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S. HRG. 110–897

OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JANUARY 30, 2008

Serial No. J–110–70

Printed for the use of the Committee on the Judiciary

VerDate Nov 24 2008 07:26 Nov 13, 2009 Jkt 052691 PO 00000 Frm 00001 Fmt 6011 Sfmt 6011 S:\GPO\HEARINGS\52691.TXT SJUD1 PsN: CMORC

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U.S. GOVERNMENT PRINTING OFFICE

52–691 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

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OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, JANUARY 30, 2008

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

The Committee met, Pursuant to notice, at 10:01 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, Cornyn, Brownback, and Coburn.

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

Chairman LEAHY. Before we even start, and before we start the clock on me, I would note again everybody is welcome to these hearings. We will not have any demonstrations either for or against any position I might take, any position the Attorney General might take, or any position that any member of this Committee might take.

Also, I want everybody to be able to see and hear, and we will not expect anybody to be standing and blocking the view of anyone who is here. I just wanted to make that very clear because if there are such demonstrations, I will ask the police to remove anybody who is making a noisy demonstration.

Good morning, Attorney General.

Attorney General MUKASEY. Good morning, Mr. Chairman.

Chairman LEAHY. We welcome Michael Mukasey back before us for our first oversight hearing with the new Attorney General. We will continue our work to restore the Department of Justice to its vital role of ensuring the fair and impartial administration of justice.

I first came to the Senate 33 years ago, when the Nation and the Department of Justice were reeling from Watergate and the trust of the American people in their government had been shaken. The damage done over the last 7 years to our constitutional democracy and our civil liberties rivals the worst of those dark days. This President's administration has repeatedly ignored the checks and balances that had been wisely placed on executive power by the Founders. They were concerned that they not replace the tyranny of George III with an American king.

Among the most disturbing aspects of these years has been the complicity of the Justice Department, which has provided cover for

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the worst of these practices during those 7 years. Its secret legal memoranda have sought to define torture down to meaninglessness. They have sought to excuse warrantless spying on Americans contrary to our laws.

They have made what Jack Goldsmith, a conservative former head of the Office of Legal Counsel, has rightly called a "legal mess" of it all. This President and this administration have, through signing statements and self-centeredness, decided that they are above the law, that they can unilaterally decide what parts of what laws they are going to follow. And the costs have been enormous, to our core American ideals, to the rule of law, and to the principle that in America, no one—not even a President—is above the law.

A little more than a year ago, Attorney General Gonzales sat in the chair now occupied by Attorney General Mukasey as we began our oversight efforts for the 110th Congress. And over the next 9 months, our efforts revealed a Department of Justice gone awry. The leadership crisis came more and more into view as Senator Specter and I led a bipartisan group of concerned Senators to consider the United States Attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manners of excess.

This crisis of leadership has taken a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with safe harbor from political interference. It shook the confidence of the American people. But through bipartisan efforts among those, both Republicans and Democrats, who care about Federal law enforcement and the Department of Justice, we joined together to press for accountability, and that resulted in a change in leadership at the Department.

So today we continue the restoration of the Department through our oversight. And I would hope that the Attorney General will answer our questions and speak not as merely the legal representative of the President, but as the Attorney General for all Americans. I hope that he avoids the practice all too common in this administration and the old leadership at the Department of cloaking misguided policies under a veil of secrecy, leaving Congress, the courts, but especially the American people in the dark.

As we begin the final year of the Bush-Cheney administration, we continue to face more questions and shifting answers on issues ranging from the destruction of White House e-mails required by law to be preserved—the law required them to be preserved, and yet they were destroyed—to questions about the CIA's destruction of videotapes of detainee interrogations, and then they did not tell the 9/11 Commission or Congress or the courts, or anybody else; and more demands for immunity and unaccountability among those in the administration. The White House continues to stonewall the legitimate needs for information by this Committee and others in the Congress. They even contemptuously refuse to appear when summoned by subpoena.

