual exemptions, taxes upon the entire income of residents of the District. However non-residents are taxed only upon certain income derived from sources within the District (D.C. Code §§ 47-1567, 1574, 1580). Section 4(t) of the Act (D.C. Code § 47-1551c(t) defines the word "nonresident" to mean "every individual other than a resident." As amended in 1949, Section 4(s) defines "resident", but provides in pertinent part:

> "* * *. The word 'resident' shall not include any elective officer of the Government of the United States or any employee on the staff of an elected officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, * * *." (D.C. Code § 47-1551c(s))

You have sent me a copy of a letter dated June 6, 1962, to the Board of Commissioners of the District of Columbia from Robert A. Breakworth, Financial Clerk, United States Senate, in which he concludes that the employees on the staff of the President of the Senate are not "residents" within the meaning of the section and have inquired whether I agree with this conclusion.

I do agree with the conclusion reached by Mr. Breakworth because (1) the quoted language of Section 4(s) is

38236.293

adequate to cover such employees on the staff of the Vice President and nothing in the legislative history is to the contrary, (2) the pattern of congressional treatment of the Vice President has been to treat him as being in the legislative branch, and (3) the administrative construction of Section 4(a) to date has been to treat employees on the staff of the Vice President as non-residents. In this connection it may be noted that the employees involved in the inquiry are those who are employed to aid the Vice President in carrying out the functions of the office conferred upon him by the Constitution. The Vice President has in recent years been given duties in addition to those so conferred. 1/ However, no employees of government bodies in connection with which the Vice President exercises functions conferred upon him by statute or Executive order are involved in the inquiry.

13 I

The Vice President is, of course, elected. The question presented is therefore whether he is an "officer in the legislative branch." This question would appear to be squarely answered by Article I, Section 3, Clause 4 of the Constitution which states that "The Vice President of the United States shall be President of the Senate, * * *." 2/

1/ The Vice President has by statute been made Chairman of the National Aeronautics and Space Council (42 U.S.C. 2471(a)) and a member of the National Security Council (50 U.S.C. 402(a)). In addition, Executive Order No. 10925 of March 6, 1961 (26 F.R. 1977, March 8, 1961) designates him Chairman of the President's Committee on Equal Employment Opportunity.

2/ The functions of the Vice President as President of the Senate are significant and varied. For example, he refers bills to the committees as endorsed by their sponsors, although these references may be changed upon sponsor objection where the Senate assents. George H. Haynes, The Senate of the United States, Vol. 1, 211 (1960). For many years he has exercised control of the members of the Senate in maintaining order, and it is his duty to main-

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00442 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.294

The clause also confers upon him the right to vote in the event of an equal division in the Senate. He is thus made an officer of the Senate and given a right to vote in certain circumstances. It would reasonably follow that he is "in the legislative branch."

It is true that upon the death of the President or upon the occurrence of inability the Vice President assumes the powers of the Presidency and thereafter exercises the executive powers. But Article I, Section 3 of the Constitution deals with this situation in the same way it deals with an "absence of the Vice President," providing that the Senate shall then choose "a President pro tempore." Accordingly, it seems difficult to conceive that an officer whose only constitutional function, when the President is capable of exercising the Executive power, is to preside over the Senate and to vote, and who is treated in the same way as if he were absent when he exercises the powers of the Presidency is not "in the legislative branch."

It may be conceded that certain aspects of the Vice Presidency distinguish him from others in the legislative branch. For example, the office is created by Article II, dealing with the executive branch, and Section 4 of that article makes the Vice President, like the President, subject to impeachment. So too, Clauses 1 and 2 of Article I, Section 5 of the Constitution provide that each House shall be the judge of the elections, returns and qualifications of its own members and may punish and expel them; and these clauses do not apply to the Vice President. 4/

2/ (continued)
tain order in the gallery. Id. 215-216. He also maintains considerable control in recognizing who shall be permitted to speak, since by Senate rules a Senator desiring to speak may not proceed until he is recognized, and the decision of the Vice President on this score is, as a result of precedent, free from appeal. Id. 216-217. Moreover, he decides questions of order as to breaches of the Senate's rules of procedures. Id. 218.

4/ This may explain the reason for making the Vice President subject to impeachment.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00443 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.295

These provisions, however, indicate what may be admitted--that the Vice President has a unique status in the legislative branch. They do not indicate that he is not "in" it. Indeed, from the very beginning of the Nation, the office of Vice President has been considered as being in the legislative branch. This has been manifested in many ways, only several of which need be cited here.

For example, John Adams not only presided as President of the Senate, but also actively participated in its debates. /4/ When approached by the President to undertake a mission to England in 1794, Adams rejected the suggestion on the grounds that the Constitution required him to preside over the Senate. /5/ This precedent in turn was followed when Adams requested Jefferson as Vice President to go to France on a diplomatic mission. /6/ Jefferson considered his office "as constitutionally confined to legislative functions." /7/ Although Adams on one occasion, while the President was away, sat with the Cabinet and took active part in discussion, this was the single exception to the rule. When he became President he did not invite the Vice President to sit in the Cabinet, and for nearly one hundred and forty years thereafter this was the practice. /8/

It is true that in recent years the Vice President has attended Cabinet meetings and has had conferred upon him functions by the President or the Congress in addition to those provided for in the Constitution. /9/ Nevertheless, in the opinion of statesmen and scholars expressed in the last several years the office of Vice President remains in the legislative branch. This was manifested particularly at hearings held in 1956 on proposals to

/4/ Haynes, Op. cit. supra Note 2, 208.
/5/ Williams, The Rise of the Vice Presidency, 25 (1956).
/6/ Id.
/7/ Haynes, supra Note 2, 223.
/8/ Id.
/9/ Footnote 1, supra.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00444 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.296

create an Administrative Vice President. Several witnesses, including former President Hoover, Clark Clifford, formerly Special Assistant to President Truman, Dr. John Steelman, formerly the Assistant to President Truman, and Senator John L. McClellan of Arkansas were in agreement that the Vice President constitutionally "is in the legislative branch of the Government." /10/ One of the major objections to the proposal creating an Administrative Vice President by statute was that this change, which would move him from the legislative branch "where he now is" to the executive branch, would take a constitutional amendment. /11/

Nothing in the House or Senate Reports or in the hearings on the 1949 amendment of Section 4(a) suggests that employees on the staff of the President of the Senate were intended to be treated less favorably than those of the staff of each individual Senator and Congressman. /12/ In

/10/ Senate Report No. 1960, 84th Cong., 2d Sess. 7-8 (1956); Hearings before the Subcommittee on Reorganization of the Committee on Government Operations, U.S. Senate, 84th Cong., 2d Sess., On Proposal to Create Position of Administrative Vice President (1956), Testimony of Mr. Hoover, p. 3; Senator McClellan, p. 18; Mr. Clifford, p. 37; Mr. Steelman, p. 67.

/11/ Id. p. 7.

/12/ The Senate Report on this amendment merely restated the words of the statute in this language (S. Rept. No. 260, 81st Cong., 1st Sess., 1949, p. 12):

> "The bill provides that the word 'resident' shall not include any elective officer of the Government of the United States or any employee on the staff of an elective officer in the legislative branch of the Government of the United States if such employee is a bona fide resident of the State of residence of such elected officer, * * *."

The House Report repeated in substance the Senate Report (H. Rept. 315, 81st Cong., 1st Sess., 1949, pp. 6-8). The hearings on the 1949 Amendment do not appear to touch on the problem. Hearings before the Joint Subcommittee on Fiscal Affairs of the Committee on the District of Columbia, Congress of the United States, 81st Cong., 1st Sess. on H.R. 1937 (1949).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00445 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.297

describing the proposed amendment to Section 4(s), Senator Hunt, sponsor of the bill and Chairman of the Committee drafting it, said on the Senate floor (95 Cong. Rec. 5868):

10 "Exempt from the provisions of this bill are also employees on the staffs of elected officers of the legislative branch of the Federal Government, if such employee is a bona fide resident of the State of residence of such elected officer. This wording was designed to exempt those employees in the offices of Members of Congress who are in Washington solely by virtue of employment in our respective offices."

No further reference was made to the subject in the course of the debate.

From Senator Hunt's references to "employees in the offices of Members of Congress", it might be argued that the exemption was not intended to extend to employees of the Vice President, who is not strictly a member of Congress. But it is to be doubted that in using this phrase Senator Hunt meant to convey the view that the words "employees on the staff of an elected officer in the legislative branch" and the language of the House and Senate Reports which used similar language, were intended to have a restricted meaning. Rather, the Senator, after repeating the substance of the language of the bill and the reports, merely gave an example of the most numerous class intended to be affected. This does not imply an intention to exclude others, such as employees of the President of the Senate, who would normally be thought to be covered by the language.

13 II

This conclusion is reinforced by the fact that Congress has had a long history of treating the Vice President as being in the legislative branch and his employees as being on the staff of an officer of that branch. Mr. Brenkworth observed in his letter (p. 6):

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00446 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.298

"* * * the employees of the Vice President * * *, are defined as Congressional employees by the Civil Service Retirement Act, /13/ are paid from appropriation in the Legislative Branch Appropriation Act, and are listed as Senate employees in the publication of salaries required by Senate Resolution 139, 86th Congress."

Congress has recognized the position of the Vice President in the legislative branch by granting to him, as President of the Senate, benefits and privileges enjoyed by members of the Senate or House. These include, among others, mileage fees, 2 U.S.C. 43a (1958); air-mail and special-delivery postage allowances, 2 U.S.C. 42a (1958); long distance telephone calls, 2 U.S.C. 46d-1 (1958); stationery allowances, 2 U.S.C. 46a (1958); use of the Senate's recording studio, 2 U.S.C. 123b (1958); the right to send official correspondence as franked mail, 39 U.S.C. 4161 (Supp. II, 1959-1960); and to receive public documents as franked mail, 39 U.S.C. 4162 (Supp. II, 1959-1960). So too, the lump-sum appropriated by Congress for reimbursement for franked mailings covers mail both of members of the Congress and the Vice President. 39 U.S.C. 4167 (Supp. II, 1959-1960). Furthermore, the term "Member" for the purposes of the Civil Service Retirement Program, 5 U.S.C. 2251(b) (1958), means "the Vice President, a United States Senator, Representative in Congress * * *."

It seems unlikely that Congress, having consistently chosen to treat the Vice President and his staff in a manner similar to members of the House and Senate and their staffs, would determine to treat his staff differently for tax purposes. In the absence of either language in Section 4(a) or legislative history compelling such a conclusion, it would be incongruous to read an intent to discriminate into the provision.

/13/ Under the Civil Service Retirement Program, the term "congressional employee" is defined to mean not only employees of the members of Congress, but also "an employee of the Vice President if such employee's compensation is disbursed by the Secretary of the Senate." 5 U.S.C. 2251(c).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00447 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

13 III

Finally, in determining the meaning of a statute, courts give weight to an established administrative interpretation of a statute which has been consistently followed. Commissioner v. Estate of Sternberger, 348 U.S. 187, 199. If, therefore, the Income and Franchise Division of the District of Columbia had asserted from the time of the adoption of the Act that employees on the staff of the Vice President were residents under Section 4(s), it might be difficult lightly to dismiss such a construction. Commissioner v. Estate of Sternberger, supra, 348 U.S. at 199.

Here, however, the contrary has been the case. We are advised that this is the first year since enactment of the amended statute in 1949 that it has been suggested that the term "resident" in Section 4(s) applies to employees on the staff of the Vice President. Failure to take a contrary position for almost twelve years should be regarded as manifesting substantial acceptance of the interpretation that the term "resident" in Section 4(s) does not embrace employees on the staff of the President of the Senate.

In accordance with your request, Mr. Brenkworth's letter is enclosed herewith.

7 Sincerely,

4 Harold F. Reis
1 Acting Assistant Attorney General
1 Office of Legal Counsel

38236.300

FEB 7 1959

MEMORANDUM FOR THE HONORABLE EDWARD L. MORGAN
DEPUTY COUNSEL TO THE PRESIDENT

Re: Advisory Commission on Intergovernmental Relations.

You have asked whether this Commission can be placed under the "jurisdiction" of the Vice President, and in particular whether it can be treated as an "office" under him with its head as an "assistant to the Vice President."

1. The Commission was created by statute (P.L. 86-380, 50 U.S.C. 1501) as an independent agency, intended to be a "genuine interlevel body, not an agency to be dominated or controlled by any one level of government". House Rept. No. 742, 86th Cong., 1st Sess., p. 14 (July 31, 1959). Transfer of an agency of such statutory character from independent status to subordinate status in the Office of the Vice President would require either legislation or, assuming the Reorganization Act, 5 U.S.C. 901 et seq., is extended by the legislation recently proposed, by submission to the Congress by the President of a reorganization plan.

2. With respect to the status of the "head" of the Commission, it should be noted that the Commission has a full-time Executive Director (Level V) at the head of its professional staff, who is appointed by the Commission (P.L. 86-380, §6(c)). The Commission itself is led by a Chairman, who is designated by the President from among the members, all of whom he appoints for two-year terms (§§3, 4(b)).

38236.301

Accordingly, I believe the objective you have in mind could be achieved if the President were to appoint the Vice President a member of the Advisory Commission, and then designate him as its Chairman. The Vice President would then preside over and lead the Commission, while the Executive Director and staff would report primarily to the Vice President in his capacity as Chairman.

The only legal question affecting this suggestion is whether the Vice President fits in the category of membership described in §3(a)(1), which authorizes three Presidential appointees who "shall be officers of the executive branch of the Government". (Clearly no other category of §3(a) fits the Vice President.) The Vice President, of course, occupies a unique position under the Constitution. For some purposes, he is an officer of the Legislative Branch, and his status in the Executive Branch is not altogether clear. Nevertheless, the Vice President has been made an Executive officer by law for a number of purposes. For example, he is a statutory member of the National Security Council (50 U.S.C. 402(a)), and a member and chairman of the National Aeronautics and Space Council (42 U.S.C. 2471) and of the National Council on Marine Resources and Engineering Development (33 U.S.C. 1102). These are all Executive agencies.

Moreover, the Vice President has been named by each of the recent Presidents beginning with President F. D. Roosevelt to carry out significant Executive duties, including the chairmanship of inter-agency committees such as the President's Committee on Government Contracts (held by Presidents Nixon and Johnson when Vice President). Vice President Humphrey was given, on a more informal basis, duties of liaison with the Nation's mayors. In light of these precedents, the Vice President has now assumed a particular place in Government in which his status may be characterized as Legislative or Executive depending on the context, and in which his availability for inter-agency or inter-governmental coordination duties at the designation of the President seems well established.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00450 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.302

All three Executive Branch seats on the Commission are presently vacant due to departures from office of officials appointed to the Commission by President Johnson. It would seem particularly appropriate to name Vice President Agnew to the Commission Chairmanship, on the basis of his experience and qualifications. He has been elected to county, state, and now national office. Hence he represents in himself three of the areas from which Commission membership is drawn by statute. Moreover, he has been a member of the Commission, as a Governor, serving as an appointee of President Johnson during 1968 and until January 19 in 1969.

William H. Rehnquist
Assistant Attorney General
Office of Legal Counsel

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00451 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.303

ASSISTANT ATTORNEY GENERAL

Department of Justice
Washington, D.C. 20530

September 24, 1973

MEMORANDUM

Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office.

The question whether a civil officer 1/ of the federal government can be the subject of criminal proceedings while he is still in office has been debated ever since the earliest days of the Republic. This inquiry raises the following separate although to some extent interrelated issues. First, whether the constitutional provisions governing impeachment, viewed in general terms, prohibit the institution of federal criminal proceedings prior to the exhaustion of the impeachment process. Second, if the first question is answered in the negative, whether and to what extent the President as head of the Executive branch of the Government is amenable to the jurisdiction of the federal courts as a potential criminal defendant. Third, if it be determined that the President is immune from criminal prosecution because of the special nature of his office, whether and to what extent such immunity is shared by the Vice President.

I.

Must the Impeachment Process be Completed Before Criminal Proceedings May be Instituted Against a Person Who is Liable to Impeachment?

A. Textual and Historical Support for Proposition that Impeachment Need Not Precede Indictment.

1/ For a discussion of the definition of "civil officer" as that term is used in Article II, section 4 of the Constitution, see pp. 8-9 infra.

38236.304

1. Views of early commentators. Article II, section 4 of the Constitution provides:

> "The President, the Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery, or other high crimes and Misdemeanors."

Article I, section 3, clause 7 provides:

> "Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

The suggestion has been made that Article I, section 3, clause 7 prohibits the institution of criminal proceedings against a person subject to impeachment prior to the termination of impeachment proceedings.2/ Support for this argument has been sought in Alexander Hamilton's description of the pertinent constitutional provision in the Federalist Nos. 65, 69 and 77, which explain that after removal by way of impeachment the offender is still liable to criminal prosecution in the ordinary course of law.

2/ We are using the term "termination of the impeachment proceedings" rather than "removal by way of impeachment" in view of the statement in Story, Commentaries on the Constitution of the United States, Vol. I, sec. 782, quoted below, that criminal proceedings may be instituted, either after an acquittal or conviction in the court of impeachment. The conclusion that acquittal by the Senate does not bar criminal prosecution follows from the consideration that such an acquittal may be based, as discussed infra, on jurisdictional grounds, e.g., that the defendant is not an officer of the United States in the constitutional sense, or on discretionary grounds, e.g., that the defendant no longer is an officer of the United States and unlikely to be reappointed or reelected, or on grounds which are partly jurisdictional and partly substantive, e.g., that the offense was not of an impeachable nature.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00453 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.305

Article I, section 3, clause 7, however, does not say that a person subject to impeachment may be tried only after the completion of that process. Instead the constitutional provision uses the term "nevertheless." 3/ The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, i.e., to forestall a double jeopardy argument.

A speech made by Luther Martin--who had been a member of the Constitutional Convention--during the impeachment proceedings of Justice Chase shows that Article I, section 3, clause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings. Annals of Congress, 8th Cong., 2d Sess., col. 432. Similarly Mr. Justice Story teaches in his Commentaries on the Constitution:

> "If the court of impeachments is merely to pronounce a sentence of removal from office and the other disabilities, then it is indispensable that provision should be made that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence for the purpose of inflicting the common punishment applicable to unofficial offenders. Otherwise, it might be matter of extreme doubt whether, consistently with the great maxim above mentioned, established for the security of the life and limbs and liberty of the citizen, a second trial for the same offence could be had, either after an acquittal or a conviction, in the court of impeachments." Vol. I, sec. 782.

Rawle, another early commentator, states in his View on the Constitution of the United States of America (1829) at p. 215:

3/ This provision was rendered necessary because the Constitution limits the judgment of impeachment to removal and disqualification, while under English law the House of Lords did also impose severe criminal sanctions including the death penalty, in cases of conviction on impeachment. Story, op. cit., Vol. I, §§ 784, 785; Rawle, A View of the Constitution, p. 217.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00454 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.306

"But the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency." (Emphasis added.)

2. Interpretations of the impeachment clause by official bodies. The practical interpretation of the Constitution has been to the same effect. During the life of the Republic impeachment proceedings have been instituted only against 12 officers of the United States. Congressional Directory, 93 Cong., 1st Sess., p. 402. In the same time, presumably scores, if not hundreds, of officers of the United States have been subject to criminal proceedings for offenses for which they could have been impeached.

It may be suggested that it is no answer to say that in most instances the officer presumably had resigned or been removed by the time he had been tried. If it really is the import of Article I, section 3, clause 7, that an officer of the United States may be subjected to criminal proceedings only after the conclusion of the impeachment procedure, the question of whether he is still in office at the time of the criminal trial can be viewed as immaterial. The constitutional text does not contain any express exception to that effect. Moreover, resignation or removal arguably does not terminate the impeachment power as a matter of law. 4/ It is true that as a practical matter, the House of Representatives and the Senate are reluctant to exercise their time-consuming impeachment functions after a case has become of less moment, because the offender is no longer in office, especially after he had renounced all monetary claims against the United States. 5/ However, because the sanctions for impeachment include disqualification to hold a federal office,

4/ The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 39, 86th Cong., 1st Sess., p. 556; H. Rept. 1639, 79th Cong., 2d Sess., pp. 38-39.

5/ See the dismissal of the proceedings against Senator Blount and former Secretary of War Belknap, and H. Rept. 1639, supra, pp. 1-2.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00455 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.307

as well as removal, an impeachment proceeding instituted subsequent to completion of the term, resignation, or dismissal, would not be a bootless act. And yet it would seem to be an unreasonable interpretation of the Constitution to move from the latter proposition to the conclusion--necessary under the argument that impeachment must precede indictment--that an offending federal officer acquires a lifetime immunity against indictment unless the Congress takes time to impeach him.

There have been several instances of legislative actions envisaging the criminal prosecution of persons while still in office, and of the actual institution of criminal proceedings against federal officers while in office.

i. Section 21 of the Act of April 30, 1790, 1 Stat. 117, provided that a judge convicted of having accepted a bribe "shall forever be disqualified to hold any office of honour, trust or profit under the United States." The disqualification provision of this section thus indicates that Congress anticipated criminal trials for bribery--an impeachable offense--prior to a judgment of the Senate providing for the removal and disqualification of the offender. It should be remembered that this statute was enacted by the First Congress many members of which had been members of the Constitutional Convention. Obviously they, and President Washington who approved the legislation, did not feel that it violated the Constitution. The disqualification clause is now a part of the general bribery statute and applies to every officer of the United States. 18 U.S.C. § 201(e).

ii. In 1796, Attorney General Lee advised the House of Representatives that if a judge is convicted of a serious crime his "removal from office may and ought to be a part of the punishment." He continued that, since the judicial tenure is during good behavior, a judge could not be removed unless lawfully convicted of some official misconduct by way of "information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States." The Attorney General concluded that while impeachment "seems, in general cases, to be best suited to the trial of so high and important an officer" it was not the only method, and in the particular circumstances he recommended trial of the judge by information or indictment. 3 Hinds, Precedents of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00456 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.308

the House of Representatives 982-983, American State Papers (Misc.) Vol. I, p. 151. The House Committee, to which the matter had been referred, concurred in that recommendation. Hinds, ibid., Annals of Congress, 4th Cong., 2d Sess., col. 2320. Here again it was felt at that early stage of our constitutional life that, at least in regard to judges, impeachment did not have to precede the institution of criminal proceedings. Hence, Congress could provide for removal of a judge for bad behavior, evidenced by a criminal conviction, although it has not done so, except in the instance of a bribery conviction. 6/

iii. Circuit Judge Davis retired in 1939 under the provisions of what is now 28 U.S.C. 371(b). 7/ Borkin, The Corrupt Judge, 116. In 1941 he was indicted for obstructing justice and tried twice. In both cases the jury was unable to agree and the indictment was ultimately dismissed. Id., p. 119. Only then did the Attorney General request Congress to impeach Judge Davis. The latter thereupon resigned from office waiving all retirement and pension rights. Id., at p. 120. This in effect mooted the need for impeachment, but arguably not the power of impeachment. See supra.

iv. Judge Albert W. Johnson was investigated by a grand jury and testified before it prior to his resignation from office. See Finding of Fact #3 in Johnson v. United States, 122 C. Cl. 100, 101 (1952).

v. The Department of Justice concluded in 1970 on the strength of precedents ## i and ii, supra, that criminal proceedings could be instituted against a sitting Justice of the Supreme Court. Shogan, A Question of Judgment, 230-233.

6/ Commerce Judge Archbald was investigated by the Department of Justice prior to his impeachment in 1912. It is, however, not apparent whether this was a formal grand jury investigation. Carpenter, Judicial Tenure in the United States, 145; Shogan, A Question of Judgment, 232.

7/ A retired judge remains in office; he possesses the right to receive the salary of his office and retains the capacity to perform judicial functions upon designation and assignment 28 U.S.C. 294.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00457 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.309

vi. Circuit Judge Kerner was recently subjected to a grand jury investigation, indicted, and convicted while still in office. The question whether criminal proceedings can precede impeachment has been raised for the first time on appeal.

In sum, the analysis of the text of the Constitution and its practical interpretation indicate that the Constitution does not require the termination of impeachment proceedings before an officer of the United States may be subjected to criminal proceedings. The caveat is that all of the above instances concerned judges, who possess tenure under Article III only during "good behavior," a provision not relevant to other officers. However, although this clause may be the basis for a congressional power to remove judges by processes other than impeachment, it is not directly responsive to the question whether impeachment must precede criminal indictment, nor was the clause the basis for the actions in the historic instances noted above.

B. Troublesome Implications of a Proposition that Impeachment Must Precede Indictment.

The opposite conclusion, viz., that a person who is subject to impeachment is not subject to criminal prosecution prior to the termination of the impeachment proceedings would create serious practical difficulties in the administration of the criminal law. As shall be documented, infra, every criminal investigation and prosecution of persons employed by the United States would give rise to complex preliminary questions. These include, first, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and second, whether the offense is one for which he could be impeached. Third, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings. An interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one. Indeed, impractical or self-defeating interpretations of constitutional texts must be avoided. The Framers were experienced and practical men. This fact, coupled with the purposive spirit of constitutional interpretation set by Chief Justice Marshall,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00458 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.310

has been the foundation for the endurance of our constitutional system for 186 years.

1. Definition of "civil officer." If liability to impeachment is a preliminary bar to criminal prosecution the question necessarily arises as to who is a "Civil Officer of the United States" within the meaning of Article II, section 4, of the Constitution. An officer of the United States has been defined as a person appointed by one of the methods provided for in Article II, section 2, clause 2 of the Constitution, i.e., by the President by and with the advice of Senate, or, on the basis of a statutory authorization, by the President alone, the Courts of Law, or a Head of a Department. United States v. Mouat, 124 U.S. 303, 307 (1886).

But as Chief Justice Marshall, while sitting as a Circuit Justice, pointed out in United States v. Maurice, 2 Brock. 96, 103, 26 Fed. Cas. 1211, 1214 (No. 15747)(C.C. Va., 1823) not every public employment is an "office." The latter term "embraces the ideas of tenure, duration, emolument, and duties." United States v. Hartwell, 6 Wall. 385, 393 (1867); United States v. Germaine, 99 U.S. 508, 511-512 (1878); Auffmordt v. Hedden, 137 U.S. 310, 326-328 (1890). The notion of "office" in the constitutional sense thus presupposes a certain degree of continuity, a specification of duties, and of compensation. The most important aspect of this definition appears to be the requirement of tenure and duration. An assignment which envisages the performance of a single specific task, or of occasional and intermittent duties, the ad hoc position, is normally not considered to be an office. United States v. Germaine, supra; Auffmordt v. Hedden, supra; United States v. Maurice, supra; 37 Op. A.G. 204; The Constitution of the United States of America, Analysis and Interpretations, S. Doc. 39, 88th Cong., 1st Sess., pp. 497, 500. 8/

8/ It is questionable whether the usual exception of the ad hoc position from the term "office" is applicable to the impeachment power; this raises the question whether, for instance, a Presidential agent appointed to perform a single diplomatic mission (S. Doc. 39, supra, pp. 499-501) could be impeached for bribery.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00459 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.311

The decisions of the Supreme Court defining the term "officer" in the constitutional sense did not involve a further important element, presumably because it was not relevant to the issues raised in them, viz., that an officer in the constitutional sense must also be invested with some portion of the sovereign functions of the government. Mecham, A Treatise on the Law of Public Office and Public Officers, secs. 1, 2, and 4, and the authorities therein cited, H. Rept. 2205, 55th Cong., 3d Sess., pp. 48-54; Cain v. United States, 73 F. Supp. 1019, 1021 (N.D., Ill., 1947); 22 Op. A.G. 187; 26 id. 24, 249 (1907). In the words of H. Rept. 2205, at p. 52, a person employed in the Executive branch is an officer only if he enforces the law in a manner so as to affect the rights of the people. A person employed by the United States who merely performs the duties of an expert, or advises or negotiates without being able to put into effect the result of his advice or suggestions therefore is not an officer in the constitutional sense. The requirement that an officer must be vested with some element of the sovereign power of the United States, necessarily exempts the vast majority of federal employees from the scope of the impeachment jurisdiction. There are only relatively few persons in the federal establishment who actually have the power to make decisions which concern the public, but case-by-case determination could be difficult.

The questions whether the position of a person employed by the Federal Government satisfies the requirements of tenure, duration, emolument, and duties, and whether any elements of the sovereignty of the United States are vested in it, frequently give rise to complex questions of law and fact. Hence, if an officer of the United States cannot be proceeded against criminally prior to the termination of the impeachment proceedings, those difficult issues would be injected into the criminal prosecution of any sitting or former federal employee in order to determine whether or not he is an officer immune from criminal prosecution until trial by the Senate. We seriously question that this is the true import of the Constitution.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00460 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.312

2. Offenses subject to impeachment. If it were assumed arguendo, despite our own conclusion to the contrary, that an officer of the United States is not subject to criminal proceedings prior to the conclusion of impeachment proceedings, the scope of that immunity necessarily would be limited to offenses subject to impeachment. Such an asserted rule automatically would create another difficult-to-administer jurisdictional defense, viz., whether the offense in question is non-impeachable and therefore, subject immediately to criminal proceedings.

According to Article II, section 4 of the Constitution, officers of the United States can be impeached for "Treason, Bribery and other high Crimes and Misdemeanors." There is no need to define treason and bribery. But "[a]s there is no enumeration of offenses comprised under the last two categories, no little difficulty has been experienced in defining offenses in such a way that they fall within the meaning of the constitutional provisions." The Constitution of the United States, Analysis and Interpretation, S. Doc. No. 39, 86th Cong., 1st Sess., p. 556.

Early commentators indicated that "high Crimes and Misdemeanors" is a term of art intended to reach wrongs of a political or of a judicial character, neither limited to, nor encompassing all, indictable offenses. See, e.g., Story, Commentaries, op. cit., Vol. I, §§ 749, 764. Some writers stressed the political nature of offenses over which a tribunal for the trial of impeachments would have jurisdiction.