The Bush-Cheney administration also created the unnecessary impasse we face today over the Foreign Intelligence Surveillance

Act by breaking agreements—agreements that the administration itself made last summer with the congressional leaders. Instead of following through on its commitments and passing a bill that leaders in Congress and the administration agreed would protect both America's interests and the civil rights and liberties of individual Americans, they tried to ram through a bill without any checks and balances.

Today we are going to get some indication whether the new Attorney General will help us restore checks and balances to our Government and recapture American ideals. Attorney General Mukasey, I certainly hope you will. We will learn whether we have begun a new chapter at the Department or whether we are just finishing the last one.

And it is not enough to say that waterboarding is not currently authorized. Torture and illegality have no place in America, and we should not delay beginning the process of restoring America's role in the struggle for liberty and human dignity around the world. Tragically, this administration has so twisted America's role, law, and values that our own State Department, our military officers, and, apparently, even our top law enforcement officer, are now instructed by the White House not to say that waterboarding is torture and illegal. Never mind that waterboarding has been recognized as torture for the last 500 years. Never mind that President Teddy Roosevelt properly prosecuted American soldiers for this more than 100 years ago. Never mind that we prosecuted Japanese soldiers for waterboarding Americans during World War II. Never mind that this is the practice of repressive regimes around the world. That is not America.

This session I have joined with Senators Kennedy and Specter to cosponsor legislation to rein in this administration's abuse of the "state secrets" defense, and I expect that will likewise be raised at this hearing along with torture, rendition, executive privilege, and other key matters.

This Committee has a special stewardship role to protect our most cherished rights and liberties as Americans and to make sure that our fundamental freedoms are preserved for future generations. No one is more eager than I to see our new Attorney General succeed in restoring strong leadership and independence to the Department of Justice. So I hope we will take a step forward to work together to repair the damage inflicted on our Constitution and civil liberties during the time preceding his time as Attorney General.

Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman.

We welcome you here today, Attorney General Mukasey, for the first oversight hearing. I note at the outset that you have brought a new tone to the Department of Justice, a very welcome new tone with good appointments such as a Deputy Attorney General and other key spots. We look forward to your administration of this very important Department to take it from the many problems it has had in the immediate past.

Senator Leahy talks about the expansion of executive power, and I think that definitely has been the case. No one is above the law, but when the President institutes the Terrorist Surveillance Program, the question arises as to whether it is lawful or not. It clearly violates the Foreign Intelligence Surveillance Act, but the President has asserted broader constitutional authority under Article II. And no statute can change the constitutional authority of the President. Regrettably, the courts have not yet ruled on that important subject.

And when we take up the issue of waterboarding—which by all initial indications will be a major subject here today—your views are important, but there are many ramifications beyond your opinion as to whether it is legal or may be constitutionally imposed.

The Senate considered this issue back on September 26th of 2006, and the Senate, on an amendment to ban waterboarding, voted 53–46 not to ban waterboarding. I was among the dissenters. I think that waterboarding ought to be banned as a generalization, and I think that waterboarding is torture. But that is not the end of the discussion.

There has been considerable public discourse on whether torture may be justified under some exigent, extraordinary circumstances. Former President Clinton was asked on an NPR interview in September of 2006 whether the President needed the option to authorize torture. And he said, "Speaking as someone who has been there″—the former President described a hypothetical, the extreme case of a top aide of al Qaeda who was planning an attack in 3 days, and said, "You do not need a blanket advance approval for torture. We could draw a statute much more narrowly which would permit the President to make a finding in a case like I just outlined."

The issue was taken up in a learned opinion by the Israeli Supreme Court, and the court said that in exigent circumstances there would be a defense for the use of torture. And it was amplified in a concurring opinion to this effect: "The state should not be helpless from a legal perspective in those emergencies that merit being defined as a 'ticking bomb,' and the state would be authorized to order the use of exceptional interrogation methods in those circumstances. Such an authority exists deriving from the basic obligation of a state to defend and protect and safeguard its citizens."

The same view was expressed by Senator Schumer on June 4th of 2004. Similar views have been expressed by the academics, by former Deputy Attorney General Phil Heymann, who is now a Harvard professor, and by Harvard Professor Dershowitz.

So that it is my view that beyond what you may say, Mr. Attorney General, the Congress ought to take up this subject. And I have discussed, preliminarily, with Senator Leahy, the possibility that we hold hearings on the subject. If Congress is going to pass on the question as to whether the CIA ought to be limited to the Army Field Manual, then we ought to draw the parameters on whether torture may be constitutionally used. It is a violation of international law, but this may well be another area where the President will seek to exercise Article II powers, saying that the statutes which prohibit torture do not apply in exigent circumstances.

And we know that constitutional law is a balancing test. Freedom of speech, our most prized possession, is limited if there is a clear and present danger. Fourth Amendment search and seizure yields to exigent circumstances. So as Justice Jackson outlined in a famous opinion, Congress is well advised to draw the parameters to influence what the President may do under Article II powers. And it is a complex subject which I think requires elaborate consideration by this Committee in advance of Senate action.

There are many other important subjects to take up, Mr. Attorney General: the reporter's privilege, attorney-client privilege, the question on the contempt citations outstanding as to certain executive officials. And just a word or two about the Foreign Intelligence Surveillance Act, a critical issue which is now pending on the administration's effort to give the telephone companies retroactive immunity.

From all indications, the telephone companies have been good citizens, but I oppose retroactive immunity because it is possible to substitute the Government for the telephone companies and still not close down the courts. And that is by passing an amendment which Senator Whitehouse and I have offered, which would substitute the Government as a party defendant. The Government would not have the defense of governmental immunity, as the telephone companies do not, but would have the state secrets defense.

Regrettably, congressional oversight has been ineffective on the expansion of executive power. When a request is made on the CIA tapes, we get resistance from the administration, and the response is, well, it is political what Congress is doing. But last week, when a Federal court made an order to produce the tapes, it will be complied with. Nobody can say the court is political.

And just two more sentences, Mr. Chairman. The separation of power is fundamental to our Constitution, and I think it is a very bad precedent to close off the courts. I doubt there will be any verdicts in those telephone company cases, but the separation of powers will be badly undercut if Congress gives retroactive immunity to the telephone companies, especially as opposed to keeping the courts open and attaining more information.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Well, you get some indication, Mr. Attorney General, that there will probably be a few questions here today. Would you 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 MUKASEY. I do.

Chairman LEAHY. Thank you. I believe, Mr. Attorney General, when we talked yesterday and again this morning, I mentioned that we would have some limitation on time in your opening statement. Of course, the whole statement will be part of the record, but I would ask you certainly to proceed as you wish and cover the issues you want. But note that the whole statement will be in the record.

Attorney General MUKASEY. I will try to get through it as quickly as I can.

Chairman LEAHY. Thank you.

STATEMENT OF HON. MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Attorney General MUKASEY. Good morning, Chairman Leahy, Senator Specter, and members of the Committee. I thank you for the opportunity to testify today.

My tenure at the Department of Justice began less than 3 months ago, and even in that short time, I have confirmed what I had hoped and expected to find, which was men and women who are talented, committed, and dedicated to fulfilling the Department's mission.

As you know, Mr. Chairman, I am new to Washington, and my education in the ways of this city continues. I have tried to live up to the commitments that I have made to work with Congress and to keep Congress informed about the Department's activities and its policy positions where possible.

There will be moments of disagreement, as there have been. There are policy initiatives that the Department supports that some members of this Committee vigorously oppose and some policy initiatives that members of this Committee support that the Department opposes. There also are situations where the interests of the executive branch and the legislature are in tension. That is not, as some people have argued, evidence of a broken or a flawed political system; it is part of the genius of the design our Constitution, which embodies a robust separation of powers. Although these tensions will never disappear, there are many areas of agreement where we can work together on behalf of our common clients, the American people.