In The Federalist, No. 65, Alexander Hamilton explained:

> "A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00461 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.313

from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."

The following year during the Great Debate on the Removal Power of the President, James Madison submitted that, if the President improperly removed--

"from office a man whose merits require that he should be continued in it * * * he [the President] will be impeachable by this House before the Senate for such an act of maladministration; for I contend that the wanton removal of a meritorious officer would subject him to impeachment and removal from his own high trust." Annals of Congress, 1st Cong., col. 498.

In 1790 and 1791 James Wilson, a signer to the Declaration of Independence and Associate Justice of the Supreme Court, in his law lectures, defined the term "high misdemeanors" as malversation in office 9/ and he asserted:

"In the United States and in Pennsylvania, impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments." The Works of James Wilson, Vol. 2, pp. 165, 166.

9/ Malversation has been defined as misbehavior in office. Jowitt, Dictionary of English Law.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00462 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.314

Story's detailed discussion of the rules governing impeachment, op. cit. (Vol. I, secs. 742-813), also stresses the political nature of impeachable offenses, and assigns this as the reason why they are to be tried before a tribunal more familiar with political practices than the courts of law. See, e.g., secs. 749, 764-765, 800. He also points out that offenses subject to impeachment necessarily cannot be limited to statutory crimes.10/ He explained that if--

> "the silence of the statute-book [is] to be deemed conclusive in favor of the party until Congress have made a legislative declaration and enumeration of the offences which shall be deemed high crimes and misdemeanors * * * the power of impeachment, except as to the two expressed cases, is a complete nullity, and the party is wholly dispunishable, however, enormous may be his corruption or criminality.

10/ Section 800 contains a recapitulation of the numerous offenses which in English history had been subject to impeachment. They included: Misleading the King with unconstitutional opinions; attempts to subvert the fundamental laws, and introduce arbitrary powers; attaching the great seal to an ignominious treaty; neglect to safeguard the sea by a lord admiral; betrayal of his trust by an ambassador, propounding and supporting pernicious and dishonorable measures by a privy counsellor; the receipt of exorbitant grants and incompatible employments by a confidential adviser to the King. While Story felt that certain impeachments were unduly harsh and understandable only in the light of their age, such as giving bad counsel to the king, advising a prejudicial peace, enticing the king to act against the advice of Parliament, purchasing offices, giving medicine to the king without advice of physicians, preventing other persons from giving counsel to the king except in their presence, and procuring exorbitant personal grants from the king, he suggested that others were founded in the most salutary public justice; such as impeachments for malversations and neglects in office, for encouraging pirates, for official oppression, extortions, and deceits, and especially for putting good magistrates out of office and advancing bad ones.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00463 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.315

> It will not be sufficient to say that, in the cases where any offence is punished by any statute of the United States, it may and ought to be deemed an impeachable offence. It is not every offence that by the Constitution is so impeachable. It must not only be an offence, but a high crime and misdemeanor." Section 796. (Underscoring supplied).

Yet to cite these commentators and say that impeachments are thought by some to be confined to wrongs of a political character more aptly characterizes the process than defines the offense. In short, it begs the question for a "private" offense, of the sort that a non-officer may also commit, may have gross political ramifications if the perpetrator is a public officer. Is an offense that brings an office into disrepute and renders it dysfunctional a "political" offense?

Disregarding a functional analysis of the impeachment clause suggested by the above question, William Rawle, another early commentator, took a narrow view of the term "impeachable offenses." He would restrict it to offenses committed while performing the duties of the office?

> "The legitimate causes of impeachment have been already briefly noticed. They can only have reference to public character and official duty. The words of the text are treason, bribery, and other high crimes and misdemeanors. The treason contemplated must be against the United States. In general those offences which may be committed equally by a private person as a public officer, are not the subjects of impeachment. Murder, burglary, robbery, and indeed all offences not immediately connected with office, except the two expressly mentioned, are left to the ordinary course of judicial proceeding, and neither house can regularly inquire into them, except for the purpose of expelling the member." View on the Constitution of the United States of America (1829) at 215.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00464 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.316

Certainly, a case can be made that if impeachment is a process by which the faith in and integrity and effectiveness of the office of an offending incumbent can be restored,11/ offenses which tend to bring the office into disrepute or render it dysfunctional should be impeachable whether or not committed in an official capacity. The constitutional remedy must be commensurate with the constitutional need. Extortion or forgery committed in private transactions seemingly has just as enormous an impact on the office as does bribery. As the Supreme Court of Louisiana recently said in a case involving a state impeachment, because there is "a deep and vital interest" in the office of Judge . . . the official conduct of judges, as well as their private conduct, is closely observed. When a judge, either in his official capacity or as a private citizen, is guilty of such conduct as to cause others to question his character and morals, the people not only lose respect for him as a man but lose respect for the court over which he presides as well." In re Haggerty, 241 So. 2d 469 (La. 1970). See also A. Simpson, Federal Impeachments 50-53.

In confronting this issue, Justice Story in his Commentaries chose the safest course and presented the arguments without resolving the issue whether impeachment should be confined to official acts:

> In the argument upon Blount's impeachment, it was pressed with great earnestness that there is not a syllable in the Constitution which confines impeachments to official acts, and it is against the plainest dictates of common-sense

---

11/ Congressman Summers, Chairman of the House Judiciary Committee, who was the Manager of the impeachment of district judge Halsted Ritter in 1936 viewed the impeachment function as depending on the effect of the offense on the office: "We do not assume the responsibility . . . of proving that the respondent is guilty of a crime as that term is known to criminal jurisprudence. We do assume the responsibility of bringing before you a case, proven facts, the reasonable and probable consequences of which are to cause people to doubt the integrity of the respondent presiding as a judge." 80 Cong. Rec. 5469, 5602-06 (74th Cong. 2d Sess. 1936).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00465 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.317

> that such restraint should be imposed upon it. Suppose a judge should countenance or aid insurgents in a meditated conspiracy or insurrection against the government. This is not a judicial act, and yet it ought certainly to be impeachable. He may be called upon to try the very persons whom he has aided. Suppose a judge or other officer to receive a bribe not connected with his judicial office, could he be entitled to any public confidence? Would not these reasons for his removal be just as strong as if it were a case of an official bribe? The argument on the other side was, that the power of impeachment was strictly confined to civil officers of the United States, and this necessarily implied that it must be limited to malconduct in office.
>
> §805. It is not intended to express any opinion in these commentaries as to which is the true exposition of the Constitution on the points above stated. They are brought before the learned reader as matters still sub judice, the final decision of which may be reasonably left to the high tribunal constituting the court of impeachment when the occasion shall arise. Commentaries, op. cit. §§ 804, 805 (1833).

One hundred and forty years later, the question concerning what criminal statutory offenses can be made the subject of impeachment proceedings remains open. For the offenses not falling within the impeachment jurisdiction, the offender/officer could be prosecuted even if the Constitution precluded the criminal prosecution of impeachable offenses prior to the conclusion of impeachment. However, if impeachment were indeed a condition precedent to criminal prosecution, a person accused of a common offense committed while in the employment of the United States could plead that the offense was of a political nature and that he could not be prosecuted prior to the conclusion of impeachment proceedings. This would inject into the trial of a criminal case the delicate issue of what is a political or impeachable offense, and what constitutes a common non-impeachable crime.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00466 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.318

Further, this delicate issue seemingly would be before the wrong forum (see Story quotation above). The actual power to impeach vel non in every instance rests with the House of Representatives and not with the courts. And this congressional power -- laying aside the possible outcome in some future instance of alleged gross abuse -- subsumes within it the threshhold issue of determining whether an offense is impeachable. In a criminal proceeding a judicial conclusion in favor of the impeachable nature of the offense would of course, not require the House of Representatives to impeach or the Senate to convict. Indeed, a number of considerations might induce nonaction by the Congress even if an "offense" were held by a court to be impeachable (and therefore a jurisdictional bar to indictment), e.g., (1) higher legislative priorities for other business -- legislation, treaty approvals, confirmations of appointments, investigations, (2) political pressures not to act, (3) inappropriatness of a political trial for the given offense, (4) an estimate of ultimate failure to garner the necessary simple majority in the House and two-thirds vote in the Senate, thereby precluding the attempt, (5) a desire not to exacerbate political relations because of the adverse effect on governmental concerns.

For the above reasons, a rule that impeachment must precede indictment could operate to impede, if not bar, effective prosecution of offending civil officers. The sensible course, as a general proposition, is to leave to the judiciary the trial of indictable criminal offenses, and to Congress the scope of the overlapping impeachment jurisdiction. The gross impracticalities of a rigid rule that impeachment precede indictment demonstrate that it would be an unreasonable, and improper construction of the Constitution.

3. Problems presented by corollary issues. There are also reasons of a corollary nature which counsel against the conclusion that impeachment proceedings must be completed before a civil officer may be subjected to criminal proceedings.

(a) During a grand jury investigation, it may appear for instance, that one of several co-conspirators is an officer of the United States

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00467 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.319

as was the case in Johnson v. United States, supra. It would seriously interfere with the investigation if it had to be suspended in respect to that officer, or indeed as to the other co-conspirators, until the termination of impeachment proceedings. The alternative is equally unappealing. If evidence were nonetheless presented in respect to the other co-conspirators, serious charges would inevitably be levied against the civil officer who would not have the opportunity in a judicial tribunal to clear himself. Further, if the civil officer actually is involved in the conspiracy, his nonparticipation at trial could impede prosecution of the co-conspirators.

(b) A similar consideration is presented by the statute of limitations. If an officer cannot be prosecuted prior to impeachment, the criminal statute of limitations could easily run in his favor. If his immunity blocked effective prosecution of co-conspirators, the statue of limitations might run in their favor too. The Criminal Code does not contain and, to our knowledge, never has contained a section providing for the suspension of the statute of limitations in the case of an officeholder until the termination of impeachment proceedings. The absence of such provision suggests Congress has considered such a rule to be unnecessary. Such practical interpretation of the Constitution is entitled to great consideration. Stuart v. Laird, 1 Cranch 299, 309 (1803); Field v. Clark, 143 U.S. 649, 691 (1892); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); United States v. Curtiss-Wright Corp., 299 U.S. 304, 328-329 (1936).

In sum, an interpretation of the Constitution which requires the completion of impeachment proceedings before a criminal prosecution can be instituted would enable persons who are or were employed by the Government to raise a number of extremely technical and complex defenses. It also would pressure Congress to conduct a large number of impeachment proceedings which would weigh heavily on its limited time. Such an interpretation of the Constitution is prima facie erroneous.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00468 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.320

II.

Is the President Amenable to Criminal Proceedings While in Office?

This part of the memorandum deals with the question whether and to what extent the President is immune from criminal prosecution while he is in office. It has been suggested in the preceding part that Article I, sec. 3, clause 7 of the Constitution does not require the exhaustion of the impeachment process before an officer of the United States can be subjected to criminal proceedings. The question therefore arises whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch.

It has been indicated above that there is no express provision in the Constitution which confers such immunity upon the President. Inasmuch as Article I, sec. 6, clause 1 expressly provides for a limited immunity of the members of the legislative branch, it could be argued that, e contrario, the President is not entitled to any immunity at all. 12/ This proposition, however, is not necessarily conclusive; it could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary.

12/ In his speech of March 5, 1800 on the floor of the Senate, Senator Pickney, a former Member of the Constitutional Convention, suggested that the failure to provide for a Presidential immunity was deliberate. Annals of Congress, 6th Cong., col. 74; Farrand, Records of the Federal Convention Vol. III, pp. 384, 385.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00469 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.321

Further, as indicated by statements of Alexander Hamilton in The Federalist, No. 69, 13/ it could be said that the immunity of the President to criminal indictment and trial during his office may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President.

Hamilton's comments were made in the context of calming fears about Executive power and distinguishing the President from the English king. Regarding criminal liability, his strongest statement would have been to suggest that the President was subject to criminal liability before or after impeachment, yet on the occasion when he made the comparison he spoke only of criminal liability after impeachment. To be sure, there are strong statements by others to the point that the Convention did not wish to confer privileges on the

13/ The Federalist, No. 69:

"The President [unlike the King] would be liable to be impeached, tried, and upon conviction * * * removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law."

See also the following from Hamilton. The Federalist, No. 65:

"The punishment, which may be the consequence of conviction upon impeachment, is not to terminate the chastisement of the offender. After having been sentenced to perpetual ostracism * * *; he will still be liable to prosecution and punishment in the ordinary course of law."

The Federalist, No. 77:

"The President is at all times liable to impeachment, trial, dismission from office * * * and to the forfeiture of life and estate by subsequent prosecution in the common course of law."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00470 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.322

President, but these were made in most general terms, and did not refer to the question now in issue. 14/ Further, despite these statements an early Congress did recognize one form of privilege in the Executive in at least one instance. 15/ The historical evidence on the precise point is not conclusive.

A. Ambiguities in a Doctrinal Separation of Powers Argument.

Any argument based on the position or independence of one of the three branches of the Government is subject to the qualification that the Constitution is not based on a theory of an airtight separation of powers, but rather on a system of checks and balances, or of blending the three powers. The Federalist, Nos. 47, 48 (James Madison). We must therefore proceed case-by-case and look to underlying purposes. This facet of any reasoning based on the doctrine of the separation of powers is necessarily stressed by those who oppose independence or immunity in a given instance. Examples include two dissenting opinions of Mr. Justice Holmes.

14/ The Framers of the Constitution made it abundantly clear that the President was intended to be a Chief Executive, responsible, subject to the law, and lacking the prerogatives and privileges of the King of England. See, e.g., James Wilson's statements that the prerogatives of the British monarch were not to be a proper guide in defining Executive powers (Farrand, Records of the Federal Convention Vol. I, p. 65) and that the President would not be above the law, nor have a single privilege annexed to his character. 2 Elliot's Debates 480. In the North Carolina Convention, James Iredell contrasted the position of the King of England who holds his authority by birthright, has great powers and prerogatives, and can do no wrong, with that of the President who is no better than his fellow citizens and can pretend no superiority over the meanest man in the country. 4 Elliot's Debates 109.

15/ See, e.g., President Washington's refusal in 1794 to submit to the Senate those parts of a diplomatic correspondence which in his "judgment for public considerations, ought not to be communicated." 1 Richardson, Messages and Papers of the Presidents 152; 1 Senate Executive Journal 147. See Attorney General Randolph's note to President Washington that the message "appears to have given general satisfaction. Mr. M--d--n, in particular thinks it will have good effect." The Writings of George Washington (Bicentennial Edition) Vol. 33 p. 282 fn 8.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00471 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.323

In Springer v. Philippine Islands, 277 U.S. 189, 209-210 (1928), he gave graphic expression to the extent which the blending element in the Constitution has blunted the principle of the separation of powers:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. * * * When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on."

And again in Myers v. United States, 272 U.S. 52, 177 (1926), he warns that any legal arguments drawn merely from the Executive power of the President, his duties to appoint officers of the United States and to commission them, and to take care that the laws be carefully executed seem to him "spider's webs inadequate to control dominant facts."

Whether or not one agrees with Holmes or the full thrust of his rhetoric, most scholars would concede that there are few areas under the Constitution to which a single branch of the Government can claim a monopoly. An argument based on the separation of powers must be illuminated therefore by constitutional practice.

The difficulty of developing clear rules regarding the various possible facets of Presidential immunity is demonstrated by the limited and ambivalent case law developed in the fields of the amenability vel non of the President to civil litigation and to the judicial subpoena power. Much of this precedent has been discussed in our memorandum dated June 25, 1973, regarding Presidential Amenability to Judicial Subpoena.

In the Burr treason trial, Chief Justice Marshall at first concluded that since the President is the first magistrate of the United States, and not a King who can do no wrong, he was subject to the judicial subpoena power. United States v. Burr, 25 Fed. Cas. 30, 34, No. 14,692 (C.C.D. Va., 1807). In the Burr misdemeanor trial, however, which took

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00472 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.324

place only a few months later, the Chief Justice had to qualify significantly his claim of the subpoena power over the President by conceding that the courts are not required

> "to proceed against the President as against an ordinary individual." United States v. Burr, 25 Fed. Cas. 187, 190, No. 14,694 (C.C.D. Va., 1807). 16/

And by acquiescing in the privileges claimed by President Jefferson of not attending court in person and of withholding certain evidence for reasons of State, Chief Justice Marshall recognized that the power of the judiciary to subpoena the President is subject to limitations based on the needs of the Presidential office.

Marshall's recognition of the special character of the Presidential office was expanded in Kendall v. United States ex rel. Stokes, 12 Pet. 524, 610 (1838), where the Court seemed to deny that it had any jurisdiction over the President:

> "The executive power is vested in a president; and so far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeachment."

It is significant that this apparent total disclaimer of any judicial authority over the President also was qualified by adding the clause "so far as his powers are derived from the constitution."

16/ See also Chief Justice Marshall's statement in the Burr treason trial "to issue a subpoena to a person filling the exalted position of the chief magistrate is a duty which would be dispensed with more cheerfully than it would be performed." Id. at p. 34.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00473 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.325

There have been countless examples in which courts have assumed jurisdiction to scrutinize the validity of Presidential action, such as proclamations, Executive orders, 17/ and even direct instructions by the President to his subordinates. 18/ It is true that, as a matter of convention the party asserting the validity of the Presidential action (whether plaintiff or defendant) is usually a party other than the President, such as his subordinate, or the custodian of the res. 19/ Nevertheless there have been recent dicta that when this convention is inadequate to protect the citizen, i.e., where the President alone can give the requested relief, the courts may assume jurisdiction over the litigation. See the June 25, 1973 memorandum, Appendix iii-iv.

Again, Attorney General Stanbery's famous oral argument in Mississippi v. Johnson, 4 Wall. 475; 481-491(1867), on which the Brief in Opposition by the Attorneys for the President in In Re Grand Jury Subpoena Duces Tecum, etc., D.C. Misc. 47-73, relies so heavily, 20/ is prefaced by the statement that the case made against President Johnson "is not made against him as an individual, as a natural person, for any acts he intends to do as Andrew Johnson the man, but altogether in his official capacity as President of the United States." Hence, Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President, 21/ and does not pertain to the question whether or not the courts lack the authority to deal with the President "the man" with respect to matters

17/ See, e.g., United States v. Curtiss-Wright, 299 U.S. 304 (1936) (Embargo Proclamation); United States v. Bush, 310 U.S. 371 (1940) (Customs Proclamation).

18/ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Steel Seizure).

19/ It may well be that under the normally operative procedural rules the President would be considered the real party in interest or a necessary party.

20/ 9 Weekly Compilation of Presidential Documents 961, 963, 970.

21/ In the eyes of the Court, the dismissal of the proceedings was based on the ground that it lacked jurisdiction over the subject matter rather than over the person of the President. This is shown by its dismissal of similar proceedings brought by the State of George against Secretary of War Stanton and General Grant. 6 Wall. 50 and 451 (1867).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00474 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.326

which have no relation to his official responsibility.

Thus it appears that under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim. The proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency.

B. Competing Interests.

An assessment designed to determine the extent to which the status of the Presidency is inconsistent with giving the courts plenary criminal jurisdiction over the President may be divided into two parts. First, the applicability vel non to the Presidency of any of the considerations which in Part I of this memorandum led to rejection of the proposition that impeachment must precede criminal proceedings, and, second, whether criminal proceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status.

1. Is court trial of a President too political for the judicial process? Part I of this memorandum, for a variety of reasons, concluded that the considerations which led to the establishment of the congressional impeachment jurisdiction, e.g., that the courts were not well equipped to handle (a) political offenses and (b) crimes committed by high office-holders, were insufficient to exempt every officer of the United States from criminal prosecution for statutory offenses prior to the termination of the impeachment proceedings. The question to be examined here is whether these reasons are so much stronger in the case of the President as to preclude his prosecution while in office.

a. Political offenses. Political offenses subject to indictment are either statutory or nonstatutory offenses. The courts, of course, cannot adjudicate nonstatutory offenses. With respect to statutory political offenses their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00475 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.327

and there appears to be no weighty reason to differentiate between the President and other officeholders, unless special separation of powers based interests can be articulated with clarity.

It should be noted that it has been well established in civil matters that the courts lack jurisdiction to reexamine the exercise of discretion by an officer of the Executive branch. Marbury v. Madison, 1 Cranch 137, 166 (1803); Decatur v. Paulding, 14 Pet. 497, 514-517 (1840); Panama Canal Co. v. Grace Line, Inc., 365 U.S. 309, 318 (1958). By the same token it would appear that the courts lack jurisdiction in criminal proceedings which have the effect of questioning the proper exercise of the President's discretion. This conclusion, of course, would involve a lack of jurisdiction over the subject matter and not over the person.

b. Intrinsically political figures. The second reason for the institution of impeachment, viz., the trial of political men, presents more difficulties. The considerations here involved are that the ordinary courts may not be able to cope with powerful men, and second, that it will be difficult to assure a fair trial in criminal prosecutions of this type.

i. The consideration that the ordinary courts of law are unable to cope with powerful men arose in England where it presumably was valid in feudal time. In the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned. (See Rawle, op. cit., supra, at 211).

ii. We also note Alexander Hamilton's point that in well-publicized cases involving high officers, it is virtually impossible to insure a fair trial. 22/ In Part I we assumed without discussion that this point was not of sufficient importance to require impeachment prior to indictment with respect to every officeholder. Undoubtedly, the consideration of assuring a fair criminal trial for a President while in office would be extremely difficult. It might be impossible to impanel a neutral jury. To be sure there is a serious

22/ "The prosecution of them [i.e., political crimes committed by political men] for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In (continued)

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00476 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.328

"fairness" problem whether the criminal trial precedes or follows impeachment. However, the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure.

2. Would criminal proceedings against a President be ineffective and inappropriate because of his powers regarding (a) prosecution, (b) Executive privilege, and (c) pardons? The Presidency, however, creates a special situation in view of the control of all criminal proceedings by the Attorney General who serves at the pleasure and normally subject to the direction of the President and the pardoning power vested in the President. See Reply Brief filed by Attorneys for the President in In Re Grand Jury Subpoena, etc. (see supra), 9 Weekly Compilation of Presidential Documents 999-1000, and the authorities there cited. Hence, it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time. This objection would lose some of its persuasiveness where, as in the Watergate case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them to a Special Prosecutor. Reply Brief, supra, at 1000, fn. 1. However, none of these delegations is, or legally can be, absolute or irrevocable.

Further, the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case. If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege. And even if all other hurdles are surmounted, he would still possess the pardoning power.

22/ (Continued)
many cases it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt." The Federalist, No. 65 (Hamilton).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00477 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.329

3. Would criminal proceedings unduly interfere in a direct or formal sense with the conduct of the Presidency?

a. Personal attendance. It has been indicated above that in the Burr case, President Jefferson claimed the privilege of not having to attend court in person. And it is generally recognized that high government officials are exempted from the duty to attend court in person in order to testify. See our memorandum of June 25, 1973, supra, pp. 7-8. This privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter.

It should be noted that the exemption of high government officials from personal appearance is only the general rule. In Peoples v. United States Department of Agriculture, 427 F.2d 561, 567 (C.A. 1970) the court cautioned that "subjecting a cabinet officer to oral deposition is not normally countenanced * * *." (Underscoring supplied). The quashing of a subpoena addressed to the NASA Administrator in Capital Vending Co. v. Baker, 36 F.R.D. 45, 46 (D.C. D.C., 1964), was predicated on the circumstance that the Administrator had no personal knowledge of the event. Personal attendance of high officials has been required in several exceptional cases where the official was directly and personally involved in the events underlying the litigation. Union Savings Bank of Patchogue v. Saxon, 209 F. Supp. 317 (D.C. D.C. 1962), (Comptroller of the Currency); Virgo Corporation v. Paiewonsky, 39 F.R.D. 9, (D.C. V.I., 1965) (Territorial Governor); D.C. Federation of Civic Association v. Volpe, 316 F. Supp. 754, 760 fn. 12 (D.C. D.C., 1970), reversed on other grounds 459 F. 2d 1231 (C.A. D.C., 1972) certiorari denied 405 U.S. 1031 (1973) (Secretary of Transportation).

Because a defendant is already personally involved in a criminal case (if total immunity be laid aside), it may be questioned whether the normal privilege of high officials not to attend court in person applies to criminal proceedings in which the official is a defendant.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00478 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.330

b. Direct interference with official duties. A necessity to defend a criminal trial and to attend court in connection with it, however, would interfere with the President's unique official duties, most of which cannot be performed by anyone else. It might be suggested that the same is true with the defense of impeachment proceedings; but this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process. The Constitutional Convention was aware of this problem but rejected a proposal that the President should be suspended upon impeachment by the House until acquitted by the Senate.[23/]

During the past century the duties of the Presidency, however, have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution. This might constitute an incapacitation so that under the provisions of the Twenty-fifth Amendment, Sections 3 or 4, the Vice President becomes Acting President. The same would be true, if a conviction on a criminal charge would result in incarceration. However, under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent.[24/]

[23/] That decision was based in part on the consideration that a simple majority of the House should not be able to suspend the President. 2 Farrand, Records of the Federal Convention 612. Tucker's Blackstone, Vol. I, App., pp. 347-348, which, having been published in 1803, did not have the benefit of the Madison papers, presumed that a President would be instantly incapacitated when actually impeached.

[24/] See Story, op. cit., sec. 786.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00479 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.331

This would suggest strongly that, in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation. [The non-physical yet practical interferences, in terms of capacity to govern, are discussed *infra* as the "fourth question."] The physical interference consideration, of course, would not be quite as serious regarding minor offenses leading to a short trial and a fine. It has been shown in the June 25, 1973 Memorandum, *supra*, Appendix, p. i, fn., that Presidents have submitted to the jurisdiction of the courts in connection with traffic offenses. However, in more serious matters, *i.e.*, those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal.

A possibility not yet mentioned is to indict a sitting President but defer further proceedings until he is no longer in office. From the standpoint of minimizing direct interruption of official duties--and setting aside the question of the power to govern--this procedure might be a course to be considered. One consideration would be that this procedure would stop the running of the statute of limitations. (For details see pp. 13-14 of Part I of this memorandum.) It is uncertain whether a constitutional conclusion that the President could not be indicted while in office would be viewed as tolling the federal statutes of limitations. While this approach may have a claim to be considered as a solution to the problem from a legalistic point of view, it would overlook the political realities. As will be shown presently, an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction. To be sure, there could also be damage flowing from unrefuted charges. It also may be noted that the possibility that a President may escape all prosecution by the running of the statute of limitations is not a constitutional matter. The policy regarding statutes of limitation is within legislative control.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00480 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.332

4. Would initiation or prosecution of criminal proceedings, as a practical matter, unduly impede the power to govern, and also be inappropriate, prior to impeachment, because of the symbolic significance of the Presidency? In Mississippi v. Johnson, supra, Attorney General Stanbery made the following statement:

> "It is not upon any peculiar immunity that the individual has who happens to be President; upon any idea that he cannot do wrong; upon any idea that there is any particular sanctity belonging to him as an individual, as is the case with one who has royal blood in his veins; but it is on account of the office that he holds that I say the President of the United States is above the process of any court or the jurisdiction of any court to bring him to account as President."

This may be an overstatement, but surely it contains a kernel of truth, namely that the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs. It is not to be forgotten that the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries. The spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination.

Perhaps this thought is best tested by considering what would flow from the reverse conclusion, i.e., an attempted criminal trial of the President. A President after all is selected in a highly complex nationwide effort that involves most of the major socio-economic and political forces of our whole society. Would it not be incongruous to bring him down, before the Congress has acted, by a jury of twelve, selected by chance "off the street" as Holmes put it? Surely the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the "defendant."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00481 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.333

The genius of the jury trial has been that it provides a forum of ordinary people to pass on matters generally within the experience or contemplation of ordinary, everyday life. Would it be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive?

In broader context we must consider also the problems of fairness, and of acceptability of the verdict. Given the passions and exposure that surround the most important office in the world, the American Presidency, would the country in general have faith in the impartiality and sound judgment of twelve jurors selected by chance out of a population of more than 200 million? If based on "some" evidence it is unlikely a guilty verdict would be reversible on appeal (assuming no procedural error), and yet it could be tantamount to removal and probably would force a resignation. Even if there were an acquittal, would it be generally accepted and leave the President with effective power to govern?

A President who would face jury trial rather than resign could be expected to persist to the point of appealing an adverse verdict. The process could then drag out for months. By contrast the authorized process of impeachment is well-adapted to achieving a relatively speedy and final resolution by a nation-based Senate trial. The whole country is represented at the trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation.

To be sure it is arguable that despite the foregoing analysis it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rests. Given the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00482 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.334

A counter-argument which could be made is that the indictment alone should force a resignation, thus avoiding the trauma either of a trial during office, or an impeachment proceeding. This counter-argument, however, rests on a prediction concerning Presidential response which has no empirical foundation. The reasons underlying the Founding Fathers' decision to reject the notion that a majority of the House of Representatives could suspend the President by impeaching him (see fn. 23, supra) apply with equal force in a scheme that would permit a majority of a grand jury to force the resignation of a President. The resultant disturbance to our constitutional system would be equally enormous. Indeed, it would be more injudicious because the grand jury, a secret body, could interrupt Presidential succession without affording the incumbent the opportunity for a hearing to voice his defense.

A further factor relevant here is the President's role as guardian and executor of the four-year popular mandate expressed in the most recent balloting for the Presidency. Under our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it. Different electorates and markedly different voting patterns produce the Senate and the House of Representatives. Because only the President can receive and continuously discharge the popular mandate expressed quadrennially in the presidential election, an interruption would be politically and constitutionally a traumatic event. The decision to terminate this mandate, therefore, is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution.