There is one area where I particularly need your help. As you know, many key positions in the Justice Department, including those of Deputy and Associate Attorney General—the No. 2 and three positions, respectively—are vacant. These positions, and others, are being filled by people of great talent and dedication serving in acting capacities. But the continued wait for Senate-confirmed officials creates a tentative atmosphere that is not in the interest of the Department or of the country.

Mr. Chairman, I appreciate the steps that the Committee has taken to hold hearings for these nominees. I hope you will work to ensure that they and others are confirmed quickly so that the permanent leadership team is in place at the Justice Department.

As this Committee is well aware, the clock is ticking on critical national security authorities. The PATRIOT Act, which—I am sorry, the Protect America Act, which gave the Government new authorities to conduct surveillance of intelligence targets overseas, will soon sunset. I urge you to pass legislation ensuring that our intelligence community retains the tools that it needs to protect the country. It must be legislation that enables our intelligence professionals to surveil targets overseas without individual court orders, and it must provide retroactive liability for companies—retroactive liability protection for companies, I am sorry, who are believed to have helped our country in the wake of the September 11, 2001, terrorist attacks.

The Senate Intelligence Committee's bipartisan bill is not perfect, but it is a fundamentally sound proposal that would put crit-

ical surveillance authorities on a long-term institutional footing and would help ensure that we continue to obtain assistance from third parties that is vital to our national security efforts. I hope Congress will act quickly to pass the legislation that our Nation needs to modernize our national security surveillance laws.

I am reminded each day in my morning briefings that the protection of the American people from the threat of international terrorism is and must remain the Justice Department's top priority. The Department continues to make progress in other key areas as well, from protecting the civil rights of all people to preventing violent crime and public corruption, to stemming illegal immigration, and I would be happy to discuss each of these subjects in detail with you today.

Let me turn to an issue that I know is of great importance to several members of this Committee in which interest has already been expressed.

Mr. Chairman, as you noted in a letter that you sent to me late last week, I committed at my confirmation hearing to review the current program used by the CIA to interrogate high-value al Qaeda terrorists and a legal analysis concerning that program. I have kept my commitment to the Committee. I have carefully reviewed the limited set of methods that are currently authorized for use in the CIA program, and I have concluded that they are lawful.

I am aware that you and other members of the Committee have asked specifically that I address the legality of waterboarding. I sought and I received authorization to disclose publicly, however, that waterboarding is not among the techniques currently authorized for use in the CIA program. In that respect, passing on its legality is beyond the scope of the commitment that I made to this Committee. Waterboarding is not and may not be currently used. Whether or not waterboarding is something that will be authorized in the future is not for me to decide, certainly not for me alone. But I can tell you what it would take for waterboarding to be added to the CIA program:

First, the CIA Director would have to request its authorization. Second, he would have to ask me or any successor of mine if its use would be lawful, taking into account the particular facts and circumstances at issue, including how and why it is to be used, the limits of its use, and the safeguards that are in place for its use. And, third, the issue would have to go to the President. Those steps may never be taken, but if they are, I commit to you today that this Committee will be notified of the fact in the same manner as the Intelligence Committees.

Given that waterboarding is not part of the current program and may never be added to the current program, I do not think it would be appropriate for me to pass definitive judgment on the technique's legality. I understand fully that you and other members of the Committee may disagree with that decision. And I also appreciate the public interest in this issue and the sincerity and the strength of the views that you and your colleagues have expressed. But as I explained during the confirmation process, I do not believe that it is advisable to address difficult legal questions in the absence of actual facts and circumstances. That this issue has gen-

erated such intense public interest and debate is no reason to ignore that principle. In fact, it is all the more reason to follow it.

The principle that one should refrain from addressing difficult legal questions in the absence of concrete facts and circumstances has even more force in this context. That is because any answer that I could give could have the effect of articulating publicly and to our adversaries the limits and the contours of generally worded laws that define the limits of a highly classified interrogation program. Indeed, I understand that a number of Senators articulated that very concern in the fall of 2006 when they defeated an amendment that would have expressly prohibited waterboarding.