In suggesting that an impeachment proceeding is the only appropriate way to deal with a President while in office, we realize that there are certain drawbacks, such as the running of a statute of limitations while the President is in office, thus preventing any trial for such offenses. [25/] In this difficult area all courses of action have costs and we recognize that a situation of the type just mentioned could cause a complete hiatus in criminal liability. We doubt, however, that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office.

[25/] As shown above, the statute of limitations problem could be obviated by a specific statutory provision suspending the running of the criminal statute of limitations in favor of the President while he is in office.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00483 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.335

III.

Is the Vice President Amenable to Criminal Proceedings While in Office?

In the first part of this memorandum we concluded that as a general proposition the Constitution does not require that an officer of the United States be impeached before criminal proceedings may be instituted against him. In the second part we concluded that by virtue of his unique position under the Constitution the President cannot be the object of criminal proceedings while he is in office. In this third part we are concerned with the question whether there is anything in the position of the Vice President that is equally inconsistent with his amenability to criminal proceedings.

We begin by discussing the case of Aaron Burr. Eight months before the expiration of his term, he was indicted for murder in both the New Jersey and New York courts for fatally wounding Alexander Hamilton in a duel on July 11, 1804. B. Mitchell, Alexander Hamilton, 537 (1962). The proceedings in New Jersey were quashed after the Jeffersonians, who became his partisans during the impeachment trial of Judge Samuel Chase over which Burr presided, prevailed upon the New Jersey Governor. Id. at 541. In New York, the grand jury changed the charge from murder to the misdemeanor of sending a challenge and Burr was tried on this charge after his term was over. 26/ These facts show one more understanding nearly contemporaneous to the making of the Constitution to the effect that impeachment need not precede indictment. Surely, had it been thought that a sitting Vice President could not be federally indicted prior to impeachment, on the ground that his duties could be so interrupted, the principle of federal supremacy would have imposed a similar restraint on the states. 27/ And yet, while the indictment was strenuously resisted, no claim was made that criminal proceedings were barred until the conclusion of impeachment proceedings.

26/ He remained a fugitive from the courts of New York during the remainder of his term as Vice-President. Mitchell, supra, at 541.

27/ In Tennessee v. Davis, 100 U.S. 257 (1879), the Supreme Court upheld the constitutionality of a statute removing to federal courts state criminal prosecutions of federal employees for acts committed under color of office.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00484 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.336

We resort then to an analysis similar to that made with respect to the amenability of the President to criminal proceedings. We based the President's immunity from criminal proceedings essentially on two grounds. First, that the person who controls criminal prosecutions as the head of the Executive branch, controls part of the evidence as holder of the power of Executive privilege, and is vested with the pardoning power under Article II, section 2, clause 1 of the Constitution, cannot at the same time be a defendant in a criminal case. This set of considerations obviously is not applicable to the Vice President. (See II-B-2).

The second reason was the effect of a criminal prosecution on the President's office. (See II-B-3 and 4.) In that context we examined the unique nature of the President's duties and the symbolic attributes of his office. The questions now to be examined are (a) whether the Vice President in his own right is vested with constitutional and statutory duties so unique and important that they may not be disturbed by a criminal prosecution and (b) whether such prosecution would do irreparable harm to the institution of the Presidency because the Vice President may at any time become President, i.e., a theory of Vice Presidential immunity derivative from Presidential immunity. In making that evaluation we start out from the premise that immunity from prosecution is basically contrary to the spirit of the Constitution and it may be resorted to only if the considerations leading to it are irrefutable.

A. Duties of the Vice President pursuant to Statute, Reorganization Plan, or Executive Order.

The Vice President serves on a number of Boards and Commissions pursuant to statute, Reorganization Plan or Executive order. He is a member of the Establishment of the Smithsonian Institution, a Regent thereof, and presides over certain meetings of the members of the Institution in the absence of the President. 20 U.S.C. 41, 42, 45. He is the Chairman of the National Council on Marine Resources and Engineering Development (33 U.S.C. 1102), 28/ and a member

---

28/ 33 U.S.C. 1102(c) authorizes the President to designate one of the members of the Council to preside over its meetings during the absence, disability, or unavailability of the Chairman.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00485 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.337

of the National Security Council (50 U.S.C. 402). In addition, he is a member of the Cabinet Committee on Economic Policy (Executive Order No. 11453); Chairman of the National Council on Indian Opportunity (Executive Order No. 11399, as amended by Executive Order No. 11551); and Chairman of the President's Council on Youth Opportunity (Executive Order No. 11330, as amended by Executive Order No. 11547). He has "immediate supervision" over the Office of Intergovernmental Relations (Executive Order No. 11455), and is a member of the Domestic Council (Reorganization Plan No. 2 of 1970, sec. 201).

The operations of none of those governmental entities would be jeopardized if the Vice President could not attend them. Regarding such functions the role of the Vice President can be analogized to that of a cabinet officer.

B. Duties of the Vice President under the Constitution.

Under the Constitution the Vice President has the following duties:

i. He shall be President of the Senate. Article I, section 3, clause 4. The Senate, however, shall elect a President *pro tempore* to act as President of the Senate in the event the Vice President is absent or exercises the Office of the President. (Article I, section 3, clause 5).

ii. Break a tie if the Senate is evenly divided. (Article I, section 3, clause 4).

iii. Become President in the case of the removal, death or resignation of the President (Twenty-fifth Amendment, section 1).

iv. Become Acting President in the event that the President is unable to discharge the powers and duties of his office (Twenty-fifth Amendment, secs. 3 and 4).

The Vice President's functions as President of the Senate clearly are not unique. The Constitution specifically provides

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00486 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.338

for a substitute in the person of the President pro tempore of the Senate. With respect to his responsibility as tie breaker his immunity from criminal prosecution should be analogized to that of Members of Congress under Article I, section 6, clause 1 of the Constitution. That congressional immunity from arrest does not extend to treason, felony, and breach of the peace, i.e., virtually the entire spectrum of criminal proceedings. The mere possibility that the Vice President may have to cast a tie-breaking vote would therefore not justify his immunity from criminal proceedings.

This leaves the question whether the responsibilities and the position of the Vice President as potential President or Acting President are inconsistent with his amenability to criminal proceedings, so that on a derivative basis he would share the President's immunity. As in the case of the Presidency, this issue will be analyzed (a) in terms of the direct interference with the performance of his duties and functions, and (b) with the symbolic impact on the dignity of the Presidency.

1. Direct or formal interference with the conduct of the Vice Presidency. The issue here is whether immediate availability of the Vice President to assume the duties of the President or Acting President is so important that he should not be even temporarily incapacitated by trial or possible incarceration. (The Vice President would become President in event of death, resignation or removal of the President, and would become Acting President in the event the President were found under the Twenty-fifth Amendment to be incapacitated.) The principal responsibility of the Vice President is to be ready to serve as President or Acting President should the occasion arise, thereby avoiding any interruption in the continuity of the office of the President. This duty "to stand and wait" is of the highest constitutional and institutional importance. Judicial proceedings which could interfere with readiness to serve therefore require careful scrutiny.

At the same time we must note the highly contingent nature of the possibility that the Vice President would be called to assume the office of President or Acting President.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00487 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.339

Moreover, it has not been the custom to sequester the Vice President to make certain that he is always available to assume his potential Presidential duties at a moment's notice. The Vice President is frequently absent from the capital, possibly in remote and inaccessible parts of the country,29/ or even abroad on ceremonial functions. Nothing, of course, can prevent him from being sick or otherwise temporarily incapacitated.

Under such a practical interpretation of the extent of the Vice President's immediate availability, it appears as a general proposition that his duty to stand and wait does not necessarily require his total immunity from criminal prosecution. If the Office of the Presidency was vacated while a criminal proceeding was being conducted against the Vice President, the process could be halted at once. Whether or not impeachment proceedings would then ensue against the former Vice President, now President, would depend on the will of Congress. The situation then would be exactly the same as if the Vice President had been President when the allegations of criminality first surfaced -- no better, no worse. Thus, a criminal indictment against a Vice President need not abrogate in any way his constitutional duty to stand and wait. This duty, therefore, does not afford a basis for granting to a Vice President immunity from criminal prosecution.

As a further practical observation, it may be noted that if a trial of the Vice President proceeded to a sentence of imprisonment, and were sustained in what might be expected to be an expeditious appeal, the Vice President might well resign. He could be replaced under the Twenty-fifth Amendment's procedure for filling a "vacancy" in the office of Vice President. Thus, the uninterruptibility of the Presidency would be preserved. There is, of course, no provision in the Constitution (other than impeachment and removal) for determining that a Vice President is incapacitated. The Constitution contains such incapacity-determination process only for the Presidency.

29/ Note the delay in reaching Vice President Coolidge on his father's farm after President Harding's death.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00488 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.340

Institution of criminal proceedings against the Vice President could, however, inject uncertainties into the Presidential succession. If a Vice President is under indictment or sentence of imprisonment, it could be claimed that he is incapacitated to succeed to the Presidency, and that the Speaker of the House of Representatives is next in line of succession. In that event the political stability of the nation could be seriously disrupted as the result of the failure of the Constitution to provide a procedure to resolve that question. The matter would come to a head if an actual vacancy in the Presidency should then occur. No one can foresee all of the contingencies which might arise in this situation. It might be reasonable to speculate that the Congress might claim an authoritative power in itself to resolve the matter, but if it did so by any vote falling short of the two-thirds Senate vote required to remove by the impeachment process, further uncertainties could ensue. Alternatively, the situation might give rise to a modern analogy to the Electoral Commission which was set up to resolve the Hayes-Tilden dispute.

To be sure, any action which could cast a doubt on the Vice President's capacity to succeed to the Presidency poses a serious question. Nevertheless, there are hazards also in having unresolved criminal charges hanging over the head of a Vice President, and the foregoing set of difficult scenarios is highly contingent. We suggest, therefore, that the rather remote possibility that the Vice President's capacity might be questioned would not justify a conclusion that the Vice President is immune from criminal prosecution.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00489 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.341

2. Practical interference with the power to govern and the symbolic significance of the Vice Presidency.--Turning now from the question of direct and formal interferences to the issue of symbolic and other practical interferences with the power to govern (as discussed in Part II-B-4), it may be observed that if it is felt these latter considerations are germane for the President, they are also germane for the Vice President, although possibly to a lesser degree. Clearly the authority of the Presidency would suffer immeasurably were it to pass to a Vice President under indictment or to one "taken from criminal custody by a set of curious chances," to paraphrase the Mikado. But the damage could be similar--or even more serious--if the Presidency passed to a Vice President against whom serious charges were in everyone's mouth and who could neither be brought to justice nor given an opportunity to clear himself.

Again, because of the contingent nature of Vice Presidential succession to the Presidency, we feel that the potential problems in this area too should be faced and solved by political [or other] means as they occur, rather than be ignored under a theory of total immunity from criminal prosecution. If, for example, actual or threatened criminal prosecution should result in a resignation, the Vice Presidential office could be refilled by the procedures of the Twenty-fifth Amendment.

3. Evaluation.--There is one fundamental recurring problem in the above discussion. Should the Vice President be treated as if he were the President himself or his alter ego, because he is only one heart beat away from taking that position? Alternatively, should the stress be placed on the contingent nature of his assumption of the Presidential office? A reasonable approach toward the solution of this dilemma would be the consideration that the criminal prosecution would not directly and immediately interfere with the performance of the Presidential duties and with the Presidential office itself, but rather with the Vice President's ability to succeed to the Presidency and the effect thereof on that institution.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00490 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.342

As indicated above, the prosecution of a Vice President would not legally or actually preclude his assumption of the Presidential duties because the proceedings could always be interrupted in that event. The problem therefore is basically of a political nature, viz., whether a Vice President against whom criminal charges have been made, who perhaps has been indicted, and who perhaps has been convicted can effectively perform the duties of the President. This political question is not solved by providing for immunity from criminal prosecution. Even if there were no indictment and trial, the very existence of those charges would hamper the Vice President in the performance of his Presidential duties almost as much as if he were tried and convicted. Indeed, he might be in a better position if he were able to vindicate himself before a court while he is Vice President.30/

In sum, although one cannot entirely be free from doubt in this unprecedented area, it is, nevertheless, concluded that the case for granting the Vice President immunity from criminal prosecution has not been made.

Having established the proposition that the Vice President does not share the immunity suggested for the President, because the various considerations which support such immunity do not relate directly to the Vice President, the public interest in going forward with investigation and possible indictment of the Vice President is supported strongly by two additional factors.

a. The alleged presence of co-conspirators

We understand that there are allegations to the effect that the Vice President was a member of a conspiracy. If true, there is a substantial public interest in including the Vice President in the on-going investigation and possible indictment proceedings. Failure to do so might not only preclude the opportunity to bring co-conspirators to justice, but also

30/ To recapitulate we conclude that the President must be denied that opportunity to vindicate himself because that would interfere with the performance of his official duties, and inevitably be inconsistent with his control of the prosecution and the pardoning power.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00491 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.343

prejudice the Vice President.

The prosecution also would be severely hampered by the withholding from the grand jury of those elements of the alleged conspiracy linked to the Vice President. As a result the activities of the alleged co-conspirators could not be fully disclosed and evaluated, which might redound unfairly to their benefit. At the same time, the Vice President might be unfairly linked by innuendo or incomplete disclosure of facts to the alleged conspiracy. In short any resultant delay in the proceedings would benefit the co-conspirators, hamper the prosecution, and postpone a possible exoneration of the Vice President.

b. The statute of limitations problem

Another circumstance counselling prompt presentation of evidence to the grand jury is that the statute of limitations is about to bar the prosecution of the alleged offenders with respect to some or all of the offenses. The problem presented by the statute of limitations would be avoided by an indictment within the statutorily specified period.

After indictment, the question whether the Government should press for immediate trial or delay prosecution until the expiration of the Vice President's duties involves questions of trial strategy (e.g., relation to possible co-conspirators as just discussed) and criminal procedure (e.g., right to a speedy trial) which other Divisions may be more competent to evaluate in the light of all of the facts.

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00492 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.344

Peter Powers
General Counsel
The Smithsonian Institution

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

19 FEB 1976

Coverage of the Smithsonian Institution
by certain Federal Statutes.

You have asked us for our opinion as to whether the Smithsonian Institution is required to comply with the reporting, release, and safeguard procedures imposed on agencies of the government of the United States by the Freedom of Information Act (5 U.S.C. §552 as amended by P.L. 93-502), the Federal Advisory Committee Act (5 U.S.C. App. I §3(3)), and the Privacy Act (P.L. 93-579). Although not free from doubt, it is our opinion that the Smithsonian is not an agency of the government of the United States of the type which Congress intended to fall within the coverages of those three statutes, and while the present voluntary compliance by the Institution with the spirit of the Acts is commendable in the spirit of public responsibility, it is not mandated by law. The Smithsonian is an establishment created by Federal statutes in order to fulfill a basic trust obligation originating in the will of James Smithson. But it is so uniquely distinctive a fusion of public and private cooperation and of joint action by all three traditional branches of our government that it seems fairly evident that the Congress could not have meant it to be treated as a traditional agency covered by the three statutes.

This conclusion is supported not only by examination of distinctive features of the Smithsonian itself but by analysis of those provisions of the three statutes which restrict their coverage to defined types of governmental agencies, a definition which ought not to be interpreted to include the Smithsonian. There is as well a considerable likelihood that each

of the three statutes is intended to affect only agencies falling within the traditional bounds of the Executive branch of government, while the Smithsonian is confined to none of the three basic subdivisions.

I.

Each of the Acts in question applies only to agencies of the United States government. In each case the term "agency" is defined by reference to the basic definition of that term included in the Administrative Procedure Act (5 U.S.C. § 551(1)). The APA in the cited section defines an "agency" as:

> [E]ach authority of the government of the United States, whether or not it is within or subject to review by another agency, but does not include:
>
> A. The Congress;
>
> B. The courts of the United States;
>
> C. The Government of the Territories or Possessions of the United States;
>
> D. The Government of the District of Columbia. . . . (Emphasis added.)

The APA definition is the sole test of coverage under the Federal Advisory Committee Act (5 U.S.C. App. I §3(3)), while both the Freedom of Information Act and the Privacy Act include additional guidance introduced by 1974 amendments to the FOIA and adopted by the Privacy Act.

> For purposes of this . . . [Act], the term "agency" as defined in section 551(1) of this title, includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. §552(e).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00494 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.346

It is clear that the basic definition of covered agencies for all three acts continues to be that drawn in the APA, an "authority of the government of the United States." Any body which cannot be so considered must fail the threshold test of coverage under each statute, and is therefore excepted from their requirements. Examination of the legislative history of that original definition also makes it clear that the term "authority" was chosen as a matter of nomenclature rather than of substance, necessitated by variances in the practice of the federal government in naming its operational branches. The Senate Judiciary Committee Print of June 1945, Document No. 248, 79th Congress, addresses this point rather directly:

> It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action, with or without appeal, to some superior administrative authority.

The same view is taken by the first authoritative Executive branch interpretation of the APA, a view which has been uniformly adopted by the Executive since that date. The Attorney General's Manual on the Administrative Procedure Act, 1947, states (p. 9):

> This definition [of agency] was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units, which may have all the attributes of an agency insofar as rule-making and adjudication are concerned.

It is certainly permissible to conclude from these statutory definitions of "agency" that they were intended to apply solely to agencies within the Executive branch of government.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00495 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.347

The APA, after all, is an Administrative Procedure Act rather than a "Governmental" one, and the basic definition of agency expressly excludes the Congress and courts of the United States from its coverage. That argument is considerably strengthened by the language and history of the explanatory 1974 amendments to the FOIA and incorporated in the Privacy Act as they relate to the meaning of the term "agency."

When those amendments were first introduced in the Senate, they defined "agency" to include, in addition to units covered by the APA definition, "the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds." See S. Rep. No. 93-854, 93d Cong., 2d Sess. 43 (1974). The Senate Report noted that the Postal Service had taken the position that without specific inclusionary language, amendments to the FOIA would not apply to it. Thus the Committee felt it necessary (id. at 33)--

> [t]o assure the F.O.I.A.['s] application to the Postal Service and also to include publicly funded corporations. . . . [Therefore] section 3 incorporates an expanded definition of agency to apply under the F.O.I.A.

The much broader definition which was ultimately adopted came in the counterpart House bill. The House Report notes that (H.R. Rep. No. 93-876, 93d Cong., 2d Sess., p. 8 (1974)):

> the definition of "agency" has been expanded to include those entities which may not be considered agencies under section 551(1). . . but which perform governmental functions and control information of interest to the public.

And the Conference Report explains that the new definition of "agency" was intended to include both those encompassed by the APA definition and other operating entities of the Government then existent or to be created in the future. The criteria set out, both in the words of the 1974 amendments themselves ("or other establishment in the executive branch of the Government") and in their history, lend considerable credence to

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00496 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.348

the contention that an authority must be within the Executive branch in order to be covered by the three Acts.

If that is the case, the Smithsonian clearly is not within their coverage. It is readily apparent that the Smithsonian, created by Act of Congress as "an establishment" of the United States (see the charter of the Smithsonian, 20 U.S.C. §41 et seq.) but under no executive power of control or appointment whatever, is not within the Executive branch. Nor can it by any stretch of the legal imagination be considered "an independent regulatory agency." The Smithsonian, headed by a Board of Regents, six of whose members are drawn from the Legislative branch, nine from the general public, one from the Judicial branch, and only one from the Executive branch,1/ is not an executive agency of the government. No member of the Smithsonian's Board of Regents is appointed by the President; of its seventeen members two hold office ex officio and fifteen are appointed by the Congress. But if the Smithsonian were an "executive agency" this mode of appointment might raise serious constitutional questions, in the sense that the Congress cannot appoint executive officers of the United States (Constitution of the United States, Article II, Section 2, clause 2). That being so it could be argued that the Smithsonian is either an arm of the Congress itself (and by definition not an agency) or a body entirely separate from the government of the United States utilized to fulfill trust obligations created by an English will and authorized by an English Court of Chancery. Under either of these interpretations the Smithsonian would not appear to qualify as "an authority of the government of the United States."

Yet there is a still more compelling argument leading to the conclusion that the Smithsonian is not included within the three statutes in question. The nature of the Smithsonian Institution is so widely different from the kinds of agencies otherwise included that it is apparent Congress could not have intended to place it into the same category. This argument is addressed in Part II of this memorandum.

1/ The Vice President, when he acts as President of the Senate, presumably is an officer of the Legislative branch.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00497 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.349

II.

A. Although the definition of agency in the APA is not wholly satisfactory as written it has received perhaps the most exhaustive and detailed consideration by scholars and courts of any section of that Act. See, for example, K. Davis, Administrative Law Treatise, §1.01 (1958); Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U. Pa. L. Rev. 1 (1970); Soucie v. David, 448 F. 2d 1067, 1073 (D.C. Circuit 1971).

The definition which has met with the most general acceptance is the one developed by Freedman--

> an administrative agency is a part of government which is "generally independent in the exercise of [its] functions" and which "by law has authority to take final and binding action" affecting the rights and obligations of individuals, particularly by the characteristic procedures of rule-making and adjudication. Freedman, supra, at 9.

Soucie adopts that definition enthusiastically, and is itself mentioned with approval in the House Reports on the 1974 amendments. Most cases seem to adopt both the "separability" test stated above and an emphasis on "substantial independent authority" possessed by the agency in question. See, e.g., Grumman Aircraft Engineering Corp. v. Renegotiation Board, 482 F. 2d 710, 714-5 (D.C. Cir. 1973), and cases there cited. In some other cases the focus necessarily shifts from the kind of governmental authority possessed by the asserted agency to whether that body is in fact an instrumentality of the government at all.

That was precisely the question in Lombardo v. Handler (Civ. No. 74-431, U.S.D. Ct., D.C. July 28, 1975), where the court was faced with the question whether the National Academy of Sciences was covered by these same three statutes. The court there found that the traditional "independent authority" test, while helpful, was not dispositive in cases where the very question was whether the asserted agency was governmental in the first instance. That court, and others which have

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00498 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.350

considered the same question, found that an examination of the nature of the body concerned and its relation to the operations of government was necessary to determine whether it, too, was "of the Government of the United States."2/ Ultimately the test was whether the organization performed governmental functions of the administrative sort as a part of government. A brief review of the origin, structure, and operations of the Smithsonian Institution plainly demonstrates that it is not the sort of instrumentality of the United States which the Congress intended to include, either as "administrative" within the APA and FACA, or as "executive" or "regulatory" under the 1974 amendments to the FOIA and their incorporation in the Privacy Act.

B. The Smithsonian Institution is an establishment constituted for the increase and diffusion of knowledge among men. 20 U.S.C. §41. The Institution began with a bequest by an Englishman, James Smithson, to the United States for those purposes. The bequest was accepted and has since been treated by the United States as a solemn testamentary trust independent of any traditional branch or role of government but operated as a responsibility of the Nation. Management of the Institution is vested in a Board of Regents drawn from among all three branches of the government, but with a majority of members from the general public. The Chief Justice of the United States, who serves as Chancellor of the Institution, and the Vice President are by law members of the Board of Regents. All other members are appointed by the Congress. 20 U.S.C. §43. The Institution possesses substantial trust funds, part of which are held in trust for it by the Treasury, derived both

2/ See, e.g., Washington Research Project, Inc. v. Department of Health, Education, and Welfare, 504 F. 2d 238 (D.C. Cir. 1974). Even where the defendent organization is concedely an "agency" for most cases its performances of "private" or "non-agency" functions in others may prevent release of information acquired by it in the nonagency context. Soucie, supra (Office of Science and Technology as both agency and presidential staff); Sharp v. FDIC (D.C.D.C., Civil No. 75-1428, Oct. 15, 1975) (FDIC-in role as State court-appointed receiver bank - not required to release confidential financial records of bank in receivership in response to an FOI request.)

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00499 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.351

from James Smithson's original bequest and from the subsequent generosity of other private donors. It employes many persons who are compensated entirely from the trust funds of the Institution, including its chief executive officer, the Secretary, and it has long carried out many activities with solely private funds, using no appropriated monies or federal employees.

While the Smithsonian has always been an instrumentality of the United States since it is established to fulfill the nation's trust obligations, it has also been long recognized as distinct from the ordinary governmental structure of the nation. The Senate Committee Report supporting the original legislation 3/ to establish the Institution recognized this special nature of the Institution when discussing how the trust funds were to be handled:

> The fund given to the United States by Mr. Smithson's will, is nowise, and never can become, part of their revenue; they cannot claim or take it for their own benefit; they can only take it as trustees, to apply to the charitable purpose for which it was intended by the donor. (Quoted in Rhees, The Smithsonian Institution, at 139 (1879)).

The same point is repeated, with great authority, throughout the history of the Institution. Chief Justice Taft in 1927 said:

> I must make clear, gentlemen, that the Smithsonian Institution is not, and has never been considered a government bureau. It is a private institution under the guardianship of the Government.

Another Senate Report, issued in 1855 in connection with the unsuccessful effort to compel the Smithsonian to become a major national library as an operating organ of government,

3/ 5 Stat. 64.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00500 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.352

notes that the trust monies are not to be used for the governmental purposes of the United States, but in trust to apply the increase and diffusion of knowledge among mankind generally. Rhees, supra, pp. 563-4.

Two other Chief Justices of the United States, on separate occasions, also emphasize the unique character and independence of the Smithsonian. Chief Justice Stone opposed extension of mandatory federal retirement coverage to employees of the Smithsonian who were compensated by use of trust funds because it

> might jeopardize the private status of the Smithsonian Institution . . . and might have the effect of invalidating the Trusts which are administered for the benefit of those institutions. Those Trusts contemplate that the private character of the Smithsonian Institution and the National Gallery of Art shall continue and that certain of their employees shall remain private employees. (Letter to Civil Service Commission, June 25, 1943.)

Chief Justice Vinson noted that

> absolute control over the appointment, compensation, direction and removal of the trust fund employees of the Smithsonian Institution is vested in the Regents of the Institution by the . . . Charter. (Letter to Chairman, Civil Service Commission, May 4, 1953.)

Thus, in his view Smithsonian trust fund employees were not subject to Civil Service Commission regulation as federal employees.

The Institution is an establishment unique unto its own terms, created to further private ends which coincide with public desires. Its range of activity is immense, covering the entire spectrum of educational, scientific, and cultural activities. Its unique blend of public and private expertise and resources enables the Smithsonian to undertake plans and

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00501 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.353

actions which would have been beyond the authority or pocketbook of either alone. As the trust instrumentality of the United States the Institution has created a repository of knowledge and beauty unique in the history of mankind, freely available for public inspection and study. Under its "private" trust mandate the Smithsonian has sponsored and undertaken the development of musical, literary and scientific efforts which might well have been outside the authority of a purely governmental agency. Acting with both public and private support, the Smithsonian has preserved a view of our past and a vision of our future with special value to all mankind, whether of American citizenship or not.

This mixture of resources and accomplishments is one without counterpart in the United States, and cannot lightly be forced into a mold meant to accommodate the commonplace instruments of day-to-day federal administration and regulation. The Smithsonian performs none of the purely operational functions of government which have been given such significant weight in determinations of agency status in other cases. It neither makes rules of general application binding the public nor adjudicates disputes of that character. It issues no orders. It regulates no industry or profession. Although created by the United States as an instrument of national trust, it plays no part in the process of administration, regulation, and government. It is not a "Government corporation," or a "Government-controlled corporation," and--with a governing body headed by the Chief of the Judicial branch and largely appointed by the Legislative branch--cannot be viewed as an establishment within the Executive branch of government. It neither functions under the President nor is it accountable to him. In sum, the Smithsonian Institution is not a body of the kind described in the three Acts in question.

The strength and thrust of those three statutes is their concept of public accountability and public responsibility in the operation of federal agencies. They were not intended to be applied to instrumentalities of the United States which do not fill an administrative, operational, regulatory, or executive role within the government. Thus, the Smithsonian Institution is not within their mandatory coverage.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00502 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.354

JUN 13 1974

MEMORANDUM TO HONORABLE WILLIAM E. CASSELMAN II
Legal Counsel to the Vice President

Re: Draft Standards of Conduct for the Office of the Vice President

This responds to your request of May 31, 1974, to Mr. Ulman for our views on the draft Standards of Conduct for the Office of the Vice President.

It appears that for general purposes you believe that employees of the Vice President's staff should legally be treated generally in the same manner as employees of the Executive Office of the President. In that regard we note that your draft Standards of Conduct, with minor exceptions, tracks 3 CFR Part 100, the Standards of Conduct applicable to agencies in the Executive Office of the President, all of whose employees are plainly in the executive branch. In that connection you state in section 1(c) that "the standards set forth herein reflect prohibitions and requirements imposed by the laws of the United States." This is true, of course, as regards 18 U.S.C. 202, 203 and 205, which apply to employees both in the executive and legislative branches. On the other hand, 18 U.S.C. 207 (post-employment prohibitions), 18 U.S.C. 208 (acts affecting a personal financial interest), and 18 U.S.C. 209 (salary of officials and employees payable only by the United States), apply solely to employees in the executive branch. This raises a legal issue of importance. If a criminal prosecution were brought against a particular employee on the Vice President's staff for an alleged violation of 18 U.S.C. 207, 208, or 209, the employee could raise the question that these prohibitions are inapplicable because he is paid from funds appropriated to the legislative branch (assuming that to be the case), and because the Vice President under the Constitution is primarily in the legislative branch. We need not, however, reach this difficult question because there is nothing to prevent the Vice President by regulations from imposing the same general standards on all his employees, whether they are in the executive br legislative branch, as are imposed by the President under 3 CFR Part 100 on employees in the component agencies of the Executive Office of the President. Indeed, we think that this is a

38236.355

salutary policy. But even if criminal sanctions may not be imposed on the Vice President's employees to the extent that some or all of them are in the legislative branch, there are other lesser sanctions which might be invoked such as reprimand, dismissal, or other forms of appropriate action designed to discourage any conduct that may result in, or create the appearance of, potential conflict by employees in the Vice President's office. (See section 25.)

For the foregoing reasons we do not believe that the authority of 18 U.S.C. 207, 208 and 209 should be cited as though they were clearly in point. Rather they might better be referred to merely as a source reflecting the underlying purpose and spirit of the particular standard of conduct involved.

This approach would call for technical changes as follows:

P. 8, line 5:

Add "cf." prior to 18 U.S.C. 208.

P. 10, lines 7, 9:

On line 7, delete the words "pursuant to § 208 of Title 18, United States Code." Add after the word "employee" on line 9 of p. 10 the following: (cf. 18 U.S.C. 208).

P. 10, lines 14-16:

Delete the words on lines 14-15 "pursuant to the provisions of section 208 of Title 18, United States Code" and on line 16, "or section 208 of Title 18."

P. 12, lines 6,13,19-20:

Add the word "cf." prior to the statutory references "(18 U.S.C. 207(a))," "(18 U.S.C. 207(b))," and "18 U.S.C. 209."

P. 14, lines 15-16:

Delete the words "207 of Title 18, United States Code" and add in their place "10(a) (2), (3) hereof."

P. 15, lines 2-3:

Delete the words "for in sections 205, 207, or 208 of Title 18, United States Code," and add in their place, the word "herein."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00504 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.356

P. 15, line 10:

Add the word "cf." prior to "18 U.S.C. 209."

P. 26, lines 16-17; p. 27, line 4:

Add the word "cf." prior to "18 U.S.C. 207(a)" on p. 26, and prior to "18 U.S.C. 207(b)" on p. 27.

P. 32, last line:

Delete the words "18 U.S.C. 208 or."

In addition to these technical suggestions, your attention is called to the following matters:

Sec. 4(b), p. 3, 3 lines from bottom:

Add after the word "Commission," the words "and the Department of Justice."

Sec. 4(d), p. 4, line 4:

Consider shortening the period of notification to "30" days.

Sec. 13(b) (3), p. 17, lines 4 to 12:

This subsection would permit reimbursement for travel and subsistence expenses in connection with official Government duties from a professional organization such as the American Medical Association. Such reimbursement may raise the question as to an unlawful augmentation of appropriations. See 46 Comp. Gen. 689 (1967); 37 Comp. Gen. 776 (1958). Moreover, we question the policy of such a provision from the viewpoint of appearance. The AMA is a recognized lobbying organization whose activities and position are frequently controversial. It is often interested in important legislation being considered by the Congress. In some instances, the Vice President may decide to take a position regarding such legislation. We do not think that employees in his office should be in a position where it could appear that they are under obligation to the Association. Possibly there is less likelihood of such appearance problems where the American Bar Association is concerned, but that too is not entirely remote as, for example, concerning "no-fault" insurance legislation. For this reason we would suggest deleting proposed section 13(b)(3).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00505 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.357

Sec. 21(a)(2), (3), p. 26:

Prior to the word "matter" (7 lines from bottom and on last line), add the word "particular."

Sec. 22, p. 29:

We note that the draft does not contain a provision like that contained in 3 CFR 100.735-22(o), which expressly prohibits employees in the agencies in the Executive Office of the President from engaging in political activities under the Hatch Act and activities barred by 18 U.S.C. 602, 603, 607, and 608. The Hatch Act applies only to employees in the executive branch (with an exception for employees paid from the appropriation for the office of the President). 5 U.S.C. 7324. This raises an issue somewhat like that involving 18 U.S.C. 207, 208, and 209, discussed above. However, application of the Hatch Act is basically a matter for the Civil Service Commission, and we are reluctant to comment on the issue without the benefit of the views of the Commission. We have not consulted the Commission, but suggest that you may wish to consult it. Should any problem arise in this area, we will be happy to assist.

We think that all employees in the Office of the Vice President would be subject to the provisions of 18 U.S.C. 602, 603, 607, and 608. Those provisions are applicable to all employees of the United States. Failure to bring these sections to the attention of employees may lull them into a sense of false security, and possibly even be misleading where the other prohibitions listed in 3 CFR 100.735-22 would apply to employees in the Office of the Vice President.

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00506 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.358

AUG 20 1974

Laurence H. Silberman
Deputy Attorney General

Robert G. Dixon, Jr.
Assistant Attorney General
Office of Legal Counsel

Whether Governor Rockefeller, if appointed as Vice President, is required to execute a blind trust in order to avoid possible violation of 18 U.S.C. 208

This responds to the above question presented to Mr. Ulman by Mr. Wilderotter orally. For reasons discussed hereafter, our answer is in the negative. The Vice President would, however, have to disqualify himself from participating as an officer in the executive branch in particular matters which have an effect on his personal financial interests or those of his wife or minor children, if any.

1. 18 U.S.C. 208(a), so far as relevant here, requires an officer or employee of the "executive" branch to refrain from participating personally and substantially in any particular governmental matter in which, "to his knowledge," he, his spouse, or minor child has a financial interest. If he does not do so, he is subject to criminal prosecution.

2. Prior to enactment of the conflict of interest law in 1962 (now 18 U.S.C. 202-209), a non-statutory procedure had been devised for President Eisenhower and other executive branch officeholders designed to obviate conflicts of interest problems arising from their substantial financial holdings. This was the so-called "Blind Trust." The appointee entering government service placed his holdings in a trust held by an independent trustee, the trust to terminate on the appointee's completion of his government service. The appointee was not informed as to the sale of assets deposited in the trust, or as to what new assets were purchased, nor did he have any power of control over the assets in the trust during its duration.

The view has been expressed by a leading authority on the conflict of interest law that the requirement of "knowledge for prosecution under section 208 . . . lends statutory sanction to

38236.359

the /blind trust/ procedure established for President Eisenhower and others to shield them from conflict of interest problems . . . ."*/

3. The conflict of interest statute, however does not by its terms apply to a President or Vice President. But the language of the bribery statute (18 U.S.C. 201), enacted at the same time as the conflict of interest statute, applies to "any person who has been nominated or appointed to be a public official." 18 U.S.C. 201(a). This language appears to be broad enough to apply to a Vice President nominated and appointed under the Twenty-Fifth Amendment. Absent any contrary evidence of congressional intent, we are inclined also to conclude that 18 U.S.C. 208 applies to the Vice President. It is arguable, however, that under the Constitution he is primarily in the legislative branch, and, therefore, 18 U.S.C. 208 is inapplicable. On the other hand, the Vice President also performs executive functions, which include participation in all Cabinet meetings and, by statute, membership in the National Security Council, among others. In addition, by Executive order, the Vice President is a member of the Domestic Council. On these occasions, he is serving as an officer of the executive branch.

4. However, even if the Vice President is regarded as subject to 18 U.S.C. 208, that section does not <u>require</u> him to put his financial holdings in a blind trust. Indeed section 208 makes no reference whatever to a blind trust. If he does not establish a blind trust, he would be obliged by section 208 to disqualify himself from participating personally and substantially in any <u>particular</u> matter in which, to his knowledge, he, his spouse, minor child or organization in which he is serving as officer, director, trustee, or partner has a financial interest. But it is doubtful but possible that any such matter would arise as to a Vice President.

---

*/ Roswell B. Perkins, <u>The New Federal Conflict of Interest Laws</u>, 76 Harv. L. Rev. 1113, 1134 (1963). See also, the Report of the Special Committee, Association of the Bar of the City of New York, <u>Conflict of Interest and Federal Service</u> (1960), pp. 249-50.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00508 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.360

Aug. 28, 1974

8/28/74

MEMORANDUM FOR RICHARD T. BURRESS
Office of the President

Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution

This responds to your request to consider various conflict of interest questions which may arise out of the nomination by the President of Mr. Nelson A. Rockefeller to the office of Vice President in accordance with the Twenty-Fifth Amendment.

Preliminarily, we have no knowledge of the extent, scope, or nature of Mr. Rockefeller's financial interests, nor do we know to what degree the President will delegate functions to the Vice President, the discharge of which may possibly give rise to an actual conflict of interest or create the appearance of a conflict of interest. Moreover, the legislative history of the Twenty-Fifth Amendment, pursuant to which Mr. Rockefeller has been nominated as Vice President, is silent as to possible conflicts of interest; the subject does not appear to have been of any concern to the Congress when it proposed the Amendment.

If there is any statutory provision which deals with possible conflicts of interest of a Vice President, it is 18 U.S.C. 208 (Appendix A). In brief, 18 U.S.C. 208(a) requires an officer or employee of the "executive branch" to refrain from participating personally and substantially in any particular matter in which "to his knowledge," he, his spouse, minor child, partner or organization in which he is serving as officer, director or trustee has a financial interest. Provision is made in section 208(b) for waiver of the disqualification requirement where the outside financial interest is deemed not substantial enough to affect the integrity of the employee's services. By official interpretation, a waiver is also available if the employee renders services of a general nature from which no preference or advantage may

38236.361

be gained by any particular person or organization. In addition, a "blind trust" procedure has been developed to deal with situations in which the divestment of financial interests by an employee at the time of his Government employment is not feasible.

In this setting, our discussion hereafter may be summarized as follows:

1. Section 208 does not expressly apply to either the President or the Vice President. The legislative history shows no such intention, and contains some indication to the contrary. The text of subsection (b) of section 208, by referring to "the Government official responsible for appointment to his position" tends to indicate that the section applies only to appointed officials--which category, at the time section 208 was enacted, could not include the Vice President. Some doubt exists as to the constitutionality of applying section 208 to the President; and such doubt is avoided with respect to the Vice President only because his single constitutionally enumerated function (presiding over the Senate) is not an "executive branch" function--which fact removes it from the reach of section 208, but also arguably removes the Vice President from coverage. For these reasons, it seems likely that section 208 would not be interpreted to apply to the President or Vice President.

2. If section 208(a) should be construed to apply to the Vice President, he can disqualify himself from participating in a particular matter in which he, members of his family or business associates have a financial interest. If the Vice President's interests in a matter are so insignificant as not to affect the integrity of his services or if he will render advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization, the President may grant the Vice President a waiver from the coverage of section 208.

3. Mr. Rockefeller may execute a blind trust of his financial holdings, which may negate the element, essential to establishment of a section 208 violation, that "to his knowledge," he, members of his family, or his business associates have a financial interest in a particular matter. He is not, however, required to take this step, so long as he disqualifies himself as section 208(a) demands.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00510 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.362

4. Following the precedent established by David Packard, when confirmed as Deputy Secretary of Defense, Mr. Rockefeller may agree to devote any profits derived from his financial holdings while he serves as Vice President to charity. Once again, he is not required to take this step so long as he disqualifies himself as section 208(a) demands.

5. Of course whether or not section 208 is applicable or is avoided by one of the above-described devices, Mr. Rockefeller will as a practical matter have to provide whatever financial assurances the House and Senate require as a condition of his confirmation.

1. The language of section 208.

Section 208(a) prohibits an "officer or employee of the executive branch" from participating as such in a particular matter in which, "to his knowledge," he, his spouse, minor child, partner or other business associates with which he is connected, have a financial interest. In this respect section 208 is unqualified. However, section 208 does not refer to, or specifically cover, the President or Vice President. Moreover, the legislative history of sections 202-209 (the conflict of interest provisions), as evidenced by committee reports and debates in the Senate and the House of Representatives, fails to demonstrate that section 208 was intended to apply to the Chief Executive and his immediate successor. In seeking to ascertain the intention of Congress, reference may be made to the report, Conflict of Interest and Federal Service (1960), prepared by the Special Committee on the Federal Conflict of Interest Laws, the Association of the Bar of the City of New York (Bar Association Report), where it was said (pp. 16-17):

> The role of the Presidency is a vital aspect of the administration of conflict of interest restrictions in the executive branch, and the proper function of the Chief Executive in this field is a major center of consideration in this study. But the conflict of interest problems of the President

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00511 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.363

and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch. For example, as Chief of State, the President is the inevitable target of a running stream of symbolic gifts pouring in from all over the world, for reasons ranging from the best to the worst. The uniqueness of the President's situation is also illustrated by the fact that disqualification of the President from policy decisions because of personal conflicting interests is inconceivable. Personal conflict of interest problems of the Presidency and the Vice Presidency are unique and are therefore not within the scope of this book.

While the recommendations of the Bar Association Report were not entirely accepted in the bill as enacted, both the House and Senate committees reporting on the bill and members of Congress in debate paid tribute to the contributions made by the Bar Association in the ultimate formulation of the bill. See, e.g., H. Rept. No. 748, 87th Cong., 1st Sess. 8 (1961); S. Rept. No. 2213, 87th Cong., 2d Sess. 4 (1962). It seems most unlikely that disagreement on so important a portion of the Bar Association's position, that personal conflict of interest problems of the President and the Vice President "must inevitably be treated separately from the rest of the executive branch," would have gone without mention in both congressional committees and in floor debate. It seems more reasonable to conclude from this legislative history that Congress in speaking of an "officer or employee of the executive branch" in section 208 meant to include solely those "officers of the United States" who receive their appointment from the President under Article II, section 3, of the Constitution and those subordinate employees who are employed by various departments and agencies of the executive branch. This conclusion is strengthened by the fact that the exceptions contained in subsection (b) of section 208 assume the existence of an "official responsible for appointment" of the officer or employee in question. It is possible, of course, that this was merely meant to indicate by omission, the unavailability of an exception for nonappointed officers or employees; but one would think that an exception mechanism would be more necessary for the President and Vice President (if they were covered) than for other officials. On balance, subsection (b) tends to negate coverage of nonappointed officials--into which category, before the Twenty-Fifth Amendment, the Vice President invariably fell.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00512 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.364

These considerations of legislative history and statutory language are buttressed by two canons of statutory construction applicable in this case. The first is that interpretations which give rise to serious questions of constitutionality should be avoided if reasonably possible. The effect of applying section 208 to the President is arguably either to disempower him from performing some of the functions prescribed the Constitution or to establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution. The same may be said with respect to the Vice President, unless the Vice President's only constitutionally prescribed function (presiding over the Senate) is not covered by section 208 because it is not an executive act (in which case it can be asserted, as described below, that the Vice President is not an officer of the executive branch and hence not covered by section 208 with respect to any of his activities). In any event, whether or not application of section 208 to the Vice President is constitutionally questionable, it would seem that any reasonable construction of the statute would treat the President and the Vice President alike. Since there are clearly constitutional problems with respect to the President, the statute would probably not be interpreted to apply to either official.

Another canon of construction calls for strict construction of a criminal statute--which is what is at issue here. It would be strange for Congress to subject the President and the Vice President to possible criminal prosecution without naming them explicitly on the basis of such converted issues as those discussed above. This is not a situation like the bribery statute (18 U.S.C. 201), where from the nature of the offense charged, no one, however exalted his position, should safely feel that he is above the law. 1/

1/ It may be noted in this connection that in the proposed new Criminal Code, section 111 of S. 1400 defines "public servant" to include a "United States official" which in turn explicitly includes the President and Vice President. But it is proposed by section 338 of the bill to place the provisions of 18 U.S.C. 202-209 in title 5, U.S. Code, where a clear-cut distinction has always been made between the President on one hand and employees in the executive branch on the other for whose conduct the President is authorized to prescribe regulations. See, e.g., the Hatch Act, 5 U.S.C. 7321, 7322.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00513 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.365

Although we think that these arguments are dispositive of the matter, without regard to them it can be argued that the Vice President is not an officer of the executive branch within the meaning of section 208, but rather primarily one in the legislative branch. See Appendix B.

2. Disqualification under section 208(a); waiver under section 208(b).

If section 208(a) were to be construed as applying to a Vice President, this factor does not disqualify Mr. Rockefeller from serving in that office. In order to comply with that provision, he is merely required to disqualify himself from participating in particular matters in which, "to his knowledge," he, members of his family or business associates have a financial interest. However, section 208 does not require the officer subject to it to remove himself from every situation. Section 208(b) authorizes the Government official responsible for the appointment of the officer or employee (here the President) to grant the latter an ad hoc exemption if the outside interest in the matter is deemed not substantial enough to have an effect on the integrity of his services. Financial interests of this kind may also be exempted by a general regulation published in the Federal Register. Moreover, in dealing with waivers under section 208(b), President Kennedy, shortly after the conflict of interest law was enacted, stated (memorandum of May 2, 1963):

> Whether an agency [here the President] should issue a general rule or regulation and, if it [he] does so, what standards it [he] should set are questions which should be resolved by each agency [the President] in the context of its [his] particular responsibilities and activities.

The same memorandum also stated that the power of exemption may be exercised under section 208(b) if the employee "renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization" 2/

2/ Although President Kennedy referred to "special" Government employees, section 208(a) does not distinguish between special and regular employees, and both classes are covered. We are reliably advised that the President intended his statement on waiver in this regard to apply across the board. The substance of President Kennedy's statement has been embodied by the Civil Service Commission in Federal Personnel Manual, App. C, 735-C-1 (Cont'd)

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00514 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.366

While we do not know at this time precisely what duties the President will delegate to the Vice President, it is entirely possible that the Vice President will be able to discharge many of them efficiently and effectively pursuant to a Presidential waiver under section 208(b), without actual or apparent conflict of interest.

3. The blind trust and the statute

We have seen that section 208(a) requires as an element of the offense that the officer or employee have personal knowledge of his disqualifying interest.

Prior to enactment of the conflict of interest law in 1962, a procedure had been established for President Eisenhower and other officeholders such as John A. McCone of the Atomic Energy Commission, intended to obviate conflict problems arising from substantial stockholdings and other financial interests. This was the so-called "blind trust." The official entering Government service placed his securities in a trust held by an independent trustee, the trust to terminate on the official's completion of his Government service. The official was not informed as to the sale or purchase of securities in the trust, nor did he have any power of control or distribution.

The view has been expressed by a leading authority on the conflict of interest law that the requirement of "knowledge for prosecution under section 208 . . . lends statutory sanction to the 'blind' trust procedure established for President Eisenhower and others to shield them from conflict of interest problems . . . ." 3/ Apparently, the blind trust procedure has been accepted by Senate committees considering nominations of officers in the executive branch, who for various reasons were unable or unwilling to divest themselves of their financial interests.

2/ (Cont'd from p. 6)

of November 9, 1965. This was done pursuant to section 703(e) of Executive Order No. 11222 of May 8, 1965.

3/ Roswell B. Perkins, The New Federal Conflict of Interest Laws, 76 Harv. L. Rev. 1113, 1134 (1963).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00515 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.367

This does not mean that in the view of the Department of Justice a blind trust ipso facto immunizes the settlor from the operation of 18 U.S.C. 208. If, for example, Mr. Rockefeller owned $10 million worth of Standard Oil stock, he might be under a legal duty to assume that he still owned the stock unless he received notice that the stock had been sold. Accordingly, if Mr. Rockefeller decides to utilize a blind trust of his financial interests he should disqualify himself from those transactions which possibly relate to companies in which he holds substantial blocks of securities until he ascertains that in fact those securities are no longer held in his portfolio. If he adheres to this principle, he can still discharge many important duties which the President sees fit to delegate to him without fear of violating the conflict of interest statute.

4. The David Packard precedent.

Beginning about 1953, and until David Packard took office as Deputy Secretary of Defense in 1969, it was customary for the Senate Armed Services Committee to require Defense Department appointees to dispose of their stockholdings in companies doing business with the Pentagon.[4] When David Packard was under consideration by the Senate Committee to serve as Deputy Secretary of Defense, he explained that his holdings in the Hewlett-Packard Company, a Defense contractor, amounted to about 3,550,000 shares, and that the sale of the stock on the open market would have a harmful effect upon the company and its stockholders. Mr. Packard stated that he was willing to establish a charitable trust which would devote all income from this stock to charitable purposes for not less than two years and so long thereafter as his period of government service extended.[5] This arrangement satisfied the Senate Committee as striking the right balance between the need for recruitment of key executive manpower for the Government and the need for preserving moral and ethical principles.

---

[4] This was the so-called "Absolute Principle," developed as a result of the Wilson controversy in 1953. See Manning, The Purity Potlatch, 24 Fed. B.J. 239, 246 (1964).

[5] Nomination of David Packard, Hearings before the Committee on Armed Services, U.S. Senate, 91st Cong., 1st Sess. (1969). 42-43.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00516 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.388

When Mr. Packard left the Government, about $6 million went to charity. The arrangement was relatively free from public criticism. It suggests a possible course of conduct for Mr. Rockefeller which should satisfy both congressional doubts and the strict requirements of section 208. Of course in the case of Mr. Rockefeller the financial interests in question would not merely be those related to defense contracts, and that may render the device impractical as a total solution to the problem. Nevertheless, it might be used with respect to those holdings that raise the most obvious risks of conflict.

5. Accommodation.

The options discussed under paragraph 2 above only meet the legal point at issue and do not attack the practical problem that is at least equally important: Regardless of whether the provisions of section 208 are applicable or are technically satisfied, the Congress may require, as a condition of confirmation, some action on the part of Mr. Rockefeller which would satisfy it that his financial holdings would not create a real or apparent conflict of interest. Such conditions, as discussed in the Committee Reports on confirmation, might well be coupled with a conclusion that section 208 is inapplicable. Should Congress insist on conditions, we do not believe it would be possible to assert that it would be acting against either the spirit or the letter of the Constitution since any such conditions would be presumably related to the nominee's adequate discharge of his responsibilities. Thus, the suggestions contained in paragraphs 3 and 4 must be considered even if other points are dispositive of the narrow legal issue.

Larry Silberman

Laurence H. Silberman
Deputy Attorney General

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00517 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.369

SEP 20 1974

Honorable Howard W. Cannon
Chairman, Committee on Rules
and Administration
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your letter to the Attorney General of September 16 in connection with the hearing to be held by your committee on the nomination of Nelson A. Rockefeller to be Vice President of the United States.

You have asked for a summary and analysis of the Federal conflict of interest law, 18 U.S.C. 208, and of any other statutes which might apply to Mr. Rockefeller if he were confirmed as Vice President. In addition, you have specifically requested an opinion as to whether it would be lawful for Mr. Rockefeller, while serving as Vice President, to be an officer, director or stockholder of, or to hold any other beneficial interest in, any company having contracts with any agency of the United States Government.

I should note at the outset that the legislative history of the Twenty-Fifth Amendment, pursuant to which Mr. Rockefeller has been nominated as Vice President, is silent as to the question of conflict of interest; the subject does not appear to have been of any concern to the Congress when it proposed the amendment. There are, however, two statutes which are relevant to the questions you raise. One, as noted in your letter, is 18 U.S.C. 208; the other is 18 U.S.C. 431.

38236.370

18 U.S.C. 208

In substance, 18 U.S.C. 208(a) prohibits an officer or employee of the "executive branch" from participating personally and substantially in any particular matter in which "to his knowledge," he, his spouse, minor child, partner or organization in which he is serving as officer, director or trustee has a financial interest. Section 208(b) authorizes a waiver of the prohibition by the "official responsible for appointment" where the outside financial interest is deemed not substantial enough to affect the integrity of the officer's or employee's services.

To summarize the views expressed in detail below: Section 208 does not expressly apply to the Vice President. Some of its language and its legislative history indicate the contrary. Moreover, serious doubt as to constitutionality urges against an interpretation which would render Section 208 applicable to the President; and it seems almost certain that the President and Vice President were intended to be treated alike.

Section 209(a) prohibits an "officer or employee of the executive branch" from participating as such in a particular matter in which, "to his knowledge," he, his spouse, minor child, partner or other business associates with which he is connected, have a financial interest. The section does not refer to, or specifically cover, the President or Vice President. Moreover, the legislative history of sections 202-209 (the conflict of interest provisions), as evidenced by committee reports and debates in the Senate and the House of Representatives, does not demonstrate that section 208 was intended to apply to the Chief Executive and his immediate successor. In seeking to ascertain the intention of Congress, it is useful to refer to the report, Conflict of Interest and Federal Service (1960), prepared by the Special Committee on the Federal

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00519 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.371

Conflict of Interest Laws, the Association of the Bar of the City of New York (Bar Association Report), where it was said (pp. 16-17):

> The role of the Presidency is a vital aspect of the administration of conflict of interest restrictions in the executive branch, and the proper function of the Chief Executive in this field is a major center of consideration in this study. But the conflict of interest problems of the President and the Vice President as individual persons must inevitably be treated separately from the rest of the executive branch. For example, as Chief of State, the President is the inevitable target of a running stream of symbolic gifts pouring in from all over the world, for reasons ranging from the best to the worst. The uniqueness of the President's situation is also illustrated by the fact that disqualification of the President from policy decisions because of personal conflicting interests is inconceivable. Personal conflict of interest problems of the Presidency and the Vice Presidency are unique and are therefore not within the scope of this book.

While the recommendations of the Bar Association were not entirely accepted in the conflict of interest legislation as enacted, both the House and Senate committees reporting on the bill and members of Congress in debate acknowledged the contributions made by the Bar Association in the ultimate formulation of the legislation. See, e.g., H. Rept. No. 748, 87th Cong., 1st Sess. 8 (1961); S. Rept. No. 2213, 87th Cong., 2d Sess. 4 (1962). It seems most unlikely that disagreement on so important an aspect of the Bar Association's report -- that personal conflict of interest problems of the President and the Vice President "must inevitably be treated separately

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00520 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.372

from the rest of the executive branch" -- would have gone without mention by both committees and in floor debate. I believe it more reasonable to conclude that Congress in speaking of an "officer or employee of the executive branch" in section 208 meant to include only those "officers of the United States" who receive their appointment from the President under Article II, section 3, of the Constitution and those subordinate officials who are employed by departments and agencies in the executive branch.

My belief is strengthened by the fact that the waiver provision in subsection (b) of section 208 assumes the existence of an "official responsible for appointment" of the officer or employee in question. At the time the statute was enacted, of course, the Vice President was elected; and the subsequent Twenty-fifth Amendment to the Constitution does not use the term "appointment" in describing the President's role in the selection of his successor. It is conceivable, of course, that the provision of a waiver procedure exercisable only by the "official responsible for appointment" was merely meant to indicate by omission the unavailability of a waiver for nonappointed officers or employees; but one would think that an exempting mechanism would be more necessary for the President and the Vice President (if they were covered) than for other officials. On balance, subsection (b) tends to negate coverage of the President and Vice President.

These considerations derived both from the statutory language and its legislative history are buttressed by two applicable canons of statutory construction. The first is that interpretations which give rise to serious questions of constitutionality should be avoided if reasonably possible. The effect of applying section 208 to the President is certainly either to disable him from performing some of the functions prescribed by the Constitution or to establish a qualification for his serving as President (to wit, elimination of financial conflicts) beyond those contained in the Constitution. The same may be said with respect to the Vice President, unless the Vice President's only constitutionally

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00521 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.373

prescribed function (presiding over the Senate) is not covered by section 203 because it is not an executive act. In any event, whether or not application of section 203 to the Vice President is constitutionally permissible, it would seem that any reasonable construction of the statute would treat the President and the Vice President alike. In light of the weighty constitutional problems with respect to the President, the statute should not be interpreted to apply to either official.

Another canon of construction calls for strict construction of a criminal statute -- which is what is at issue here. It would argue strongly against interpreting the statute to apply to the President and Vice President in light of what must be conceded to be (at very least) the textual uncertainty described above.

Although, as I see it, these considerations are dispositive, without regard to them it might be asserted that the Vice President is not an officer of the executive branch for purposes of section 203. The Vice President's only constitutionally prescribed function is that of presiding over the Senate. Article I, sec. 3, cl. 4.

18 U.S.C. 431

As to your specific question concerning the permissibility of a Vice President's financial or managerial connection with a Government contractor: The only possibly relevant statute of which we are aware is 18 U.S.C. 431, dealing with contracts by a "Member" of Congress. It prohibits the member "directly or indirectly, himself or by any person in trust for him, or for his use or benefit, or on his account" from undertaking, executing, holding, or enjoying, in whole or in part, any contract made on behalf of the United States or any agency thereof, by any officer or employee authorized to make contracts on its behalf.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00522 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.374

The key issue thus is whether the Vice President is a "Member of . . . Congress" within the meaning of 18 U.S.C. 431. I do not so regard him. Certainly the Vice President is not a Member of Congress as that term is used in the Constitution. To be sure, for certain purposes he can be regarded as being in the legislative branch. Thus, for example, the Vice President is empowered to be President of the Senate and to vote in the event of an equal division in the Senate. Art. 1, sec. 3, cl. 4. Unlike Members of the Senate, however, the Vice President (like the President) is subject to impeachment. Art. II, sec. 4. Moreover, while clauses 1 and 2 of section 5 of Article I provide that each House shall be the judge of the elections, returns and qualifications of its own "members" and may punish them for disorderly behavior and expel them, these clauses plainly do not apply to the Vice President. The Constitution also provides that no person holding "any Office under the United States" (which, of course, includes the Vice President), shall be a "Member of either House" during his continuance in office. Art. 1, sec. 6, cl. 2. Considered as a whole, these provisions indicate that the Vice President has a unique status in the legislative branch, but not the status of a "Member" of the Congress within the meaning of the Constitution.

Turning next to the meaning of "Member . . . of Congress" in the precise context of 18 U.S.C. 431: Since it is a criminal statute, to be strictly construed, I cannot interpret it to apply to the Vice President when it makes no specific reference to him, and when he is not regarded as a "Member" of either the House of Representatives or the Senate (the Congress) under the Constitution. It should be noted that the statute in question was passed less than twenty years after the Constitution was written, so that it is not unreasonable to assume a parallel use of terminology. This is particularly the case since our examination of the legislative history of that section discloses no mention whatever of the Vice President. Congress has not been at a loss for words when it intends a statute, criminal or civil,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00523 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.375

to reach offenses against a Vice President or to apply to him in other respects. */ For these reasons, I conclude that the statute does not apply to that office.

If you have any further specific questions, I will be glad to be of whatever help I can to the Committee.

Sincerely,

Lawrence R. Silberman
Acting Attorney General

---

*/ See, e.g., 18 U.S.C. 871, 1751; 10 U.S.C. 888, 934(2); 5 U.S.C. 2106. For example, in 5 U.S.C. 2106, which deals with Government organization and employees, it is provided: "For the purposes of this title, 'Member of Congress' means the Vice President, a member of the Senate or the House of Representatives . . . ."

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00524 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.376

DEC 19 1974

MEMORANDUM TO HONORABLE KENNETH A. LAZARUS
Associate Counsel to the President

RE: Applicability of 3 C.F.R. Part 100 to the President and Vice President.

This is in response to your request for an opinion from this Office regarding the applicability of 3 C.F.R. Part 100 to the President and Vice President personally. It is my conclusion that these regulations were not intended to and do not bind the President or Vice President.

The Part is addressed to "employees," which term is defined as officers or employees of an agency. 3 C.F.R. § 100.735-2(c). "Agency" is defined to include "the following agencies in the Executive Office of the President: the White House Office, the Council of Economic Advisors, the National Security Council, the Office of Science and Technology, and the Office of the Special Representative for Trade Negotiations, and any committee, board, commission, or similar group established in the Executive Office of the President." 3 C.F.R. § 100.735-2(a). The President is of course the head of the White House Office; both the President and Vice President are by law members of the National Security Council, 50 U.S.C. § 402(a), and by Reorganization Plan No. 2 of 1970 members of the Domestic Council, note 31 U.S.C. § 16; and the President is the chairman of the Council on Economic Policy. It might be argued, then, that they are "officers" of these "agencies" within the meaning of the regulations. In our view, however, other factors prevent such a conclusion.

3 C.F.R. Part 100 was issued in compliance with Executive Order No. 11222, note 18 U.S.C. § 201, and is based upon the provisions of that order, the regulations of the Civil Service Commission, 5 C.F.R. Part 735, and the statutory prescriptions of 18 U.S.C. §§ 202-209. See 3 C.F.R. § 100.735-1(b). The Civil Service Regulations are clearly not applicable to the

38236.377

President and Vice President; nor are the conflict of interest provisions of 18 U.S.C. §§ 202-209 (see Attachment). Those regulations in 3 C.F.R. Part 100 merely interpreting or implementing those statutory provisions, therefore, would not apply to the President or Vice President. What remains is the Executive Order.

The Order (Section 705) defines "agency" and "employee" in such the same way as 3 C.F.R. Part 100, so that it could be thought to consider the President and Vice President "officers" of an "executive department." However, when the word "officer" is used in the Constitution, it invariably refers to someone other than the President or Vice President. Article II, Section 1, clause 6 (Congress may by law determine what Officer shall act as President if there be neither President nor Vice President); Article II, Section 2, clause 1 (President may require opinions from the principal Officer in each executive department); Article II, Section 2, clause 2 (President appoints all Officers of the United States except for inferior Officers, the appointment of whom Congress may vest elsewhere); Article II, Section 3 (President commissions "all the Officers of the United States"); Article II, Section 4 (the President, Vice President, and all civil Officers may be removed by impeachment); Article II, clause 3 (all executive and judicial Officers shall be bound by oath to support the Constitution, contrasted with the explicit oath prescribed for the President, in Article III, Section 1, clause 8); Article I, Section 8, clause 18 (Congress has power to make all laws necessary and proper for carrying into execution all powers vested by the Constitution "in any Department or Officer thereof;" inasmuch as Congress cannot legislate in those areas where the President is given exclusive power, e.g., the pardoning power, this phrase must refer to executive departments and the Officers therein, but not to the President.) The Supreme Court, moreover, has interpreted Article II, Section 2, clause 2, as being the exclusive means by which one may become an "officer." United States v. Germaine, 99 U.S. 508 (1878). This use of the word "officer" in the Constitution has led the Department of Justice consistently to interpret the word in other documents as not including the President or Vice President unless otherwise specifically stated. I would, therefore, not interpret the word "officer" in Section 705 of Executive Order

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00526 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.378

No. 11222 as including the President or Vice President--thus eliminating the last of the three possible bases for asserting that 3 C.F.R. Part 100 applies to them.

Such a conclusion would seem consistent with the intent of President Johnson, who issued the Executive Order and signed the regulations. While directing all top officials in the executive branch to file statements of financial interests with the Chairman of the Civil Service Commission, the Order does not require the President or Vice President to do so. See Section 401. Moreover, President Johnson in announcing the Order continually referred only to "executive branch personnel," see Public Papers of the Presidents -- Lyndon B. Johnson, 1965(I), at 514; it is most unlikely that, if he had intended to bind himself as well, he would not have made specific mention of the fact.

With regard to the Vice President there is even a constitutional question whether the President can direct him to abide by prescribed standards of conduct. The Vice Presidential Office is an independent constitutional office, and the Vice President is independently elected. Just as the President cannot remove the Vice President, it would seem he may not dictate his standards of conduct. (As a practical matter, of course, the President could require certain standards from the Vice President in the discharge of any duties delegated to him by the President.)

Notwithstanding the conclusion that neither the Executive Order nor the regulations pursuant to it legally bind the President or Vice President, it would obviously be undesirable as a matter of policy for the President or Vice President to engage in conduct proscribed by the Order or regulations, where no special reason for exemption from the generally applicable standards exists. See Ex. Order No. 11222, Section 101 and 3 C.F.R. § 100.735-1(a). Failure to observe these standards will furnish a simple basis for damaging criticism, whether or not they technically apply. We would suggest, therefore, that if there are portions of these regulations which cannot feasibly be applied to the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00527 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.379

President or Vice President, these--and the reasons for their nonapplication--should be identified in an internal memorandum. If this is done in advance, the determination of nonapplication can be made, and can be recorded, outside the context of a particular fact situation which might otherwise cause the determination to be suspect.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

Attachment

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00528 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.380

The Attorney General

APR 6 1977

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

Attached herewith is a memorandum on the question of the applicability of the Hatch Act to the Vice President's staff. As you will note, our further research confirms our preliminary conclusion that the Hatch Act does apply. The application is quite technical, and we believe that if Congress had considered the question at the time of providing an appropriation for the Vice President's staff, it probably would have taken the necessary action to exempt that staff from the Hatch Act. However, the question was not raised, and the necessary action was not taken.

We have furnished no written advice to Vice President Mondale or his staff on this. I have informally communicated our findings to Mike Berman, Counsel to the Vice President, with my recommendation that if the Vice President wishes to continue to use his Executive Office staff for political work, he should seek legislative action immediately to exempt his staff from the Hatch Act. I suggested that an appropriate vehicle might be the supplemental appropriation for 1977 for the Executive Office of the President. All that would be required is the transfer of the budget item for the Vice President's staff from its present separate status to the general category of "White House Office." The Hatch Act provides that all members paid out of the appropriation for the Office of the President, which has since become the appropriation for the White House Office, are exempt from its coverage.

Berman has already begun work on an amendment to the supplemental appropriation to accomplish this purpose.

Incidentally, the Vice President has 30 staff members on the Senate payroll in connection with his position as President of the Senate. Those staff members are not covered by the Hatch Act. He has 22 staff members in the Executive Office Building. It is our view that these people would be covered by the Act.

Attachment

38236.381

APR 6 1977

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Application of the Hatch Act to the Vice President's Staff

At a meeting on March 21, Doug Huron, Associate Counsel to the President, and Mike Berman, Counsel to the Vice President, raised a question regarding the statement, in a footnote of our opinion on Presidential travel expenses, that members of the Vice President's personal White House staff are subject to the Hatch Act prohibition against participation in political management and political campaigns. 5 U.S.C. § 7324(a)(2).

In footnote 6 of our memorandum of March 15, 1977 to Mr. Lipshutz regarding political trips, we indicated that the exception in 5 U.S.C. § 7324(d)(1) for employees paid "from the appropriation for the office of the President" did not apply to persons paid from the separate line item in the Executive Office Appropriation Act of 1977 for "expenses necessary to enable the Vice President to provide assistance to the President in connection with specially assigned functions." Prior to drafting the footnote, Ed Kneedler of our office contacted the Hatch Act section of the General Counsel's Office at the Civil Service Commission and was informed that the issue of the application of the Hatch Act to the Vice President's staff had apparently not arisen before and that we could not get the Commission's views within the short time remaining before our memorandum had to be sent to Mr. Lipshutz. We conducted our own study of the question and concluded on the basis of the legislative history of both the Hatch Act and the Appropriation Act that the Vice President's Office was covered.

On March 21, Doug Huron gave Mr. Kneedler a copy of a letter written by former Civil Service Commission General Counsel Anthony Mondello in 1973, which stated that his office "has interpreted the language found in 5 U.S.C. § 7324(d)(1) to be applicable to employees paid from the

38236.382

appropriation for the White House Office or from appropriations made to provide assistance to the President in connection with special functions or projects." On this basis, and without further discussion, Mr. Mondello concluded that the Vice President's Special Counsel was exempt. We do not believe this conclusion is consistent with the original intent of the Hatch Act.

The predecessor of 5 U.S.C. § 7324(d) was introduced in 1939 in the House as a floor amendment to be substituted for the original § 9 of the Senate bill. 84 Cong. Rec. 9625. 1/ In introducing the amendment Congressman Dempsey explained that its purpose was to allow the President, the Vice President, and other policy-making officials to defend their actions in public. 84 Cong. Rec. 9626; see Id. at 9630. To serve this purpose, he continued, "the amendment . . . clearly exempts . . . the staff of the President and those who obtain their salaries from the appropriation made for White House purposes." Id.

At the time of the enactment of the Hatch Act in 1939, the appropriation for the "Office of the President," which provided for "personal services in the office of the President," was the only appropriation for personnel under the heading

1/ In pertinent part, the Dempsey Amendment as enacted in 1939 reads (53 Stat. 1148):

> For the purposes of this section the term "officer or employee" shall not be construed to include (1) the President or Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Clause (1) has since been stricken as unnecessary. See 5 U.S.C. § 7324, Historical and Revision Note.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00531 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.383

"Executive Office." 2/ Later that year the Executive Office of the President was established, and the Bureau of the Budget and other agencies were transferred to it. 3/ To reflect the change in organization, the next appropriation act carried a general heading for "Executive Office of the President." Instead of "Office of the President," the item covering "personal services" was entitled "White House Office." 4/ With changes in form, the appropriation for the President's personal staff has been carried under this item since then. 5/

2/ The item for "Office of the President" read:

> Salaries: For personal services in the office of the President, including the Secretary to the President, and two additional secretaries to the President at $10,000 each: $136,500: Provided, that employees of the executive departments and other establishments of the government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be deemed necessary. 53 Stat. 524.

3/ Reorganization Plan No. 1 of 1939, 53 Stat. 1423. The Plan does not mention the Office of the President or the White House Office.

4/ Independent Offices Appropriation Act of 1941, 54 Stat. 112. Except for an additional authorization for six administrative assistants, the language was identical to the prior act. Neither the President's message supporting the reorganization plan, the legislative response to the plan, nor the legislative history of the appropriation act discusses the change.

5/ The current item reads:

> For expenses necessary for the White House office as authorized by law, including not to exceed $3,850,000 for . . . other personal services without regard to the provisions of law regulating the employment and compensation of persons in the Government service; . . ." Executive Office Appropriations Act of 1977, 90 Stat. 966.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00532 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.394

In other words, the current item for "White House Office" is the lineal descendant of the only appropriation for Presidential staff that existed when the Hatch Act was passed. As new functions and agencies have been added to the Executive Office of the President, this item has continued as the source of the salaries of the inner circle of personal advisers to the President. 6/ It is this group of advisers, assistants, and speech writers whom the sponsor of the exemption viewed as adjuncts to the President in his role as a political officer.

During the 1939 debate on the Dempsey Amendment, Congressman Michener raised the issue of whether personnel of agencies such as the Bureau of the Budget which would be transferred to the Executive Office of the President under the proposed Reorganization Plan of 1939 would be covered by the "Office of the President" exemption. 84 Cong. Rec. 9633. To clarify this point, he offered a sub-amendment which would have restricted the exemption to positions in the Office of the President "as classified prior to the Reorganization Act of 1939." Id. When Mr. Michener's time expired, no member of the House, including Congressman Dempsey, attempted to address the point. There was no debate, and the proposal was never voted on. 84 Cong. Rec. 9634. The indifference of the House to the point suggests that the House considered the amendment unnecessary as it understood that the exemption clearly applied only to what Mr. Michener called "the President's secretariat and incidental employees," 7/ i.e., employees in "the Office of the President."

It is for these reasons that we conclude that the exemption to the Hatch Act in 5 U.S.C. § 7324(d)(1) was

---

6/ We raised this point in our memorandum of June 10, 1970, discussing whether the staff of the Domestic Council were covered by the Hatch Act (Attachment A).

7/ There is no discussion of the applicability of the Hatch Act in the legislative history of the 1941 Executive Office of the President appropriation.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00533 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.385

intended to apply only to persons paid from the item for "White House Office." OLC has previously advised the White House that the "office of the President" is the equivalent of the White House Office. 8/

It should be noted that persons detailed from other agencies to the White House are ordinarily subject to the Hatch Act since they are not paid out of the White House Office appropriation. 9/ In the Executive Office Appropriation Act of 1971, 84 Stat. 866, Congress significantly increased the appropriation for the White House Office by transfer from the item for Special Projects. The reason the transfer was requested was to pay Presidential staff who had been essentially on permanent detail from other agencies out of this item. 10/ Although the point was not raised in the legislative history of the 1971 Act, it is reasonable to conclude that the White House realized that the change would enlarge the number of employees who were clearly exempt from the Hatch Act.

In the same statute, a separate line item for "expenses necessary for the Vice President to provide assistance to the President in connection with specially assigned functions" was added for the first time. The spokesman for the Administration

8/ We have advised the White House that OMB personnel were subject to the Hatch Act (memorandum of September 4, 1970, Attachment B) and that Domestic Council staff paid under a separate item were subject to the Hatch Act (memorandum of June 10, 1970, Attachment A).

9/ We have advised the White House that detailed employees may be subject to the Hatch Act even if paid from this appropriation. (Memorandum of June 26, 1970, Attachment C). Authority to detail is provided by 3 U.S.C. § 107.

10/ Hearings Before a Subcommittee of the Appropriations Committee of the House of Representatives, Executive Office Appropriations for 1971, 91st Cong., 2d Sess., pp. 5-7. See also H.R. Rep. 91-994, 91st Cong., 2d Sess.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00534 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.386

testified before the House committee that over the years the responsibility of the Vice President to assist the President had increased and that he had been provided with a sufficient staff only by detailing employees from other agencies. The purpose of the appropriation, he explained, was to give the Vice President an explicit source of staff support for his governmental responsibilities in the executive branch. 11/ The legislative history does not discuss the applicability of the Hatch Act to these employees.

In light of the legislative history discussed above, it would be difficult to argue that persons paid from this item are within the scope of 5 U.S.C. § 7324(d)(1). If either the Administration or Congress had wanted them exempted from the Hatch Act, it could have been explicitly done by following the procedure used at the same time for detailed Presidential staff--shifting expenses from other appropriations to the "White House Office" item. Instead, a separate line item was requested and given. In addition, the Vice President retains his legislative staff, who are not covered by the Hatch Act. 12/ Since his legislative appropriation was not decreased in 1971 and subsequent years, it could have been expected that his

11/ Hearings before a Subcommittee of the Appropriations Committee of the House of Representatives, Executive Offices Appropriations for 1971, 91st Cong., 2d Sess., pp. 185-89. See also H.R. Rep. 91-994, 91st Cong., 2d Sess.

12/ In 1971, the Vice President's appropriation for executive staff was $700,000. Executive Offices Appropriation Act of 1971, 84 Stat. 866. For "clerical assistance to the Vice President" he received $367,263 under the Legislative Branch Appropriation Act of 1971. 84 Stat. 807. This was an increase from the prior year. For 1977, the Vice President receives $1,246,000 for executive staff and $615,015 for legislative staff. 91 Stat. 966, 1439.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00535 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.387

political staff would be paid from this source. 13/ Finally, since the Administration requested staff assistance for the Vice President in his governmental functions within the executive branch, 14/ it is reasonable to conclude that Congress intended to provide a staff limited to those official functions.

Peter Kyros, of the Office of the Vice President, has argued that 5 U.S.C. § 7324(d)(1) applies because the item in question provides "for expenses necessary to enable the Vice President to provide assistance to the President in connection with specially assigned functions (italics in original)(Attachment D). In other words, he derives the status of the Vice President's staff from the duties assigned to the Vice President. But this argument proves too much. The Vice President has no active executive responsibilities under the Constitution, and the President has no constitutional duty to assign him any. The Vice President's status as an assistant to the President is therefore the same as that of other policy making officials or advisers who are not subject to the Hatch Act. 15/ If it is argued that employees who furnish

13/ In 1971, the Vice President's legislative staff numbered 23 persons, clerical and otherwise. Hearings of a Subcommittee of the Senate Appropriations Committee, Executive Offices Appropriations of 1971, 91st Cong., 2d Sess., p. 1255. There is no discussion of their duties in the legislative history.

14/ Among the Vice President's functions cited as requiring staff were his membership in the Cabinet, the NSC, and the CEQ, his duties as head of the Office of Intergovernmental Relations, and his membership in various advisory committees and councils. Hearings by a Subcommittee of the Appropriations Committee of the House of Representatives, Executive Office Appropriations of 1971, 91st Cong., 2d Sess., pp. 183-86. The testimony concentrated on the need for staff support if the Vice President were to function as an adviser and official spokesman. Id. at 187-89.

15/ The original version of the Hatch Act specifically exempted the President and Vice President. See 5 U.S.C. § 7324, historical and revision note; Act of August 2, 1939 § 9(a), 53 Stat. 1148. Heads and assistant heads of executive or military departments and policy making officials appointed subject to advice and consent by the Senate are exempt. 5 U.S.C. § 7324(d)(2)-(3).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00536 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.388

him with staff assistance derive an exemption from his functions, there is no reason why the same should not be true of the staff of OMB, the Domestic Council, and other agencies within the Executive Office of the President whose heads are exempt. This result would be contrary to the Congressional intent underlying 5 U.S.C. § 7324(d) and to its settled construction. Had Congress considered derivative exemption possible under the Act, it would not have been necessary for the Dempsey Amendment to specifically provide for the President's personal staff after having exempted the President or to exempt assistant heads as well as heads of departments.

In conclusion, the better view appears to be that the legislative intent behind 5 U.S.C. § 7324(d)(1) was to exempt from the Hatch Act a limited number of close personal advisers to the President and their staff members. This was accomplished by basing the exemption on the appropriation for the "Office of the President" from which this inner circle was paid. At the time, this was the only appropriation for personnel directly under the President's control. As other agencies were added to the Executive Office of the President and nomenclature changed, the White House Office was the only lineal descendant of the former Office of the President. The remaining employees in the Executive Office of the President are subject to the Hatch Act unless covered by another exemption. Nothing in the legislative history of the appropriation for the Vice President's executive staff shows a congressional intent to treat those employees differently from other staff in the Executive Office of the President outside the White House Office. In our view, there is no rational basis for doing so that will distinguish the Vice President's staff from other staffs which are not exempt.

It has been suggested that this interpretation is archaic and anomalous because the staffs of the President and Vice President are for practical purposes intermingled. It is true that the Congress which enacted the Hatch Act did not consider the role of the Vice President's staff, for the Vice President had no role in the executive branch at the time. Circumstances have changed, and modern Presidents use the Vice President as both political spokesman and policy

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00537 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.389

adviser. It may be desirable to have the Vice President's staff as freely available for political duties as the President's. If so, legislation will be necessary. One approach would be to incorporate the appropriation for the Vice President's staff in the general appropriation for the White House Office, thereby removing all doubts on the matter. The other, more direct solution would be to amend the Hatch Act to specifically exempt the Vice President's staff.

John M. Harmon
Acting Assistant Attorney General
Office of Legal Counsel

Attachments

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00538 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.390

MEMORANDUM
PRESIDENT'S AUTHORITY TO DELEGATE FUNCTIONS
JAN 24 1980
<Attorney>

Public Law 673, 81st Cong., 2nd Sess., (Title III, sec. 301-303) authorizes the President to provide for the performance of certain functions of the President by other officers of the Government. Section 301 confers upon the President general authorization to delegate functions to the head of any department or agency in the Executive Branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate. Such functions which the President may delegate under this section are those which are vested in the President by law or those which the officer is required or authorized by law to perform only with the approval, ratification or other action of the President.

Section 302 deals with the scope of the delegation of the functions. This section provides as follows:

> "The authority conferred by this chapter shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate, the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President." (Added Oct. 31, 1951, ch. 655, Section 10, 65 Stat. 712). (Emphasis supplied)

Two questions are raised.

(1) What are the "inherent" rights of the President for delegating the performance of functions vested in him by law as these words are used in sec. 302, or otherwise and

(2) To the extent that the performance of certain functions are not delegable, may the President by Executive Order or other direction authorize the Vice President to perform rights which exist in the President.

I

The term "inherent" as used in the Act is not defined. The reports of the Congress do not shed any light on what was intended by inclusion of the word "inherent" into the Act. It is apparent, however, from the reports that the purpose of this Bill was to permit the President to delegate many time consuming and laborious functions so as to free his time for more important matters. It was estimated the President was required to execute approximately four hundred duties. The Congress felt that the President could delegate a substantial part of these and have his heavy burden lightened. The Senate Report, however, recognized that the Bill could not, because of legal obstacles, eliminate all of the burdens of the President. As the Senate Report noted (S.R. No. 1867, 81st Cong., 2d Sess., p. 3):

> "The bill cannot, therefore, eliminate nor is it intended to wholly relieve the burdens of the President in this work area. In the first place, the President cannot delegate many functions because delegation would be inappropriate due to their character. In other cases the President may feel it essential that he perform the function due to the importance of the function or due to special circumstances. In short, much of the workload of the President, is inherent in the office and cannot be alleviated by the enactment of general legislation. The proposal is merely an important step in the right direction. * * *c

In its conclusion the committee stated that the subject Bill will help "to improve administration of the Executive Branch of the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00539 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.391

Government by easing the mounting problems of the Chief Executive through the elimination of part of the heavy workload now vested in him." (Emphasis supplied)

In the House Report (H.R. No. 1139, 81st Cong., 1st Sess.) the following is said:

> "* * * Corresponding authority is conferred upon the President by the bill in respect of functions which are under the terms of other law authorized to be performed only with or subjects to the approval, ratification, or other action of the President. However, it should be understood that the functions, as set out in this bill, refer to those vested in the President by statutory authority, rather than those reposing in the President by virtue of his authority under the Constitution of the United States.
>
> "In order to preserve the present right of the President to delegate the actual performance of functions vested in him by law, the bill provides that the provisions thereof shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of such functions. The bill further provides that nothing therein shall be deemed to require express authorization in any case in which an official performing a Presidential function would be presumed in law to have acted by authority or direction of the President.
>
> NEED FOR THE BILL
>
> "The effective discharge of the hundreds of duties and responsibilities imposed upon the President by law would be virtually impossible were it not for the general and inherent right of the President to delegate the actual performance of functions vested in him by law." /1/

In none of the Reports of the Congress referred to above is there any definition of the inherent right of the President to delegate the performance of functions vested in him, but both Reports, as well as the Act, recognize that the President has such an inherent right. (See also, Debates in the House, Cong. Rec., pp. 11391-11396).

Generally, it may be said that the inherent rights or implied powers of the President are all those vast powers which are reasonably necessary in executing the express powers granted to him under the Constitution and Laws of the United States for the proper and efficient administration of the executive branch of government.

Section 1 of Article II of the Constitution provides that "the executive Power shall be vested in a President of the United Statrs of America." This Clause constitutes a grant of all the executive powers of which the Government is capable (cf. Myers v. United States, 272 U. S. 52; Works of Alexander Hamilton (Lodge ed), Vol. 4, pp. 388-389).

We must remember that we do not have a parliamehtary form of Government. Rather we have a tripartite system which contemplates an executive fully exercising his independent powers. For that purpose sec. 1 of Article II must be given a liberal construction as will confer upon the Chief Executive ready power to deal both with day to day problems as well as with emergencies that arise.

This comprehensive executive power to act must be taken as having sprung from all the available clauses of the Constitution which expressly confer power upon the President. In addition to sec. 1, Article II, which provides that the executive power shall be vested in the President, the Constitution requires that the President will "faithfully execute the Office of the President" and will to the best of his ability "preserve, protect and defend the Constitution of the United States" (Sec. 1); that "he shall be Commander-in-Chief of the Army and Navy of the United States" (Sec. 2); that he shall be the sole organ of the Nation in its external relations (Secs. 2 and 3); and that "he shall take Care that the Laws be faithfully executed" (Sec. 3).

In passing upon the question before us we must also remember as

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00540 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.392

Chief Justice Marshall said, that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that "(I)ts means are adequals to its ends" (McCulloch v. Maryland, 4 Wheat. 311, 41k, 424 (1819).

In terms of hard-headed practicialities, the President obviously could not physically perform the various functions that are conferred on him by the Constitution. The President must of necessity act through his heads of the Departments and other persons (see 7 Op. A.G. 453). Their official acts promulgated in the regular course of business, are presumptively his acts (see Runkle v. United States, 122 U.S. 543). In Williams v. United States, 1 How, 290, the Court said (p. 296):

> "***The President's duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform. This cannot be, 1st, Because, if it were practicable, it would be to absorb the duties and responsibilities of the various departments of the government in the personal action of the one chief executive officer. It cannot be, for the stronger reason, that it is impracticable--may, impossible."

In Myers v. United States, 272 .S. 52, 117, Chief Justice Taft speaking for the Court said as follows:

> "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court (Citing cases) As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws."

This is the general rule which the Court has applied in sustaining the delegation by the Preesident of the exercise of his executive authority. /2/

The exception to the general rule is contained in this succinct statement in Willoughby's "Constitution" (Vol. II, p. 1160):

> "Where, however, from the nature of the case, or by express constitutional or statutory declaration, the personal, individual judgment of the President is required to be exercised, the duty may not be transferred by the President to anyone else."

Thus in Runkie v. United States, 122 U.S. 543, involving dismissal of a major from the army, a matter which required confirmation or disapproval of the President, the court held the power was of a judicial character which could not be delegated. The President could call others to assist him in making an examination of the court martial, but "his judgment when pronounced must be his own judgment and not that of another." (122 U.S. at p. 557). See too, United States v. Puge, 137 U.S. 673, 680-681; United States v. Fletcher, 148 U.S. 84, 88-91; Ex Parte Field, 9 Fed. Cas. 1 (1862); 7 Op. A.G. supra, at pp. 465-466.

Subject to these limitations, it would appear that the President could delegate certain functions to the Vice President unless the latter is ineligible to exercise these powers under the Constitution or laws of the United States.

There is no express provision in the Constitution which would preclude the Vice President from exercising those powers of the President which do not require the latter's personal, individual

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00541 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.393

judgment.

There are two provisions in the Constitution which should be considered in this connection. The first in Article II, Section 1 which provides that "in case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President * * *".

We need not reach the question as to what constitutes "inability to discharge the Powers and Duties of the said Office" in any given case. As matter stand, we do not have such a case here.

The Executive Order could be drafted delegating functions to the Vice President indicating that the President not only has the ability to discharge the powers and duties of the Office but in fact will continue to exercise the most important powers and duties of his Office. This could be made plain if the Executive Order would provide in substance that:

1. Presidential functions that may not be delegated because of Constitutional or statutory restrictions are not delegated.

2. Functions which have heretofore been delegated to other officers of the Government are not delegated.

3. With respect to any Presidential function that may not be delegated because of Constitutional or statutory restrictions the Vice President should be required to submit any proposed action to the President for his consideration and decision, and the Vice President should be directed to take such action in the matter as the President shall direct.

4. The Vice President could make such inquiries as he may deem proper to determine whether the laws of the United States are being faithfully executed by the appopriate officers of the Government, including, but not limited to, heads of departments and agencies, and should be directed to report to the President from time to time in that regard. The Vice President should be directed to ascertain the President's will or decision as to the action to be taken concerning any such matter, and should notify the appropriate Government officer or officers accordingly. Such notification should be in writing and should recite that the action indicated is in accordance with the decision of the President.

5. All formal orders or other documents issued by the Vice President under or pursuant to the proposed order should be published in the Federal Register, and any Executive Order or proclamation of the President amended, modified, or revoked by any such order or document of the Vice President should be identified in the Vice President's order by number, date, and subject matter.

6. The right should be reserved to the President to perform at any time any of the functions delegated to the Vice President by the order.

7. As used in the order, the term "function" should be defined to embrace any duty, power, responsibility, authority, or discretion vested in the President or other officer concerned, and the term "performed" should be defined to mean "exercised."

8. The order should continue in effect until amended, modified, or revoked by further order of the President.

From these provisions, it would be manifest that the delegation by the President to the Vice President of the various functions recited in such Executive Order would not violate Article II, Section I of the Constitution.

Second, the Constitution provides that the Vice President shall be "The President of the Senate, but shall have no Vote, unless they be equally divided".

Would exercise by the Vice President of the functions delegated to him by the Executive Order be inconsistent with his functions as President of the Senate?

It would not. The Vice President may properly exercise both

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00542 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.394

functions without any conflict. Moreover, the Constitution contemplates that the Senate may function even in the absence of the Vice President. It declares in Article I, Section 3 that "The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States".

Since there are no legal precedents either supporting or rejecting the authority of the President to delegate his powers to the Vice President, we may properly consider historical precedents. Vice Presidents Coolidge, Garner and Wallace were invited into the Cabinet and attended its meetings with regularity. Wallace was also operating Chairman of various emergency agencies, coordinating their administration under policies and directives issued by the President. "His direction of certain defense and war agencies was a revolutionary departure for the vice-presidency, and still remains unimitated, unless the announcement in April 1953 that Vice President Nixon would be chairman of a commission to enforce federal antidiscrimination policies in public contracts is the prelude to this body's developing into an active, signifcant agency. The list of appointments given to Wallace is imposing. Vice President Wallace was assigned to the Ecnomic Defense Board (established July 30, 1941, reorganized and renamed the Board of Economic Warfare after Pearl Harbor), the Supply Priorities and Allocations Board (formed August 28, 1941, dissolved into the War Production Board, without Wallace, January 1942), and the Advisory Committee on Atomic Energy (set up October 1941, and included the Vice President until his term of office expired in January 1945)." (Williams, "The American Vice Presidency, New Look" p. 26).

While Washington consulted with Adams on diplomatic matters, the latter refused to go ahead in order to negotiate a commercial treaty with England in 1794. Adams took the position "he was required by the Constitution to preside over the Senate" and questioned the propriety of leaving the country "since he was charged by the Constitution with the duty of taking over the first office in an emergency." Jefferson took the same position as Vice President when Adams requested him to go abroad to further the aims of peace (Williams, ibid, p. 24). More recently, Vice Presidents have engaged in foreign missions upon request of the President. In 1936 Garner went to Mexico as a good-will ambassador. In 1944 Wallace left on a good-will mission to the Far East. "Particularly in the mission to China, Wallace made decisions for the President and made recommendations to him that * * * came to be the mooted postwar China policy" (Williams, ibid. p. 25). In addition to Wallace, Barkley and Nixon have made official foreign trips (Williams, ibid. p. 25; See too, Rossiter, "Reform of Vice Presidency," 63 Pol. Sci. Q. 383, 388-389, 398-399).

The next question is whether Title 3, Section 302 expressly or impliedly forbids the President from delegating to the Vice President powers not requiring the exercise of a personal judgment. There is no express prohibition. Nor may we imply one in view of the language used. Title 3, Section 301, which deals with general authorization to delegate functions of the President vested "by law", limits the delegation expressly to persons appointed by and with the advice of the Senate. Section 302 which deals with the inherent right of the President to delegate contains no such express limitation. From the explicit treatment in Section 301 and the significant omission of similar language in Section 302, we may reasonably conclude that Congress had no intention of barring the President from delegating his powers to any person, including the Vice President, so long as the latter was not disabled by law from exercising the powers delegated. And this conclusion is consistent as well with the Senate and House Reports, discussed above, which stress the need of permitting delegation of certain matters "which now make an unwarranted demand upon the time of the President" and which provide "a workable and expeditious method for placing the responsibility for the discharge of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00543 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.395

appropriate functions in other officers of the Government" (H.R. 1139, 81st Cong., 1st Sess., p. 3).

There are many practical considerations which would also sustain the limited delegation of Presidential authority suggested.

1. The structure of the Executive branch of the Government has grown so large and intricate that every means should be sought to lighten the workload of the President if we are to expect him to give adequate attention to matters that are most vital to the nation. Thus, even in the normal course of events, the limited delegation of authority suggested would be warranted from the viewpoint of good governmental administration. Its character is not changed nor should greater significance be attached to it because of temporary illness of the President.

2. The President has recognized the desirability of training the Vice President for any eventuality.

3. Cooperation with the legislative branch of the government and with foreign nations would be made more effective if the Vice President had an intimate working knowledge of departments and agencies in the Executive Branch.

4. The Vice President has already been occupying an important position in the formulation of governmental policy. This would be expanded, not altered, by the proposed Executive Order.

The President has made the Vice President a full-scale participant in formulating and executing major administration policy at cabinet meetings -- a step without precedent in presidentiall history. Also, the Vice President, at the request of the President, has presided at cabinet meetings in the President's absence. Congress has added the Vice President as a statutory member of the National Security Council; and when absent, the President who is official chairman of this Committee has delegated his functions to the Vice President. As the President's special representative, the Vice President has also engaged in good-will tours of Latin America and o the Far and Middle East.

Such delegations of authority have advanced the country's welfare through administration of the government at the maximum efficiency. An Executive Order providing substantially the delegation discussed would be merely another step in this direction. The proposed delegations would be well within the President's inherent rights under Title 3, Section 302.

The second question raised is whether an Executive Order would be valid if it provided as follows:

> "With respect to any Presidential function that may not be delegated because of Constitutional or statutory restrictions, the Vice President shall submit any proposed action in regard thereto to the President for his consideration and decision; and the Vice President shall take such action in the matter as the President shall direct. The order or other document of the Vice President giving effect to such direction of the President shall recite the fact that the President has considered the action in question and that such action is taken in accordance with the instructions and at the direction of the President.

In this area as in others the President cannot be expected to do all or even a part of the large amount of preliminary review and investigation entailed in reaching a decision which the Constitution or statutory restrictions require him personally to make. The provision quoted above would do no more. Under it, the President would reserve the right to have the proposed action submitted to him for his consideration and his decision. The President would reserve the right to require the Vice President to take such action in the matter as the President shall direct. Moreover, the order or other document of the Vice President giving effect to the direction of the President would be required to recite the fact that such action is taken "with the instructions and at the direction of the President".

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00544 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.396

Thus, in every way the President would retain and would exercise the primary and immediate responsibility and decision in those cases where the Constitution and statutory authority may require that his functions be discharged in that manner. The determination would be the President's in these cases, not that of the Vice President, and this is decisive of the question raised.

/1/ This Report also declared:

"The Attorney General, in connection with an extended review of executive theory and practice, has said that 'in general, when Congress speaks of acts to be performed by the President, it means by the executive authority of the President' (7 A.G. Op. 453). Yet this right of delegation has not heretofore been clearly established or defined by judicial decision, and there are intimations in various rulings that it does not extend to matters which involve the exercise of judgment or discretion, although the futility of attempting to apply such a distinction even to the head of a department was recognized by the Attorney General in 35 A.G. Op. 19, and the right of department heads to act for the President in matters which relate to the business of their respective departments has been upheld by the courts in a number of cases.

"The net result, in respect of any given statutory Presidential function, tends to be uncertainty as to whether performance thereof may be delegated. At the best this requires a time consuming and laborious exploration to arrive at a conclusion that the function may properly be delegated. At the worst such exploration reveals that the function, however, inconsequential, must continue to be performed by the President. These facts operate to require the President to perform functions which at the present time do not have any reasonable claim upon his time or attention. * * *"

/2/ See e.g. Wilcox v. Jackson, 13 Pet. 498, 513; successive acts of Congress authorized the President to erect fortifications and other things. This power was held properly executed by the Secretary of War.

Williams v. United States, 1 How. 290, 296. An Act of Congress prohibited the advancing of public money in any case whatever, except under the "especial direction of the President." Yet, under the general; direction of the President, this power was held to be properly executed by the Secretary of the Treasury.

French v. Weeks, 259 U.S. 326. Approval of findings of the Final Classification Board placing officers in certain classifications may be exercised by the Secretary of War on behalf of the President.

Russell v. United States, 261 U.S. 514, 523. "Executive power, in the main, must of necessity be exercised by the President through the various departments." This case involved a delegation to the Secretary of the Navy to cancel shipbuilding contracts.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00545 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.397

24 MAR 1982

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

Re: Payment of Expenses Associated with Travel by the President and Vice President

This memorandum responds to your request for our advice about the payment of expenses associated with travel by the President or Vice President. We are to assume that travel by the President or Vice President may often include both official events, undertaken as part of the President's or Vice President's official roles as governmental leaders, and purely political events, undertaken for partisan purposes in order to advance the interests of the President's and Vice President's political party. This mixed character of much Presidential and Vice Presidential travel follows naturally from their dual roles as governmental officials and leaders of their party. You have asked us to articulate the legal principles governing the allocation and payment of costs associated with such travel.

Several caveats must be noted at the outset. First, our opinion should not be read as a declaration that the generally applicable principles will necessarily lead to an inflexible result in a particular case. In fact, the principles are of such generality that they often will generate few determinate results. They thus must be viewed as general guides to decisionmaking. Second, the principles should be applied to a particular trip by the officials most familiar with the facts of the trip. Each case may present unique circumstances that will need to be taken into account in determining, for instance, whether an event is "official" or "political" in character. As we will indicate, there is considerable room in this context for the careful use of informed discretion. Third, this opinion focusses on broadly applicable legal principles, not on the specific rules adopted by the Federal Election Commission for election activity. See 11 C.F.R. Chapter 1 (1981). If, in light of this opinion, particular questions arise, we will, of course, be glad to address them.

38236.398

Furthermore, the principles discussed in this opinion may be fully understood only with an appreciation of the unique context presented by the peculiar functions and responsibilities of the President and Vice President in our system of government. They are the senior officials of the Executive Branch of government. Their official roles are necessarily political in the broad sense that they must formulate, explain, advocate and defend policies. To the extent that the President and Vice President generate support for their policies and programs, they are also executing and fulfilling their official responsibilities. Even the most clearly partisan activity is not without some impact on the official activities of the President and Vice President.

By the same token, official success or failure by the President and Vice President has an inevitable and unavoidable impact on the standing of their political party, members of their party and their party's candidates for public office. Thus, it is simply not possible to divide many of the actions of the President and Vice President into utterly official or purely political categories. To attempt to do so in most cases would ignore the nature of our political system and the structure of our government. Accordingly, efforts to establish such divisions must be approached with common sense and a good faith effort to apply the spirit of the principles we discuss in this memorandum, and they must be judged with considerable deference to the decisions of the persons directly involved in making the determinations.

With this background, our discussion will focus on three major questions. First, what are the basic legal principles to be applied, putting aside specialized restrictions formulated by the Federal Election Commission with regard to election activities? Second, how does one determine whether an event giving rise to an expense is "official" or "non-official" in character? Third, assuming that a trip involves events that are both official and non-official (or political) in character, may certain of the expenses for such a mixed trip be apportioned between the government, on the one hand, and a political committee, on the other hand? In the fourth section, we will discuss other considerations that bear on the issues discussed herein.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00547 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.399

(1) Two Basic Norms

When considering payment of expenses associated with Presidential and Vice Presidential travel, two major principles governing the use of appropriated funds must be borne in mind. First, appropriated funds may be spent only for the purposes for which they have been appropriated. 31 U.S.C. § 628; 52 Comp. Gen. 504 (1972); 50 Comp. Gen. 534 (1971). Thus, funds appropriated for the official functioning of the offices of the President and the Vice President may be used for travel expenses only if the travel is reasonably related to an official purpose. If, however, there is no reasonable connection between the expense incurred and the official purposes to be served by an appropriation -- as, generally speaking, there would not be when an expense is incurred purely for partisan political purposes -- official funds may not be used to pay the expense.

The second basic principle is that, in general, official activities should be paid for only from funds appropriated for such purposes, unless Congress has authorized the support of such activities by other means. Stated another way, although appropriated funds should not be used for non-official purposes, it is equally true that outside sources of funds may not be used to pay for official activities. This latter principle, which prevents the unauthorized augmentation of appropriations, has been recognized by the Comptroller General on numerous occasions. 1/ A problem concerning an unauthorized augmentation of an appropriation does not arise when a trip is purely non-official in character and non-official funds are used to pay for it. Rather, the issue arises only where an official activity is supported by non-appropriated funds and where there is no authority for that to occur.

In short, appropriated funds should not be used to pay for political events, and absent authority to the contrary, political funds should not be used to pay for official events. The difficulties of applying these principles arise because both types of activities may occur on the same trip and because it is exceedingly difficult in many instances to determine what is official and what is political.

1/ See, e.g., 9 Comp. Dec. 174 (1902); 17 Comp. Dec. 712 (1911); 23 Comp. Gen. 694 (1944); 46 Comp. Gen. 689 (1967).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00548 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.400

(2) What Tests Should be Used for Determining Whether an Expense Should be Considered "Political" or "Official"?

Because officials will wish to ensure that appropriated funds are used only to pay for expenses associated with official events and are not used to pay for political expenses, it will be necessary to determine on a case-by-case basis whether an expense is official or political in character. As discussed generally above, there is unfortunately no single litmus test for making such judgments. Indeed, many events could be characterized properly as either political or official or both. Therefore, in making this determination the persons most familiar with the facts of a particular trip will have to assess all of the circumstances involved and apply a large measure of common sense. There are, however, two major variables concerning the source of the expense to be borne in mind; the nature of the event involved, and the nature of the individual involved. Either, or both, of these indicia may be useful in a particular case in determining whether a particular expense should be considered official or political.

With respect to the nature of the event giving rise to an expense, an earlier opinion of this office, entitled "Political Trips" and transmitted to the Counsel to the president on March 15, 1977, stated the following guidelines:

> As a general rule, Presidential and Vice Presidential travel should be considered 'political' if its primary purpose involves their positions as leaders of their political party. Appearing at party functions, fundraising, and campaigning for specific candidates are the principal examples of travel which should be considered political. On the other hand, travel for inspections, meetings, non-partisan addresses, and the like ordinarily should not be considered 'political' travel even though it may have partisan consequences or concern questions on which opinion is political divided. The President cannot perform his official duties effectively without the understanding, confidence, and support of the public. Travel and appearances by the President and Vice President to present, explain, and secure public support for the

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00549 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.401

> Administration's measures are therefore an inherent part of the President's and Vice President's official duties. (pages 11-12)

We concur with the foregoing rules of thumb, which are based largely on a common sense understanding of the nature of political and official activities. 2/

While we would hope that the foregoing generalities may be useful guides for the future, they should not be viewed as inflexible. There clearly is much room for discretion in determining whether an event giving rise to an expense is political or official. At bottom, the question is a factual one that can only be answered by those most familiar with the particular facts of a given situation. Nonetheless, in general, if the purpose of an event on a trip is to promote the partisan aims of the President's or Vice President's party or candidates of that party, then expenses incurred in performing the event would generally be political in character. Should particular questions arise about specific events, we would be glad to provide more concrete advice concerning them.

The second variable that may, in some circumstances, determine the character of a particular expense incurred on a trip is the nature of the individual whose activity generates the expense. There are some individuals who, in particular situations, are on a trip for inherently official or political purposes. Expenses incurred by them should generally be viewed as either official or political depending on their particular role. For instance, there are some persons whose official duties require them to be with the President, whether or not the President himself is on official business. 3/

2/ Although we generally agree with this earlier opinion of this Office, we would note that much of its advice is of a prudential, not strictly legal, character. In the present memorandum, we do not undertake to specify rules that are not legally mandated. Moreover, the earlier opinion itself takes pains to stress the flexibility that exists in determining whether, in a particular case, travel by the President is official or political (see page 7).

3/ This point is the same as stated in the March 15, 1977, opinion of this Office, entitled "Political Trips" (pages 9, 15-16).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00550 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.402

This group includes the President's doctor, his military aide and the Secret Service agents responsible for his protection. 4/ A similar group would exist for the Vice President. Expenses incurred during travel with the President or Vice President by this group of individuals should be considered official regardless of the character of the event that may be involved in a given trip.

Similarly, on an otherwise entirely official trip, an individual may accompany the group for purely political reasons. As a rule, any expenses specifically incurred by such individuals should be considered political expenses, regardless of the events involved in the trip.

In short, as we noted at the outset of this section, there is no single test for determining whether an expense is political or official in character. Viewed generally, expenses of individuals whose official duties require them to travel with the President or Vice President should normally be considered official. Expenses of individuals who are on a trip for purely political reasons should normally be considered political. Expenses associated with individuals who are not necessarily serving in either a wholly official or wholly political capacity -- such as the President or Vice President or other individuals in the White House who may, consistent with their official duties, perform political functions -- should normally be judged to be official or political depending on the character of the event giving rise to the expense.

(3) On a Mixed Trip Including Both Official and Political Activities, Can Certain Expenses be Apportioned between the Government and a Political Committee?

Based on what we have said thus far, the following conclusions may be stated. First, if all events during a trip are political in character, the only official expenses on the trip would be those associated specifically with the group of individuals whose official duties require them to accompany the President and Vice President. Second, if all

4/ This list is not intended to be exhaustive. The President may, in his discretion, determine that others are necessary members of his official party whenever he travels.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00551 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.403

events on a trip are official in character, the only political expenses would be those associated specifically with individuals who accompany the President and Vice President on the trip for purely political reasons. This means that on a trip that is entirely official, any expenses associated with the President or Vice President or others who are not necessarily on the trip for purely official or purely political reasons should be considered official. Conversely, on a trip that is entirely political, expenses associated with persons who are not necessarily on the trip for wholly official or wholly political reasons should be considered political.

A question remains, however, concerning expenses associated with individuals whose purpose for being on a trip is not necessarily only political or only official, when the trip itself is for both official and political purposes. Specifically, on a mixed trip involving a substantial official element and a substantial political element, can the expenses associated with the President or Vice President or others who are on the trip for both reasons be apportioned between the government and a political committee? There are several possible views on this question.

It might be argued, for example, that the performance of an official event during a trip could not have been accomplished without incurring certain expenditures and that, therefore, the entire cost of the trip should be treated as official and should be paid out of appropriated funds, with the sole exception being incremental expenses associated specifically with a political activity (e.g., a hotel bill for an extra night's lodging necessitated entirely by a political event on the following day). This approach is grounded on the assumption that to permit any other apportionment of the cost of a trip to a political committee would allow the official budget to benefit from an unauthorized augmentation of appropriations. Since the expenses incurred were necessary to accomplish an official purpose, on this view they must be paid for in full with appropriated funds.

The opposite theory could also be advanced. That is, if there is any political activity on a trip, a political committee could theoretically be required to pay for the trip's entire cost (except for incremental expenses specifically attributable to an official event). This theory proceeds on the assumption that any other approach would allow the President's or Vice President's political activities to be subsidized by their official appropriations.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00552 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.404

A third approach, which in effect combines the first two, is suggested by a prior opinion of this office, transmitted to the Counsel to the President on September 17, 1980, and entitled "Reimbursement of Travel Expenses Incurred by Government Officials on Mixed Official and Campaign Trips." That opinion responded to a question about the operation of a Federal Election Commission rule under which a campaign committee's share of the costs of a mixed official-political trip is the full cost of the trip from the point of origin through each campaign-related stop and back to the point of origin. 11 C.F.R. § 9004.F. 5/ After the FEC adopted this rule, the White House Counsel's Office assumed that the expense to the government for such a trip would be the difference between the trip's actual cost and the amount reimbursed by the campaign committee. However, the Counsel's office was concerned that such diminishment of the actual expense to the government could constitute an unauthorized augmentation of appropriations. For that reason, it sought an opinion of this office.

The September 17, 1980, opinion concluded that, if the government were to pay only the difference between the actual cost of a trip and the amount reimbursed by the campaign committee under the FEC rule, there would be an unauthorized augmentation of appropriations (assuming no authority to accept contributions) so long as the government were allowed to "reap the benefit" of the enhanced payment of expenses by the campaign committee under the FEC rule. To cure this problem, the opinion stated that an accounting system should be devised to charge "the full allocated travel costs to both the Campaign Committee and the government agency," with a deposit of any excess funds in the Treasury (page 4, emphasis added).

While we express no view regarding the correctness of this third approach during the period of a presidential election campaign when the Federal Election Commission's

---

5/ For instance, if a trip from Washington, D.C. to Chicago were taken for official purposes, and then a trip from Chicago to Denver were taken for campaign purposes (with a return from Denver to Washington, D.C.), under the FEC rule the campaign committee would have to make reimbursement for the cost of travel from Washington, D.C. to Denver and back to Washington, D.C.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00553 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.405

regulations would be applicable, we do not believe that the approach correctly reflects the requirements that apply outside the campaign period. We believe that the first two approaches are unreasonable solutions to the problem because each tilts the scales completely toward one of the two conflicting guiding principles and results either in an inappropriate augmentation of appropriated funds or the subsidization of political activity with appropriated funds. The approach of the September 17, 1980, Office of Legal Counsel opinion attempts to address these problems in, we believe, an unrealistic and unnecessary way by requiring one trip to be paid for twice -- both with official funds and with political funds.

In our view, a fourth approach which attempts in good faith to apportion the costs of such a trip on the basis of a reasonable division between the time spent on political activities and the time spent on official activities is a more reasonable and a legal resolution of the underlying problems. For example, if 50% of a single day's events are political and 50% are official, approximately 50% of the costs associated with participants whose roles are not necessarily either official or political should be reimbursed by the political committee and 50% should be paid from appropriated funds, unless such an apportionment, under the particular circumstances, would on some basis be unreasonable or inequitable. We believe that such an approach faithfully accomodates both of the basic norms discussed in part (1).

Thus, when there is a mixed trip involving the President or Vice President, the purpose of which is both substantially political and substantially official, expenses should be paid in the following manner: first, expenses for individuals who are necessarily official (Secret Service, etc.) should be paid for with appropriated funds; second, expenses for individuals who are necessarily political (campaign officials) should be reimbursed by a political committee; third, incremental expenses specifically attributable to an official event should be paid from appropriated funds, and incremental expenses specifically attributable to a political event should be paid from political funds; and finally, expenses for individuals whose official roles permit them to perform political activity should be reasonably and equitably apportioned so that a share reflecting the amount of a trip that is political in character should be paid by a political committee. If these general guidelines are followed, then the purposes of using appropriated funds for official purposes but not using such funds for political purposes will be achieved.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00554 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.406

We must reaffirm the limited nature of our conclusion about apportionment. As we have indicated, some categories of expenses may have to be treated as entirely official or entirely political, and thus they would not be subject to apportionment. Apportionment would be appropriate only with respect to expenses associated with individuals whose official roles permit them to perform political functions, and only when those individuals are on a trip that itself is not entirely political or wholly official in nature. 6/ In such circumstances, to accommodate both of the guiding norms noted in part (1), we believe that an apportionment of expenses between appropriated funds and the funds of a political committee which reflects the relationship between official and political activities may be made. We urge caution in applying such an approach, particularly in retaining records to substantiate any characterization of an event or trip as political or official that could be used in the future if,

---

6/ We are not suggesting any specific formula for apportionment, for several formulae may be equally reasonable and some may be particularly well suited to particular trips. For example, a formula may be predicated on the number of hours spent on each event, the number of hours on the entire trip (including travel time) devoted to official or political affairs, the number of events devoted to each, or if a trip is devoted to one type of event in a distant city and another type in a nearby city on the return flight, on the relative distances travelled to each. While some general guidelines within these limits should be established for consistency in application, the overriding factor is the reasonableness of the apportionment in a specific situation. We would not exclude the possibility of creating an exception for de minimis involvement in official activity during a trip that would be treated as entirely political, and vice versa. We note that previous Administrations have made use of such a de minimis exception, as indicated in the background materials supplied to us by your office.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00555 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.407

for instance, there should be an audit by the General Accounting Office. 7/

(4) Other Considerations

We would add one qualification to the preceding discussion. As noted in part (1), official expenses, including expenses incurred during the President's and the Vice President's travel for official purposes, may not be paid for by funds other than those appropriated for official purposes unless there is authority to the contrary. An acceptable source of such authority would be a congressional authorization, in the form of a statute, for the President and the Vice President (or their respective offices) to accept gifts to defray their official expenses. This office has concluded in the past that the White House Office and the Office of the Vice President do not have statutory authority to accept contributions or gifts. This legal premise provides the basis for the conclusion that the payment by a political committee of official travel expenses incurred by the President or Vice President would be an impermissible augmentation of the appropriations for these offices.

However, in the course of our research for this opinion, we reviewed a provision of law, 2 U.S.C. § 439a, not considered in any of the prior opinions on this subject by this office or by the Comptroller General, which appears to grant the President and Vice President gift authority, at least to the extent of authorizing them to accept contributions to defray their ordinary and necessary official expenses. Section 439(a) states in full:

7/ In two opinions to several Senators, dated October 6, 1980 and March 6, 1981, the Comptroller General discussed the apportionment of travel expenses for purposes of their payment by official and political funds under the Carter Administration. (B-196862) Apportionment was not objected to by the Comptroller General. The Comptroller General expressly noted, as we have observed here, that there are "no guidelines of a legally binding nature [which] have been established by legislation, judicial decision, or otherwise" (page 2 of March 6, 1981, opinion). These opinions, coupled with prior practice by the White House, buttress our conclusion that a reasonable apportionment may be made in the circumstances we have described.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00556 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.408

> Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of the Internal Revenue Code of 1954, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office. (emphasis added)

The foregoing provision authorizes "amounts contributed to an individual for the purpose of supporting his or her activities as a holder of Federal office" to be used by such individual "to defray any ordinary and necessary expenses incurred in connection with his or her duties . . . ." The term "Federal office" is defined separately as including the offices of the President, the Vice President, and members of Congress. 2 U.S.C. § 431(c). Accordingly, on its face, this provision would appear to authorize use by the President and Vice President of amounts contributed to such individuals for the purpose of supporting their activities as President or Vice President. This would include expenses incurred in the course of official travel. 8/

8/ Of course, any applicable conflict of interest provisions would have to be borne in mind if § 439a were to be used as authority for the receipt of contributions for the President's or Vice President's travel expenses.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00557 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.409

We have consulted the legislative history of 2 U.S.C. § 439a, first adopted as part of the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1289, and have found nothing that would be inconsistent with such an interpretation. However, in the limited time available, we similarly have found nothing to indicate that Congress specifically considered the provision's application to the Office of the President or Vice President. The brief floor discussion of this provision 9/ and of a similar provision in a predecessor bill 10/ merely focused on its application to members of Congress, who traditionally have been permitted to accept gifts to defray the expenses of their offices. 11/ A regulation promulgated by the Federal Election Commission under this provision repeats the language of the statute. See 11 C.F.R. §§ 113.1 & 113.2. Thus, we are aware of no indication that Congress intended it to mean anything other than what it clearly says: that elected officials including the President and the Vice President may accept gifts to defray expenses incurred in connection with the performance of their duties.

Nevertheless, we would caution against complete reliance on § 439a until further consideration has been given to the authority under that statute for political committees to make contributions, and until the matter has been coordinated with the Federal Election Commission. In this connection, the Federal Election Commission has authority to render advisory opinions to federal officeholders about "the application of a general rule of law stated in" the Federal Election Commission Act, of which § 439a is a part. See 2 U.S.C. § 437(b). To our knowledge, the Commission has not been called upon to and thus has not formally addressed the application of § 439a to gifts made to the President or the Vice President to defray the expenses of their offices.

9/ See 120 Cong. Rec. H10335 (daily ed. October 10, 1974).

10/ See 119 Cong. Rec. S 15081-15082 (daily ed. July 30, 1973).

11/ Congress amended the provision in 1980, Pub. L. No. 96-187, §§ 105(4), 113, 93 Stat. 1354, 1366 (1980), generally to prohibit a federal official from converting contributed funds for his or her personal use. A specific exemption to this provision also was added for individuals who were Senators and Representatives on January 8, 1980.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00558 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.410

Moreover, even if §439a ultimately is to be relied upon to grant gift authority for the President and Vice President, we would advise that guidelines be established for the receipt of contributions under the provision. This will be necessary since the Standards of Conduct Regulations applicable to agencies in the Executive Office of the President, 3 C.F.R. §§ 100.735-(1)-(32), were not drafted with the intent of regulating contributions to meet the official expenses of the President and Vice President. Those regulations as currently drafted might not be consistent with full implementation of § 439a if that were desired.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00559 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.411

SUBMISSIONS FOR THE RECORD

Department of Justice

STATEMENT

OF

ALBERTO R. GONZALES
ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

OVERSIGHT OF THE DEPARTMENT OF JUSTICE

PRESENTED ON

JULY 24, 2007

38236.116

STATEMENT OF
ALBERTO R. GONZALES
ATTORNEY GENERAL

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING
OVERSIGHT OF THE DEPARTMENT OF JUSTICE

JULY 24, 2007

Good morning Chairman Leahy, Ranking Member Specter, and Members of the Committee. I would like to thank you for the opportunity to appear here today to discuss the Department of Justice's ongoing efforts to help protect the United States from terrorism, to investigate and prosecute criminal behavior, and to vindicate Americans' civil and constitutional rights. I look forward to discussing the work that the Department has done in the three months since my last appearance before this Committee and to outline my priorities for the Department in the months ahead. As always, I welcome this opportunity to listen to your specific concerns and to enlist your support for the important work of the Department.

Terrorism and National Security

The terror events in London and Glasgow on the 29th and 30th of June remind us of the importance of having laws that ably support our efforts to combat those who would bring terror to our shores. And the Director of National Intelligence recently confirmed in a National Intelligence Estimate on the terrorist threat to the U.S. Homeland that the threat remains serious. The Violent Crime and Anti-Terrorism Act of 2007, which I recently delivered to Congress, and FISA Modernization legislation, which the Administration delivered to Congress earlier this year, would give federal law enforcement and our Intelligence Community critical tools they need in the War on Terror, while safeguarding the rights and liberties of all Americans.

These bills are, in short, designed partly to fill gaps in our ability to address terrorist plots. Since the terror attacks of September 11, 2001, the Department's top priority has been protecting the nation from the threat of terrorism. With the creation of the Department's new National Security Division, we now have attorneys and staff members within one organizational component dedicated to using all available intelligence and law enforcement tools in our effort to investigate and prosecute individuals committed to launching further attacks within the United States. The consolidation of the Department's national security capabilities into one division has promoted coordination and enhanced our ability to detect and disrupt terrorist threats. The Violent Crime and Anti-Terrorism Act of 2007 and the Administration's FISA Modernization proposal will enhance our abilities further still.

38236.117

Anti-Terrorism Provisions in the Violent Crime and Anti-Terrorism Act of 2007

A key part of terrorist planning is the recruitment of terrorists and training for an attack. In order to help the Department thwart plots at the earliest stages of this process, I urge Congress to enact several measures aimed directly against terrorist recruitment, solicitation, and training. Specifically, the Violent Crime and Anti-Terrorism Act of 2007 includes a provision banning so-called "martyr payments"— payments to would-be suicide bombers or their families. Such monetary rewards encourage terrorists to commit these heinous acts by promising support to their surviving family members. The bill also criminalizes the solicitation of a federal crime of terrorism, much as the law already criminalizes solicitation of general crimes of violence. In addition, the bill amends the statute that currently bans individuals from receiving military-type training from a terrorist organization; this amendment criminalizes attempts and conspiracies to obtain such training as well and would increase penalties for such crimes.

With so many Americans and United States government employees located in dangerous places abroad, it is more important than ever to ensure that we have adequate protections in place for our nationals who are overseas. The Department has identified some gaps in the laws aimed at protecting our nationals abroad and has proposed amendments to address these gaps. For example, the bill makes it a federal offense to kidnap American nationals outside the United States, clarifies that sexual abuse of Americans overseas is a crime, forbids the abduction of officers and employees of the United States who are seized because of their official work, and raises the penalties for similar existing crimes. Moreover, to improve the safety of American airline passengers, including those en route to overseas destinations or returning to the United States, the bill imposes sanctions for creating a serious threat to the safety of an airplane or passengers (for instance, by trying to open an airplane door while in flight).

The bill also includes, of course, authorities that would improve our ability to investigate and punish terrorists. Courts should be able to mete out to terrorists the same penalties that drug dealers are subject to, including the denial of federal benefits. The bill confers this authority. Another provision will reduce unnecessary delays and burdens on the government in investigating terrorism cases and increases the maximum penalty for obstruction of justice in the course of a terrorism investigation.

Each of the anti-terror provisions in the bill will enhance our capacity to investigate, disrupt, prosecute, and punish terrorists and those who seek to join or to support them. I sincerely hope that we can work together to put these measures in place and to advance the Department's ability to protect Americans' security both at home and abroad.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00562 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.118

FISA Modernization Legislation

I also want to briefly discuss the Administration's continuing interest in working with the Congress and this Committee to update the Foreign Intelligence Surveillance Act of 1978 (FISA). While FISA has been and continues to be one of our most valuable intelligence tools, it is imperative that the statute be modernized to account for the new technologies and threats of the 21st century.

It has been almost thirty years since FISA was enacted, and revolutionary advances in telecommunications technology in that time have upset the delicate balance that the Congress originally struck in the statute. As a result, FISA now imposes a regime of court approval on a wide range of intelligence activities that do not substantially implicate the privacy interests of Americans—an unintended consequence that has impaired our intelligence capabilities. In many cases, FISA now requires the Executive Branch to obtain court orders to monitor the communications of individuals posing a threat to our national security located overseas. This process of obtaining a court order necessarily slows, and in some cases may prevent, the Government's efforts to conduct surveillance of communications that are potentially vital to protecting the national security.

This situation is unacceptable—we must quickly reform FISA's outdated legal framework and ensure that the Intelligence Community is able to gather the information it needs to protect the Nation. The diversion of the resources of the Intelligence Community, the Department of Justice, and the Foreign Intelligence Surveillance Court (FISC) to FISA applications targeting foreign terror suspects overseas also must be remedied. As you surely agree, these precious resources would be better spent safeguarding the liberties of people in the United States.

The Administration has proposed comprehensive amendments to FISA to address these and other concerns. In addition to updating FISA, the Administration's proposal would extend liability protection to companies that are alleged to have cooperated with authorized intelligence activities in the wake of the September 11th attacks. By modernizing FISA, we can both provide the Intelligence Community with an enduring, agile, and efficient means of collecting critical foreign intelligence information and strengthen the privacy protections for U. S. persons in the United States. I look forward to working with the Congress on this critical issue.

Recent Accomplishments

With the tools we do have, we continue to concentrate on identifying and remedying vulnerabilities that terrorists can exploit in their plotting and planning, especially those efforts that target Americans here at home. Cutting off the provision of support and resources to foreign terrorists and terrorist organizations is critical to preventing and disrupting terrorist attacks and planning. I am committed to maintaining our focus on the investigation and prosecution of terrorism cases and to our continued success in charging and convicting those who plan and support terrorist plots. We will

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00563 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.119

persist in our vigilance, and we will use the full range of criminal charges available to us—including non-terrorism offenses such as false-statement charges, immigration fraud, human smuggling, and use of fraudulent travel documents—to charge defendants before their plans culminate in acts of terror.

The Department recently has enjoyed several successes in pursuing those who would do us harm. We have brought charges against several individuals engaged in such plots, including four men who plotted to carry out a series of bombings at New York's JFK Airport and six members of a southern New Jersey group charged with conspiring to attack the Army's Fort Dix in New Jersey. And we will continue to prosecute those who seek to support al-Qaeda—those like Rafiq Sabir, a physician whom a jury convicted of conspiring to aid jihadists abroad and providing material support to al Qaeda; and Tarik Shah, who agreed to provide martial arts training for al Qaeda operatives.

The Department also continues to play a critical role in obtaining authorization under FISA to conduct electronic surveillance and searches related to suspected terrorists and spies. These efforts have increased significantly since September 11th; in the past five years, the number of approved FISA applications has increased from 934 in 2001 to 2,176 in 2006. The Department's efforts in this area have allowed law enforcement and intelligence agencies to gather the information necessary to prevent terrorist attacks and combat espionage activities in the United States.

National Security Oversight and Compliance

In the midst of these efforts, I am pleased to report that the Department is also implementing a significant new national security oversight and compliance effort. This effort encompasses substantial changes within the Department of Justice aimed at improving the Department's controls over its national security activities. The effort will include the implementation of new oversight and compliance programs, including a dedicated Oversight Section within the Department's National Security Division. These oversight and compliance programs will be at the forefront of the Department's ongoing effort to ensure that our national security investigations are conducted in a manner consistent with our laws, regulations, and policies, including those designed to protect the privacy interests and civil liberties of our citizens. These innovations reflect a new level of internal oversight and an appreciation of the need for strong measures to improve compliance in our national security activities.

These institutional reforms also reflect an appreciation of the challenges that the Department faces in accomplishing its national security mission. The Department's Inspector General issued a report in March raising important concerns about the FBI's use of National Security Letters. After describing the broader oversight initiatives the Department is undertaking, I would like to briefly update the Congress on the many specific corrective actions that the Department has undertaken since the Inspector General released his report.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00564 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.120

Since the attacks of September 11th, 2001, the FBI's national security mission has dramatically expanded, and the Department's National Security Division has taken steps to develop its national security oversight capacity to keep pace with the level of operations. For example, for the past several years, the Department has complemented its FISA minimization reviews with accuracy reviews designed to ensure the factual accuracy of every assertion contained in the FBI declarations submitted to the Foreign Intelligence Surveillance Court. We are also increasing the frequency of these field office reviews; DOJ attorneys are on a pace to complete 30 such reviews by the end of this year, as compared with the 23 reviews conducted in 2006.

Most importantly, we are taking advantage of the opportunity presented by Congress' creation of the Department's new National Security Division. Since its establishment, the National Security Division has been building its capacity and increasing the tempo of its oversight activities. With the new oversight initiative we announced this month, DOJ attorneys have been given, for the first time, the clear mandate to examine all aspects of the FBI's national security program for compliance with law, regulations and policies.

To accomplish this expanded mandate, we are standing up a dedicated Oversight Section, as approved by the Congress last year, within the National Security Division's Office of Intelligence. This section is part of a broader proposed reorganization of the National Security Division. It will consist of attorneys and staff members specifically dedicated to ensuring that the Department fulfills its national security oversight responsibilities across the board.

We have begun exercising this oversight through a regular process of conducting National Security Reviews of FBI field offices and Headquarters national security units. These reviews are staffed by career Department attorneys with years of law enforcement and intelligence experience from the National Security Division and the FBI's Office of General Counsel, along with officials from the Department of Justice's Privacy and Civil Liberties Office. These reviews, which the Division started conducting in April 2007, broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and Attorney General Guidelines, and its use of various national security tools, such as National Security Letters. The reviews are not limited to areas where shortcomings have already been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

Since establishing this new national security review process in April, the National Security Division already has completed national security investigation reviews in five field offices, and the first Headquarters unit review began on July 23, 2007. By the end of this year, the Department will have completed a total of 15 reviews in field offices and headquarters units.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00565 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.121

The Oversight Section will also play an important role in other areas. At my direction, it will review all referrals by the FBI to the President's Intelligence Oversight Board, focusing on whether these referrals indicate that a change in policy, training, or oversight mechanisms is required. The Oversight Section will report to me semiannually on such referrals and will inform the Department's Chief Privacy and Civil Liberties Officer of any referral that raises serious civil liberties or privacy issues. In addition, it will provide compliance-related training for National Security Division lawyers and FBI agents and analysts.

The FBI Director has also recently proposed the creation of an FBI Office of Integrity and Compliance. The mission of this proposed office would be to implement a strong compliance program, which would assist FBI management at all levels in maintaining a culture in which ethics and compliance are paramount. The creation of this office and the implementation of the new FBI-wide compliance program would represent important innovations in the way the FBI does business.

The Office of Integrity and Compliance would be headed by a career Assistant Director who will report directly to the FBI's Deputy Director, providing the office with direct access to the top decision makers within the FBI. It would develop compliance standards, training programs, and risk assessments, ensure that necessary audits are performed, and deliver an annual report to key stakeholders. It would work closely with the Inspection Division to revise inspection protocols to include compliance risk and to ensure that compliance monitoring is carefully planned and executed. Finally, the compliance program would be institutionalized with a robust management structure including a Steering Committee chaired by the FBI Director and five Executive Management Committees. These committees would analyze the environment and legal requirements in each operational area, identify specific risk areas, and assess and establish policies, procedures, and training to mitigate those risks.

In addition to the structural reforms and other measures discussed above, some of which were in development well before the Inspector General's report, the Department has also taken a number of additional measures in response to the specific shortcomings identified by the Inspector General with respect to National Security Letters (NSLs). Upon receiving the Inspector General's report, the FBI Director and I ordered several significant corrective actions throughout the Department. At this time, we have fully implemented nearly all of the Inspector General's recommendations and also have made reforms beyond those called for by the Inspector General.

In March, as part of the FBI's effort to examine the scope of the problems identified by the Inspector General's report, the FBI Director ordered a one-time, historical audit of the FBI's use of NSLs in all 56 FBI field offices. This review was a substantial undertaking, requiring the deployment of over 100 inspectors and the review of thousands of investigative files. The review has now been completed, and it largely confirmed the Inspector General's overall statistical findings with respect to the rate of NSL errors attributable to the FBI.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00566 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.122

With respect to the use of so-called "exigent letters," the FBI has issued a Bureau-wide directive prohibiting the use of the type of letters described in the Inspector General's report. Furthermore, the Inspector General and FBI have agreed to conduct a joint investigation, led by the Inspector General, into the use of exigent letters to examine whether there has been any violation of criminal law, administrative misconduct, or improper performance of official duties.

The FBI has taken a number of steps to improve the accuracy of the reporting of NSL statistics to Congress. Last year, the FBI began developing a new NSL tracking database and plans to deploy the system to a field office for testing this month and to all field offices by the end of 2007. The FBI has also corrected deficiencies in its current database to reduce the potential for error and is correcting any known errors in its data.

The FBI also issued revised comprehensive guidance on NSLs after consultation with the Congress, privacy and civil liberties groups, the Justice Department's National Security Division, and the Department's Chief Privacy and Civil Liberties Protection Officer.

The FBI has initiated the development of a new training course on the use of NSLs. Once this course is fully developed, the FBI will issue a directive mandating training for all Special Agents-in-Charge, Assistant Special Agents-in-Charge, Chief Division Counsel, and all appropriate FBI agents and analysts. While this course is being developed, the FBI's Office of General Counsel has instructed its National Security Law Branch attorneys that they must conduct mandatory NSL training any time they are in a field office.

In addition, at my request, the Justice Department's Chief Privacy and Civil Liberties Officer and the Office of the Director of National Intelligence jointly convened a working group to examine how NSL-derived information is used and retained by the FBI.

To ensure that our prosecutors as well as our investigators properly use NSLs, I directed the Department's Executive Office for United States Attorneys to review its existing training materials and guidance relating to terrorism investigations and prosecutions to ensure that NSLs are described properly in those materials.

Finally, in accordance with another IG recommendation, the Department has developed a legislative proposal aimed at clarifying the scope of information that can be acquired under certain NSL provisions. We would be happy to work with the Committee on this proposal.

I am personally committed to ensuring that National Security Letters are used responsibly and in compliance with all legal requirements, and I look forward to working with this Committee to address any questions it may have about my efforts.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00567 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.123

Violent Crime

One of the most important functions of the Department of Justice is to combat violent crime and to help investigate and prosecute the nation's worst criminals. I am pleased to report that national crime rates remain near historic lows, thanks in large part to the courageous efforts of local, state and federal law enforcement agencies. And several major metropolitan areas continue to report decreases in the number of violent crimes in their communities. It must be acknowledged, however, that the FBI's 2005 Uniform Crime Report (UCR) and 2006 Preliminary UCR did signal a slight increase in the aggregate number of violent crimes in America. These data do not reveal a nationwide trend; instead, they show local increases in some violent crimes in certain communities. Despite the continuation of historically low crime rates, the Department takes seriously any increase in crime and renews its commitment to preventing violent crime across the country in partnership with state and local law enforcement agencies and prosecutors.

Initiative for Safer Communities

Recent visits by Department of Justice officials with representatives of 18 metropolitan areas nationwide underscored the local nature of violent crime. These community-centered conversations, which were undertaken as parts of the Initiative for Safer Communities that I launched in October 2006, revealed some common themes in cities experiencing an increase in violent crime but exposed no single cause or set of causes.

Among other factors, communities expressed concern about the increasingly young age of their violent offenders and about the dangers posed by loosely organized street gangs and by guns placed in the hands of criminals. Some communities expressed concern about the ability of their local or state criminal justice systems to impose appropriate sanctions for violent criminals. Our conversations with these communities reinforced the notion that each locality faces unique challenges and must address those challenges with a solution that is cognizant of both the local causes of crime and the local resources available to address it.

One consistent message we heard across the country was officials' appreciation for the distinctive advantages of federal prosecution. State and local authorities value the ability of the federal system to impose stiffer penalties—including prison time without parole—to some of the "worst of the worst" violent offenders. That is why, in May of this year, I directed all federal prosecutors and Department components, working in partnership with state and local law enforcement and prosecutors, to redouble their efforts to identify those violent crime cases that could be most effectively pursued under federal law.

The increase in the number of violent crimes, coupled with the value of prosecuting significant violent offenders in the federal system, makes it all the more important to ensure the effectiveness of our federal criminal laws. Law enforcement

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00568 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.124

personnel at all levels are doing their job; our laws must help—and not hinder—their important efforts. With these considerations in mind, I urge this committee to take up the Violent Crime and Anti-Terrorism Act of 2007.

Violent Crime and Anti-Terrorism Act of 2007

In addition to strengthening our anti-terrorism authorities, this broad legislative proposal is aimed at ensuring that law enforcement and prosecutors have the tools they need to investigate and to prosecute violent criminals and to keep American communities safe. Of particular note, the bill makes the U.S. Sentencing Guidelines mandatory, as Congress intended, rather than merely advisory. The bill thus restores the certainty—and fairness—of federal sentences and reinforces the Department's ability to keep serious offenders off of our streets. The bill also provides rights of appeal for both the United States and the defendant to challenge the sentencing determinations made by a trial court. This change will permit the Department to vindicate the fairness of the guidelines when a criminal's sentence is more lenient than sentences that are imposed on others who have been convicted of the same crime.

The legislation promises to improve criminal law as it applies to other areas as well. It amends the armed career criminal statute to create a tiered penalty approach for felons with prior drug trafficking or violent felony convictions, giving judges and prosecutors the framework they need to properly punish hardcore criminals. Additionally, the legislation increases the maximum penalty for the general federal criminal conspiracy statute, making the law more effective in prosecuting conspiracies to commit offenses. Another important provision increases the maximum sentences that individuals convicted of felony crimes of violence or drug trafficking crimes will face if they have entered the United States illegally. Moreover, the bill would allow federal prosecutors to pursue violent offenders more effectively across the board with longer and more consistent statutes of limitations.

Sending a tough message to those who violate federal firearms laws, the bill strengthens the statutory prohibition on illegal firearms transfers by doubling the maximum penalty for transferring a firearm that will be used to commit a violent crime or drug trafficking offense. The bill also establishes a firm but flexible system of graduated sanctions for certain violations of the Gun Control Act. These provisions will provide greater incentive for federal firearms licensees to comply with the law and will assist the Bureau of Alcohol, Tobacco, Firearms and Explosives in effectively addressing specific violations.

Violent crime is often committed for financial gain, and criminal enterprises cannot survive without money to fuel their operations. The bill therefore includes the Proceeds of Crime Act: a comprehensive update and enhancement of the federal criminal forfeiture and money laundering laws. By targeting criminal proceeds, the Act strikes directly at the heart of the criminal enterprise, taking away the financial incentive that motivates many crimes in the first place. The Act also expands statutory authority, and provides more uniform procedures, to forfeit money and property used to commit crimes.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00569 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.125

Violent Crime Initiatives and Task Forces

The Violent Crime and Anti-Terrorism Act will substantially enhance the Department's ability to prevent and to punish violent crime. Moreover, the Act will support initiatives that the Department has instituted in pursuit of these vital objectives. I should highlight two of the Department's programs aimed at addressing the dangers posed by violent criminals: Project Safe Neighborhoods (PSN) and the Comprehensive Anti-Gang Initiative.

As you may know, PSN originally focused on reducing gun violence by promoting community-based, multi-faceted solutions to be implemented by coalitions of local, state and federal partners. I expanded PSN to include new and enhanced anti-gang efforts, and I am pleased to report that this fiscal year the Department is awarding approximately $50 million in state and local grants to support these cooperative efforts to reduce gun violence and gang crime.

The Department has also recently expanded its Comprehensive Anti-Gang Initiative. When I last testified before this committee, the Initiative operated in six sites across the country. I have since expanded the Initiative to four additional sites: Indianapolis, IN; Raleigh-Durham, NC; Oklahoma City, OK; and Rochester, NY. This effective program focuses prevention, enforcement, and offender reentry efforts in a given target area, partnering with faith-based and other community organizations aiming to rehabilitate neighborhoods stricken by gang violence. I believe that no one should have to live in fear of gangs or violent crime. The Comprehensive Anti-Gang Initiative is one way in which the Department brings hope to those who live in violent environments.

Numerous other Department efforts lead the way in clearing communities of violent offenders, including those that are gang-related. The Department established an Anti-Gang Coordination Committee to organize the Department's wide-ranging efforts to combat gangs. At the district level, each United States Attorney has appointed an Anti-Gang Coordinator to provide local leadership and focus to our anti-gang efforts. 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.

In addition, 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 Bureau of Alcohol, Tobacco, Firearms and Explosives, Bureau of Prisons, Drug Enforcement Administration, Federal Bureau of Investigation, and United States Marshals Service as well as the Department of Homeland Security's U.S. Immigration and Customs Enforcement and other partners. The center coordinates overlapping investigations, ensures that tactical and strategic intelligence is shared among law enforcement agencies, and serves as a central coordinating center for multi-jurisdictional gang investigations involving federal law enforcement agencies. GangTECC works hand-in-hand with the National Gang Intelligence Center, which integrates the gang intelligence assets of all Department of

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00570 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.126

Justice agencies, and has established partnerships with other federal, state, and local agencies that have gang-related information.

GangTECC has contributed to a number of important anti-gang operations in the past year. In addition to supporting the recent and successful prosecution of MS-13 leaders in Maryland, GangTECC has coordinated anti-gang initiatives in several cities across the country, including Baltimore, MD; Cleveland, OH; Dallas, TX; Trenton, NJ; and the communities of Bakersfield, Modesto, and Sacramento in California. GangTECC, working with the National Gang Intelligence Center and Gang Squad, the Department's new gang prosecution unit, is presently supporting—and in some cases spearheading—significant investigations of high-level gang members in several states. Some of these investigations even reach outside the United States and involve cooperation with our foreign law enforcement partners.

The Department has also established and leads numerous joint violent crime-related task forces, including the FBI-led Safe Streets Task Forces and Gang Safe Streets Task Forces that focus on dismantling organized gangs; U.S. Marshals-led Regional Fugitive Task Forces and district-based task forces that focus on fugitive apprehension efforts; and ATF-led Violent Crime Impact Teams, which comprise agents from numerous federal, state, and local law enforcement agencies and identify, target, and arrest violent criminals to reduce the occurrence of homicide and firearm-related violent crime. The FBI's Safe Streets Task Force program recently added a new task force in Orlando, bringing the total number of these task forces to 180. The ATF added Violent Crime Impact Teams to Mesa, Ariz.; Orlando, Fla.; San Bernardino, Calif.; and San Juan, Puerto Rico—raising the total number of teams to 29 nationwide. These efforts are making a difference. Violent Crime Impact Teams alone have recovered more than 13,950 firearms and captured 1,960 criminals identified as the "worst of the worst." Further, the opening of the USMS Gulf Coast Regional Fugitive Task Force operating in Alabama and Mississippi brings the total number of USMS-led regional and district fugitive task forces to 92. In FY 2006, USMS task forces collectively apprehended over 80,000 fugitives, many of whom were wanted in federal and state courts for violent offenses.

Every program that I have discussed and all of the Department's efforts to combat violent crime would benefit from the passage of the Violent Crime and Anti-Terrorism Act of 2007.

In addition to helping law enforcement fight violent crime, the proposed legislation amends and strengthens laws targeting sexual predators, drug traffickers and terrorists. Specifically, the law mandates a minimum sentence of two years for possessing child pornography and provides technical and other improvements to laws used to combat drug trafficking. Beyond these beneficial changes, I strongly believe that the bill's anti-terror provisions make the passage of this bill immensely important.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00571 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.127

Additional Initiatives in the FY 2008 Budget

State and local authorities value flexibility and the ability to target Federal resources where local law enforcement needs those resources most, including fighting violent crime. This is why the President's FY 2008 Budget proposes to consolidate more than 70 grant programs, many of which are small, earmarked, or hindered by inflexible formulas, into just four flexible and competitive grants.

Protection of Children

Protecting children against sexual predators has been a key priority of my tenure as Attorney General, and I am proud of the Department's efforts thus far to combat the terrible crimes that are all too often committed against children. The Department has moved forward aggressively to implement key reforms of the Adam Walsh Child Protection and Safety Act of 2006 and other efforts to protect our nation's youth, and I am pleased to be able to report on what we have most recently accomplished.

As you know, the Adam Walsh Act adopted a comprehensive new set of national standards for sex offender registration and notification and directed the Department to issue guidelines and regulations to interpret and implement these requirements. The Act also created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART Office") to administer the requirements. The SMART Office's director has developed detailed guidelines to assist the States, territories, and Indian tribes in incorporating the Adam Walsh Act standards in their sex offender registration and notification programs. I reviewed and approved those Guidelines on May 17, and they were published both on the Department's website and in the Federal Register. A public comment period on them is open until August 1st. Once the comments are received and evaluated, we will publish the final guidelines to help the States, territories, and Indian tribes comply with Act.

In addition to strengthening the substantive standards for sex offender registration and notification, the Adam Walsh Act provides for increased Federal assistance to states and other jurisdictions for the enforcement of registration requirements and protection of the public from sex offenders. For example, the Act directs the Department to use the resources of Federal law enforcement, including the United States Marshals Service, to assist jurisdictions in locating and apprehending sex offenders who fail to register as required. Under new section 2250 of title 18 of the U.S. Code, sex offenders who knowingly violate the Act's registration requirements under circumstances supporting Federal jurisdiction, such as failure to register following relocation from one State to another, can be imprisoned for up to 10 years. Since the enactment of section 2250, Marshals Service investigations have resulted in the issuance of 166 arrest warrants for fugitives in violation of the law. Marshals and other law enforcement officials have now arrested 120 of those fugitives. The Department's Criminal Division and the United States Attorneys' Offices have developed policy and guidance for prosecutions under the new Federal failure to register offense and are moving forward aggressively in bringing Federal prosecutions in appropriate cases.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00572 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.128

In addition, the Adam Walsh Act enacted important reforms affecting the correctional treatment of sex offenders. For example, the Act adopted new provisions for civil commitment of sexually dangerous persons. This means that a person in the custody of the Bureau of Prisons is now subject to court-ordered civil commitment if it is proven by clear and convincing evidence that: (i) the person has engaged in sexually violent conduct or child molestation, and (ii) the person suffers from a serious mental illness, abnormality, or disorder as a result of which the person would have serious difficulty in refraining from further sexually violent conduct or child molestation if released. Pursuant to the Act's civil commitment provisions, the Bureau of Prisons has certified 43 inmates (not limited to those incarcerated for sex offenses) as sexually dangerous persons, a decision that initiates judicial commitment proceedings. The Bureau of Prisons is formalizing the screening and certification of inmates who satisfy the statutory "sexually dangerous person" criteria, and civil commitment of such persons for the protection of the public and for their care and treatment will be sought in all appropriate cases.

The 2008 Budget includes resources to strengthen BOP's ability to manage the Federally sentenced sex offenders in the Bureau's custody in accordance with the Adam Walsh Act. These enhancements will help address the security issues raised by a growing sex-offender inmate population and the need to reduce recidivism among such offenders following their release.

Another important aspect of the Adam Walsh Act is the inclusion of provisions aimed at preventing use of the Internet to exploit children. Of course, the Internet is one of the greatest technological advances of our time, but it also makes it alarmingly easy for sexual predators to find and contact children, as well as to trade, to collect, and even to produce images of the sexual exploitation of children. The Act amended existing law to protect children from such exploitation by requiring that producers of graphic nude images (even without depictions of sexual intercourse) maintain for inspection records proving that all persons depicted in those images were 18 years of age or older at the time the images were made. On July 12, the Department published in the Federal Register a new proposed rule to implement this provision.

The Adam Walsh Act also provided a statutory basis for the backbone of the Department's efforts to combat child exploitation, Project Safe Childhood (PSC). We have begun to marshal our collective resources and raise online exploitation and abuse of children as a matter of public concern. We have sought to do this through enhanced coordination of our law enforcement efforts, especially with the Internet Crimes Against Children task forces and our other State and local partners. And we have sought to reach out to parents and children about how to stay safe online through cooperation with our non-governmental partners like the National Center for Missing and Exploited Children (NCMEC). We also took the lead in the international community, sponsoring resolutions on effective crime prevention and criminal justice responses to combat sexual exploitation of children adopted this past April by the United Nations Commission on Criminal Justice and Crime Prevention and the Group of Eight major industrial powers.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00573 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.129

The Department's enhanced law enforcement efforts have begun to show results. In the first nine months of FY 2007, the U.S. Attorneys have brought more than 1,500 cases of child pornography offenses, online sexual solicitation of minors, and traveling to sexually abuse a child, a pace that if continued in the next three months will yield more than 2000 prosecutions, up 25 percent over the 1,600 in FY 2006. Our conviction rate thus far is 92 percent. In the first eight months of FY 2007, the Federal Bureau of Investigation's Innocent Images National Initiative opened 1,654 cases, a pace that if continued over the next four months will yield more than 2,481 investigations, up 16 percent over the 2,135 in FY 2006. Meanwhile, in the first half of the fiscal year, the Internet Crimes Against Children (ICAC) task forces increased the number of arrests for online child exploitation and abuse to 1,139, up nearly 20 percent over the same period in FY 2006. Through these prosecutions our goal is to stop those who prey on our children and also to deliver a strong message of deterrence: When you target kids, we will target you.

The Department has undertaken two other important steps to reduce the incidence of child sexual exploitation and abuse facilitated by the Internet, and these steps have begun to show results.

Together with NCMEC and the Ad Council, we have supported a public service advertising campaign called "*Think Before You Post,*" which is designed to educate teenage girls about the potential dangers of posting and sharing personal information online. Popular social networking sites such as MySpace, Facebook, and Sconex make it easier for children and teens to post and share personal information, pictures, and videos, which may make them more vulnerable to online predators. Girls are particularly at risk of online sexual exploitation—a recent study by University of New Hampshire researchers for NCMEC found that, of the approximately one in seven youths who received a sexual solicitation or approach over the Internet, 70 percent were girls.

The *Think Before You Post* campaign sends a strong reminder to children and their parents to be cautious when posting personal information online because, "[a]nything you post, anyone can see: family, friends, and even not-so-friendly people." The public service announcements were distributed to media outlets throughout the country and can also be viewed at the Department's website www.usdoj.gov. I commend these announcements to your attention.

Coordination of our law enforcement efforts through our 93 U.S. Attorneys will also be advanced by the recent launch of the PSC Team Training program. This program, which I launched at NCMEC's Alexandria headquarters in February, will reach every district by the end of 2008 through a series of regional training sessions. The training program will create a platform from which federal, state, and local law enforcement agencies and non-governmental organizations can effectively work together across state and even national borders. In February, teams from Alabama, Arkansas, Missouri, Texas, and Washington received training. The next training session was held in Miami in May, bringing together teams from Florida, Puerto Rico, and the Virgin

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00574 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.130

Islands. In June, teams from Kentucky, South Carolina, Tennessee, and West Virginia were trained, and our next training session in August will include teams from Connecticut, New York, and New Jersey.

Drug Enforcement

The Department continues to aggressively investigate and prosecute illegal drug traffickers and drug trafficking organizations. Last fiscal year, federal drug prosecutions accounted for more than 25 percent of all cases filed by our U.S. Attorneys and 36 percent of federal defendants.

Drug Trafficking Organizations

Drug trafficking organizations continue to supply the vast majority of drugs into the United States. The Department's most effective approach to fighting these trafficking organizations combines the skills and resources provided by the Drug Enforcement Administration (DEA) and the Organized Crime and Drug Enforcement Task Force (OCDETF) program to gather intelligence, aggressively investigate and bring to justice violent members of these organizations. The Department generally relies on the expertise of multiple federal agencies along with our international, state, and local partners, to mount a comprehensive attack on major drug organizations and the financial infrastructures that support them.

This approach has been successful. In June of this year, Manuel "Hoover" Salazar-Espinosa, designated by the Justice Department as one of the world's most significant drug kingpins, was convicted in New York of conspiring to import cocaine, distributing cocaine with intent to import, and conspiring to launder narcotics proceeds. According to the evidence at trial, Salazar-Espinosa conspired with notorious Mexican cocaine cartel leaders to transport ton-quantities of Colombian cocaine through Mexico to the City of New York on a weekly basis. Salazar-Espinosa also assisted in the laundering of $12 million to $14 million in narcotics proceeds per week during the period 2002 to 2005. The Department's prosecutors also proved Salazar-Espinosa's responsibility for a 1.3-ton cocaine shipment destined for the United States, which was seized while concealed in the arm of a crane in Panama in July 2005. In February of this year, the Department secured convictions of Anayibe Rojas Valderrama and two co-defendants for conspiring to import five kilograms or more of cocaine into the United States and conspiring to manufacture and distribute five kilograms or more of cocaine intending and knowing that the cocaine would be unlawfully imported into the United States. Rojas Valderrama was the finance officer of the 14th Front of the FARC. She was extradited from Colombia to the United States in March 2005 to stand trial on the U.S. charges, and is the first FARC leader to be convicted in the United States.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00575 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.131

Methamphetamine

With the recent passage of the Combat Methamphetamine Epidemic Act (the Combat Meth Act), domestic lab production of methamphetamine has dramatically declined. The Combat Meth Act regulates the sale of the legal ingredients used to make methamphetamine; strengthens criminal penalties; authorizes resources for State and local governments; and enhances the regulation of methamphetamine by-products, among other things. The Department is committed to enforcing these new provisions of the law rigorously in order to end the domestic production of methamphetamine. I am pleased to report that, as State laws regulating methamphetamine precursors have gone into effect along with the Combat Meth Act, we have seen a significant decline in the number of domestic methamphetamine labs.

The United States Government has established a strong partnership with Mexico to combat methamphetamine. Since the Attorney General of Mexico and I announced several anti-methamphetamine initiatives designed to improve enforcement, training, information sharing, and public awareness, significant progress has been made. For example, Mexico has begun imposing import quotas tied to estimates of national needs. The Mexican Government has reduced the amount of pseudoephedrine, ephedrine, and combination product importation permits to 70 tons during 2006, a reduction of 53 percent from the 2005 import level.

DEA has expanded the role of its Clandestine Lab Enforcement Teams to target Mexican methamphetamine trafficking organizations and has developed a special field intelligence program, Operation White Fang, to identify and target the organizations responsible for producing and trafficking methamphetamine across the entire southwest border. DEA is also providing training to Mexican law enforcement and prosecutors on topics ranging from chemical identification to officer safety.

Opium Production in Afghanistan

The illicit production of opium in Afghanistan continues to be a worldwide problem. Through training and education of Afghan officials, as well as ongoing criminal investigations, the Department, in partnership with the Department of State, continues to combat the opium trade. The Criminal Division's Senior Federal Prosecutors Program continues to be an important presence in Kabul; this program was critical in assisting the Afghans to draft a new comprehensive counter-narcotics law. The Department will continue to build upon its successes, foster international support, and constantly seek new ways to reduce and eliminate this dangerous drug trade.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00576 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.132

Identity Theft

Identity theft has become of increasing concern to the American people. Among other things, it results in lost confidence in online commerce and in the reliability of businesses and government agencies that collect and maintain personal data. Moreover, the aggregate losses from such crimes can amount to billions of dollars and millions of hours of recovery time for individuals, businesses, and the government.

The Department plays dual roles in combating identity theft. Our principal role is prosecutorial: Our prosecutors seek to bring identity thieves to justice and to recover the proceeds of crimes for their victims. The Department is also one of the two agencies leading the President's Identity Theft Task Force, which I chair.

On April 23, I had the privilege, along with FTC Chairman Deborah Platt Majoras, of transmitting to the President a comprehensive Strategic Plan, developed by the Identity Theft Task Force, for combating identity theft. The Strategic Plan is the result of an unprecedented federal effort to identify the best way forward to attack this pernicious crime and represents a milestone in America's efforts to fight back against identity thieves—a blueprint for a coordinated, across-the-board effort to better protect America's families from this insidious offense.

The 31 major recommendations in the Task Force Strategic Plan target the entire life cycle of identity theft—from the acquisition of sensitive data to its misuse and from the investigation and prosecution of identity thieves to recovering lost assets for their victims—and provide guidance for all sectors of the economy. The report fully acknowledges that the government also has to do a better job of preventing and responding to identity theft. This integrated approach reflects a belief that the problem of identity theft can be best handled only when all stakeholders are focused on the same goals.

The report includes four particularly ambitious and important recommendations that I would like to highlight here. First, federal agencies should reduce the unnecessary use of Social Security numbers, which are one of the most valuable commodities to an identity thief. Second, national standards should be established to require private sector entities to safeguard the personal data they compile or maintain and to provide notice to consumers when a breach occurs that poses a significant risk of identity theft. Third, federal agencies should implement a broad, sustained awareness campaign to educate consumers, the private sector, and the public sector on methods of deterring, detecting, and defending against identity theft. Fourth, Congress should consider a variety of legislative proposals aimed at improving our ability to prevent, to investigate, and to prosecute identity theft and related crimes.

Recognizing that many of our current criminal statutes have not been updated to allow law enforcement to keep pace with new and developing methods of identity theft, the Task Force recommended a legislative package that would facilitate identity theft enforcement by, among other things, closing loopholes in existing laws. Doing so would

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00577 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.133

help ensure that prosecutors have the appropriate tools for charging identity theft crimes. For example, one section proposes amending the identity theft and aggravated identity theft statutes to ensure that identity thieves who misappropriate information belonging to corporations and organizations can be prosecuted. Another would amend existing statutes to assure the ability of federal prosecutors to charge those who maliciously use spyware and keylogger software.

Our legislative proposals, which the Department formally transmitted to Congress on July 19, 2007, also included a provision amending the restitution statutes to ensure that victims can recover the value of time they reasonably spent in attempting to make themselves whole after a theft. We appreciate the Committee's prior leadership in this area, and I look forward to working with this Committee to ensure that these provisions are enacted into law.

Intellectual Property Enforcement

Intellectual Property (IP) protection is a core component of U.S. economic health and the key to preserving America's competitive position in the global marketplace. The Justice Department has made combating IP crime a priority, and we are committed to enforcing the law in this area and to pushing for even stronger legal protections.

We have seen the real and tangible consequences of counterfeiting and piracy as they deprive artists and innovators of the fruits of their creations, divert business from honest merchants, provide a ready source of revenue for organized criminal groups, and defraud—and often physically endanger—innocent consumers. Our response must move forward on several fronts. We must strengthen our global law enforcement efforts, work to increase the number of international operations we conduct jointly with other countries, and ensure strong intellectual property laws here in the United States.

The Department continues to increase efforts to protect U.S. intellectual property against counterfeiting and piracy with a special emphasis on prosecuting cases that implicate health and safety. While some view IP crime as harmless or victimless, the reality is that criminals who manufacture and sell counterfeit products can pose a substantial risk to the health and safety of American consumers. Imagine a heart patient undergoing emergency surgery at a hospital that unknowingly purchased counterfeit—and substandard—surgical equipment. Or a truck driver who buys counterfeit brake pads that diminish his ability to avoid an accident. Preventing these potential catastrophes is the central reason we take this issue so seriously. These crimes have an impact on the economy, but they are about far more than just dollars and cents.

As you know, the Department created an Intellectual Property Task Force to bolster our efforts across the board. For instance, last June, the Department's Task Force on Intellectual Property announced that it had implemented 31 recommendations to improve IP protection and enforcement in the United States and abroad, as described in detail in the Progress Report of the Department of Justice's Task Force on Intellectual Property (June 2006).

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00578 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.134

In the past two years, we have significantly expanded the Computer Hacking and Intellectual Property (CHIP) network of Federal prosecutors dedicated to the prosecution of high-tech and IP crime. The total number of CHIP prosecutors has increased to 230 (with at least one in each U.S. Attorney's Office), and the number of specialized CHIP Units has nearly doubled to 25 cities nationwide. The Task Force's unprecedented efforts to improve criminal IP enforcement have yielded, among other successes, substantial increases in Federal investigations and prosecutions of IP violations.

In addition, last year, the Department committed to increasing the number of IP prosecutions and improving our international cooperation and outreach efforts. Through the dedicated efforts of U.S. Attorney's Offices, our Criminal Division, and law enforcement across the country, we accomplished those goals.

For instance, in 2006, we convicted 57 percent more defendants for criminal copyright and trademark offenses than in 2005. Of those convictions, the number of defendants receiving prison terms of more than two years increased even more sharply—up 130 percent. FBI arrests in IP cases increased by nearly 40 percent, with the number of convictions increasing by more than 50 percent. Increased enforcement and stiffer sentences send an important message to these counterfeiters and pirates that we take their crimes seriously and that they will be investigated, prosecuted, and punished for those crimes.

It is imperative that countries work together to ensure strong enforcement worldwide. There can be no safe havens for intellectual property criminals if IP crimes are to be curtailed. Last month, following one of the first extraditions ever for an IP offense, the leader of one of the oldest and most notorious internet software piracy groups was sentenced to more than four years in prison for his part in an illegal distribution of at least $50 million worth of pirated software, movies, and music.

In cases like this, we have worked with prosecutors throughout the United States and internationally to protect the rights of IP owners and to enforce the law. Last year alone Department of Justice prosecutors provided training and technical assistance on IP investigations and prosecutions to over 3,300 foreign prosecutors, investigators, and judges from 107 countries. We are training more every day.

In order to advance our international efforts, the Department last year placed the first-ever IP Law Enforcement Coordinator in Bangkok, Thailand. Later this year, we will be sending a second coordinator to Eastern Europe.

When I meet with my counterparts in other countries, I make sure to include IP crimes in the discussion. Last May, at a meeting of G8 Justice and Home Affairs Ministers in Germany, my counterparts and I adopted a set of principles to enhance international cooperation in fighting IP crime, and we will continue this work over the coming year. Throughout Central and South America, in Asia, and in Europe, we are

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00579 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.135

making clear that these important issues need to be taken seriously—not just for the sake of Americans but for the benefit of consumers and entrepreneurs worldwide.

We must also continue our efforts at home, however. In order for us to protect the intellectual property that is so important to our national economy and to meet the global challenges of IP crime, U.S. laws must be up to date. On May 14, I submitted to the Congress a bill, the Intellectual Property Protection Act of 2007, that imposes stronger penalties for repeat copyright offenders and increases the maximum penalty for counterfeiting offenses when the defendant has knowingly or recklessly caused or attempted to cause serious bodily injury or death.

The Intellectual Property Protection Act of 2007 hits IP criminals in their wallets by strengthening applicable forfeiture and restitution provisions. Doing so ensures that IP criminals will forfeit their illicit profits as well as any property used to commit their crimes and strikes at the very motivation underlying the criminal enterprise: money.

A major theme that cannot be sounded too frequently—and that I thank this Committee for appreciating—is that IP crime is not a mere technicality or victimless crime. Counterfeiting and piracy are serious problems with real victims, and these problems pose a threat not only to American industries but to public health and safety as well. Those who seek to undermine this cornerstone of U.S. economic competitiveness may believe that they are making easy money; that they are above the law or below the radar screen of law enforcement. It is our responsibility and commitment to show them that they are wrong. This Committee's prompt consideration of and action on the Intellectual Property Protection Act of 2007 will help us do just that.

Immigration Enforcement and Border Security

Next, I would like to offer a review of the Department's ongoing work on immigration enforcement and border security. This critical area of law enforcement was, of course, the subject of intense debate and careful consideration in May and June as the Senate considered the Secure Borders, Economic Opportunity and Immigration Reform Act of 2007. I would like to thank the members of this Committee for your participation in that important national discussion as well as for the efforts that many of you made to advance the President's call of comprehensive immigration reform. As the President has noted, we will not fully succeed in stemming the tide of illegal immigrants or in securing America's borders without a comprehensive solution to the immigration puzzle. That bill was a good if imperfect step toward a workable and sustainable solution. I hope that this debate will continue.

That said, the Department remains committed both to enforcing the immigration laws and to helping the Department of Homeland Security in securing our borders even in the absence of comprehensive reform legislation. Immigration offenses thus remain the largest category of cases that the Department files. Nearly one third of the 60,000 new criminal cases filed last year were for immigration offenses.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00580 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.136

We have resolved to do even more. In the latter half of 2006, the Department sent 30 additional prosecutors to the districts along the southwest border to help them pursue a greater number of immigration and narco-trafficking cases. Since 2000, the overall number of Assistant U.S. Attorneys working in the southwest border districts alone has increased by about 29 percent.

With enhanced immigration enforcement efforts such as the Department of Homeland Security's termination of the so-called "catch-and-release" practice with non-Mexican aliens arriving at the Southwest Border, the number of illegal aliens entering along the border appears to have declined. To sustain and build upon this progress, we are seeking to increase the number of immigration prosecutions we file where we have the necessary referrals from the Border Patrol and the capacity to take on more cases. In that respect, I am pleased to report that the U.S. Attorney's Office for the Southern District of California is projected to file more than 1,600 immigration cases in FY 2007, a 7% increase over the last fiscal year. In Arizona, the U.S. Attorney's Office is projected to file more than 2,225 cases, which would represent a 7.2% annual increase. Moreover, our border districts prosecute tens of thousands of misdemeanor cases for entering without inspection in violation of 8 U.S.C. § 1325 that are not included in our case filing statistics.

To further expand our capacity to prosecute immigration offenders, the President has proposed in his 2008 budget $7.4 million for a Border and Immigration Prosecution Initiative that would provide for the hiring of 55 additional prosecutors to prosecute immigration cases. In addition, the budget seeks $7.5 million to hire 40 Deputy U.S. Marshals to manage the increased workload resulting from increased immigration enforcement along the Southwest Border. These resources are needed so that we can continue to increase our prosecutions and deter illegal border crossings in the ongoing effort to achieve operational control of the border.

As you know, the Department not only prosecutes those who commit immigration offenses but also adjudicates civil actions brought by the Department of Homeland Security to remove individuals who are in the United States illegally. These matters are adjudicated within the Department of Justice by the Executive Office for Immigration Review (EOIR), an agency that includes immigration judges and members of the Board of Immigration Appeals (Board). As I have previously reported, the Department last year completed a comprehensive review of EOIR's operations, and last August I directed that a number of reforms be undertaken to improve the overall adjudication process and to remedy the procedural deficiencies and management issues that were identified.

I am pleased to report to the Committee that we have made tremendous strides in implementing these reforms, and the new procedures have significantly assisted the current immigration judges and Board members in the performance of their duties. Moreover, a new hiring process has been implemented to select the very best candidates to serve in these career positions in the future. This new process, which I approved this spring, has been formalized to make the hiring of immigration judges and Board

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00581 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.137

members more routine, consistent, and transparent. In furtherance of that goal, the initial vetting, evaluation, and interviewing functions have been placed within the Office of the Chief Immigration Judge and within the Executive Office for Immigration Review as a whole.

In addition, EOIR has developed extensive training programs for both new appointees and veteran immigration judges, has noticeably improved its transcription services, and has placed supervisory immigration judges in the field to provide improved and more consistent management of the immigration courts. EOIR is also set to issue procedural manuals and other resource materials for use both by the immigration judges and by those who appear before them in immigration courts, and EOIR is about to begin replacing the immigration courts' antiquated audio recording system with greatly improved digital systems.

Identifying problems as they arise is essential to ensuring quality, and thus EOIR has established channels through which private individuals and government attorneys now can report their concerns about the conduct, professionalism, or quality of decisions of immigration judges. In order to avoid the occurrence of such problems, the Department is undertaking the promulgation of codes of conduct for immigration judges and Board members. The Department has already published proposed codes for review and comment.

The integrity of the immigration courts requires more than the unfailing professionalism of immigration judges; it requires the prevention of fraud and abuse as well. In pursuit of this objective, we have created a formal process by which immigration judges can refer suspected instances of immigration fraud and abuse for investigation and potential prosecution. Forty-five such cases have already been referred.

The Board is contributing to the quality and consistency of immigration decisions itself by publishing more precedent decisions this year than it has over the previous six years and by drastically decreasing its reliance on summary one-line decisions. These summary decisions now account for less than 10% of the Board's total decisions.

Finally, the Committee will be pleased to learn that EOIR has greatly improved its public outreach efforts over the last year by doubling the size of the Legal Orientation Program for unrepresented detained aliens, expanding pro bono programs for unaccompanied alien children, and increasing the number of court-sponsored pro bono attorney training programs.

There is still much to do to ensure that our immigration courts function as efficiently and fairly as possible. It is incumbent on us to meet the challenge of rapidly processing large numbers of cases, so that the immigration laws of this nation are effectively enforced. This not only serves the rule of law, it ensures that an immigrant's first experience with the U.S. Government is demonstrably fair, reliable, and efficient, and that it positively reflects the generosity and openness of this great country. I thank

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00582 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.138

the Committee for its attention to the immigration system and look forward to working with the Committee as we continue our reforms in the coming months.

Crisis Response—Hurricane Katrina

Over and above our established priorities, the Department of Justice remains ready and able to respond to unforeseen events and disasters and to maintain an appropriate law-enforcement presence in their wake. The most notable example of this is the Department's work in assisting the city of New Orleans as it rebuilds its critical criminal justice infrastructure after Hurricane Katrina. The Department has made more than $30 million in grants available to Orleans Parish and others in the greater new Orleans region to help rebuild the criminal justice system there. In total, the Department has made available to the state of Louisiana over $86 million in justice assistance grants (JAG) and Katrina relief law enforcement infrastructure funds.

Grant funding, however, is only one small part of our efforts to assist New Orleans. To address the emerging violent crime concerns there after the hurricane, the Department dispatched attorneys to New Orleans to temporarily increase the number of prosecutors bringing cases on behalf of the U.S. Attorney's Office for the Eastern District of Louisiana. In addition, nine more assistant U.S. attorneys (AUSAs) were hired to assist with Katrina-related fraud and violent crime prosecutions, and one more AUSA will be hired to prosecute cases involving gang violence. Other Department agencies have also provided additional staffing: the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) assigned six additional ATF Special Agents to New Orleans to supplement the Violent Crime Impact Team (VCIT), which focuses on reducing gun crime; the USMS assigned four additional deputy U.S. marshals to supplement the Crescent Star Fugitive Task Force, which conducts investigations to locate and apprehend violent felony fugitives across 13 parishes in the Eastern District of Louisiana; and the FBI detailed an additional 9 special agents to New Orleans to supplement the Violent Gangs Safe Streets Task Force, which works closely with the New Orleans Police Department in criminal enterprise investigations. To leverage their presence in the area, Drug Enforcement Administration (DEA) special agents have been granted temporary authority to investigate not only drug crimes but all federal offenses.

In addition to supporting local law enforcement, the Department has contributed to violent crime prevention resources and supported victims' services. The Bureau of Justice Assistance has obligated approximately $100,000 to coordinate efforts to restart a Police Athletic League (PAL) and to expand Boys and Girls Clubs in the impacted area. The Department's Office on Violence Against Women (OVW) has committed up to $3 million to create a comprehensive victim service- and support-center that will help victims of domestic and sexual assault crimes obtain multiple services in a single location. The services provided to the victims by faith-based and other community organizations will include emergency housing, medical care, counseling services and employment assistance. In conjunction with the center, the Department's Office for Victims of Crime is funding two highly trained victim assistance specialists for the next three years to develop a regional victim service committee, providing essential training,

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00583 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.139

outreach, advice, counseling, and services to victims and witnesses served by the local justice system. Additionally, the Bureau of Justice Assistance continues to make progress in implementing the lessons learned from these disasters, including providing training and assistance to local justice agencies and systems with respect to continuity of operations and related disaster-response planning efforts that are critical to ensuring that law and order can be maintained.

The Department also continues to battle fraud arising from the tragedies triggered by Hurricanes Katrina, Rita, and Wilma in 2005. Since I established the Hurricane Katrina Fraud Task Force in September 2005, the Task Force has moved aggressively against all forms of disaster-related fraud, ranging from Internet scams to identity theft to government contract fraud. To date, the Task Force has indicted more than 700 persons in 40 judicial districts. Many of these have already resulted in guilty pleas or convictions at trial. For example, we have already successfully prosecuted corrupt government officials who tried to extort money from honest contractors and benefit applicants, contractors who tried to cheat the government in debris-removal contracts, and fraudsters who concocted elaborate schemes to obtain hundreds of thousands of dollars in emergency benefits to which they were not entitled. The work of the Task Force—and of the many U.S. Attorneys, federal agents, and Inspectors General who have worked tirelessly to pursue these cases—has been outstanding and has created a model for how such cases should be handled in the future.

Politicization of Hiring in the Department

I am very proud of the results that the Department of Justice has achieved. As the testimony above demonstrates, the Department's employees continue to work day in and day out to protect Americans. That said, reinforcing public confidence in the Department is also critical and will be one of my top priorities as Attorney General for the remainder of my term. I know that this Committee shares this concern, and I would like now to address briefly one issue in particular.

I believe very strongly that there is no place for political considerations in the hiring of our career employees or in the administration of justice. As such, the allegations of such activity have been troubling to hear. From my perspective, there are two options available in light of these allegations. I could walk away or I could devote my time, effort and energy to fix the problems. Since I have never been one to quit, I decided that the best course of action was to remain here and fix the problems. That is exactly what I am doing.

As you know, upon learning of these troubling accusations, we promptly referred these matters to the Office of Professional Responsibility and Office of the Inspector General. This was the right course of action for the Department and I have complete faith and confidence that their investigations will be thorough, comprehensive, and, ultimately, very helpful in rooting out and addressing any mistakes that occurred on my watch.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00584 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.140

But I am not going to wait for the results of these investigations to begin taking steps to ensure that any previous mistakes are not repeated. I have appointed experienced personnel, revised certain policies and procedures, and have communicated to the Department leadership that I will not tolerate any improper politicization of this Department. I will continue to make efforts to ensure that my staff and others within the Department have the appropriate experience and judgment so that previous mistakes will not be repeated. And I will continue to ensure that the Department attracts and hires highly qualified individuals from the broadest base possible without reference to their political affiliations.

The Department's work is critical. In order to continue to serve the American public well, we need to reinforce public confidence and to attract and retain the best possible employees. We are working to ensure that this happens.

Conclusion

The work of the Department of Justice is far broader than even the sum of the important areas that I have canvassed here, and the notable efforts I have recounted are mirrored across every division and component of the Department. The efficacy and impact of the Department's work will continue to grow with this Committee's guidance and assistance. To that end, I look forward to answering your questions and working with you on the legislative proposals that I have highlighted for your consideration. Thank you.

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00585 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.141

Statement
United States Senate Committee on the Judiciary
RESCHEDULED: Oversight of the U.S. Department of Justice
July 24, 2007

The Honorable Patrick Leahy
United States Senator , Vermont

STATEMENT OF CHAIRMAN PATRICK LEAHY,
SENATE JUDICIARY COMMITTEE,
HEARING ON OVERSIGHT OF THE DEPARTMENT OF JUSTICE
JULY 24, 2007

Three months ago, when Attorney General Gonzales last appeared before this Committee, I said that the Department of Justice was experiencing a crisis of leadership perhaps unrivaled during its history. Unfortunately, that crisis has not abated. Until there is independence, transparency and accountability, it will continue. The Attorney General has lost the confidence of the Congress and the American people. Through oversight we hope to restore balance and accountability to the Executive Branch. The Department of Justice must be restored to be worthy of its name. It should not be reduced to another political arm of the White House. The trust and confidence of the American people in federal law enforcement must be restored.

With the Department shrouded in scandal, the Deputy Attorney General has announced his resignation. The nominee to become Associate Attorney General requested that his nomination be withdrawn rather than testify under oath at a confirmation hearing. The Attorney General's chief of staff, the Deputy Attorney General's chief of staff, the Department's White House liaison and the White House Political Director have all resigned, as have others. I would joke that the last one out the door should turn out the lights, but the Department of Justice is too important for that -- we need to shine more light there, not less.

The investigation into the firing for partisan purposes of United States Attorneys, who had been appointed by this President, along with an ever-growing series of controversies and scandals have revealed an Administration driven by a vision of an all-powerful Executive over our constitutional system of checks and balances, that values loyalty over judgment, secrecy over openness, and ideology over competence.

The accumulated and essentially uncontroverted evidence is that political considerations factored into the unprecedented firing of at least nine United States Attorneys last year. Testimony and documents show that the list was compiled based on input from the highest political ranks in the White House, that senior officials were apparently focused on the political impact of federal prosecutions, on whether federal prosecutors were doing enough to bring partisan voter fraud and corruption cases, and that the reasons given for these firings were contrived as part of a cover up.

What the White House stonewalling is preventing is conclusive evidence of who made the decisions to fire these federal prosecutors. We know from the testimony that it was not the President. Everyone who has testified has said that he was not involved. None of the senior officials at the Department of Justice could testify how people were added to the list or the real reasons that people were included among the federal prosecutors to be replaced. Indeed, the evidence we have been able to collect points to Karl Rove and the political operatives at the White House. The stonewalling by the White House raises the question: What is it that the White House is so desperate to hide?

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00586 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.142

The White House has asserted blanket claims of executive privilege, despite officials' contentions that the President was not involved. They refuse to provide a factual basis for their blanket claims, have instructed former White House officials not to testify about what they know, and then instructed Harriet Miers to refuse even to appear as required by a House Judiciary Committee subpoena. Now, anonymous officials are claiming that the statutory mechanism to test White House assertions of Executive privilege no longer governs. In essence this White House asserts that its claim of privilege is the final word, that Congress may not review it, and that no court can review it. Here, again, this White House claims to be above the law.

My oath, unlike those who have apparently sworn their allegiance to this President, is to the United States Constitution. I believe in checks and balances and in the rule of law.

Despite the stonewalling and obstruction, we have learned that Todd Graves, U.S. Attorney in the Western District of Missouri was fired after he expressed reservations about a lawsuit that would have stripped many African-American voters from the rolls in Missouri. When the Attorney General replaced Mr. Graves with Bradley Schlozman, the person pushing the lawsuit, that case was filed and ultimately thrown out of court. Once in place in Missouri though, Mr. Schlozman also brought indictments on the eve of a closely contested election, despite the Justice Department policy not to do so. This is what happens when a responsible prosecutor is replaced by a "loyal Bushie" for partisan, political purposes.

Mr. Schlozman also bragged about hiring ideological soulmates. Monica Goodling likewise admitted "crossing the line" when she used a political litmus test for career prosecutors and immigration judges. Rather than keep federal law enforcement above politics, this Administration is more intent on placing its actions above the law.

The Attorney General admitted recently in a video for Justice employees that injecting politics into the Department's hiring is unacceptable. But is he committed to corrective action and routing out the partisanship in federal law enforcement? His lack of independence and tendency to act as if he were the President's lawyer rather than the Attorney General of the United States makes that doubtful. From the infamous torture memo, to Mr. Gonzales' attempt to prevail on a hospitalized Attorney General Ashcroft to certify an illegal eavesdropping program, to the recent opinion seeking to justify Harriet Miers' contemptuous refusal to appear before the House Judiciary Committee, the Justice Department has been reduced to the role of enabler for this Administration. What we need instead is genuine accountability and real independence.

We learned earlier this year of systematic misuse and abuse of National Security Letters, a powerful tool for the Government to obtain personal information without the approval of a court or prosecutor. The Attorney General has said he had no inkling of these or other problems with vastly expanded investigative powers. Now we know otherwise. Recent documents obtained through Freedom of Information Act lawsuits and reported in The Washington Post indicate that the Attorney General was receiving reports in 2005 and 2006 of violations in connection with the PATRIOT Act and abuses of National Security Letters. Yet, when the Attorney General testified under oath before the Senate Select Committee on Intelligence in April 2005, he said that "[t]he track record established over the past three years has demonstrated the effectiveness of the safeguards of civil liberties put in place when the Act was passed." Earlier this month, in responses to written questions I sent to the Attorney General about when he first learned of problems with National Security Letters, he once again failed to mention these reports of problems.

Only with the openness and honesty that brings true accountability will the Department begin to move

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00587 Fmt 6601 Sfmt 6601 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.143

forward and correct the problems of the last few years. Instead, we have leadership at the Department of Justice whose expressions of concern and admissions that mistakes were made only follow public revelations and amount to regrets that their excesses were uncovered.

In the wake of growing reports of abuses of National Security Letters, the Attorney General announced a new internal program. This supposed self-examination, with no involvement by the courts, no report to Congress, and no other outside check, essentially translates to "trust us." With a history of civil liberties abuses and cover-ups, this Administration has squandered our trust. Earlier internal reviews, like the Intelligence Oversight Board and the Privacy and Civil Liberties Oversight Board have been ineffective and inactive, failing to take action on the violations reported to them. Only with a real check from outside of the Executive branch can we have any confidence that abuses will be curbed and balance restored.

A tragic dimension of the ongoing crisis of leadership at the Justice Department is the undermining of good people and the crucial work that it does. Thousands of honest, hard-working prosecutors, agents, and other civil servants labor every day to detect and prevent crime, uncover corruption, promote equality and justice, and keep us safe from terrorism. Sadly, prosecutions will now be questioned as politically-motivated and evidence will be suspected of having been obtained in violation of laws and civil liberties. Once the government shows a disregard for the independence of the justice system and the rule of law, it is very hard to restore the people's faith. This Committee will do its best to try to restore independence, accountability, and commitment to the rule of law to the operations of the Justice Department.

# # # # #

VerDate Nov 24 2008 14:48 Oct 08, 2009 Jkt 038236 PO 00000 Frm 00588 Fmt 6601 Sfmt 6011 S:\GPO\HEARINGS\38236.TXT SJUD1 PsN: CMORC

38236.144