If this were an easy question, I would not be reluctant to offer my views on this subject, but with respect, I believe it is not an easy question. There are some circumstances where current law would appear clearly to prohibit waterboarding's use, but other circumstances would present a far closer question.

Reasonable can disagree and have disagreed about these matters. That is not surprising. They involve application of generally worded legal provisions to complex factual situations in an area of highest national interest. It is precisely because the issue is so important and the question so difficult that I as Attorney General should not provide answers absent a set of circumstances that call for those answers. Those circumstances do not present themselves today and may never present themselves in the future.

I understand that I will be asked questions about this topic today. I will answer those questions to the best of my ability. But I will answer them within the limits that I have described. I recognize that those limits may make my task today more difficult for me personally. But it is my job as Attorney General to do what I believe the law requires and what is best for the country, not what makes my life easier.

Despite our disagreement on this issue, I hope that the Committee will respect my judgment on this matter, and I hope and expect that we will find common ground on many other matters of great importance to this Committee and to the country, including, most importantly, our shared belief in the important mission of the Department of Justice and the great work of its employees.

Mr. Chairman, members of the Committee, I look forward to your questions.

Chairman LEAHY. Well, thank you. Thank you, Mr. Attorney General, and thank you for stressing that issue. As you have suggested, you know you will be asked questions on it, and let me begin.

We had a recent interview in the New Yorker, and the Director of National Intelligence Mike McConnell seemed to recognize the hypocrisy of the position that whether waterboarding is torture depends on the circumstances. He was asked if waterboarding would be torture if done to him. He said yes. Just weeks ago, the former Secretary for Homeland Security Tom Ridge stated it even more clearly: "There is just no doubt in my mind under any set of rules. Waterboarding is torture." I give that as a preamble to my question.

You have those remarks by current and former Bush administration officials who were responsible for protecting America from ter-

rorism. Do you agree with them—and with me, for that matter—that waterboarding an American citizen anywhere in the world is torture and illegal? Waterboarding an American citizen anywhere in the world is illegal and torture?

Attorney General MUKASEY. Senator, without going into detail about what they said, I understood what they said to have expressed their personal points of view. The one thing that separates me from them is that I am the Attorney General and they are not, that when I pronounce on the reach of general legal principles, that is taken as a statement of how far those principles—

Chairman LEAHY. So you disagree with them?

Attorney General MUKASEY. They expressed their personal view.

Chairman LEAHY. Well, Secretary Ridge was expressing a view he had when he was head of Homeland Security. He considered waterboarding an American to be torture. You are not willing to state that as unequivocally as he did for the reasons you have stated. Is that correct?

Attorney General MUKASEY. I don't know what underlay his logic, and I don't know that it was described in his statement. I know what my function is and what my office is now, and I know that if I address a difficult legal question without actually having concrete and actual circumstances before me, two things can result: One is that people who are hostile to us can look to that as an authoritative statement of what—how this country applies its laws and how it will continue to apply its laws.

Chairman LEAHY. Well, it is interesting. You have Ridge saying it would be torture and McConnell saying it would be torture. Then we have our State Department equivocating on what they would say if an American was picked up abroad and subjected to this or if any of our military were picked up and subjected to this. I think the failure to say something probably puts some of our people in more danger than not. But I understand your answer, and I am sure you understand my disagreement with it.

Attorney General MUKASEY. One point that you made about our military, our military is not subjected to any danger at all and shouldn't be subjected to any danger at all by anything that I have said or, indeed, that they have said. Our military fights in uniform, follows a recognized chain of command, doesn't target civilians, and is entitled to and should receive the protections of the Geneva Conventions, just as we—

Chairman LEAHY. I understand that.

Attorney General MUKASEY.—protections to the—

Chairman LEAHY. I understand that, Mr. Attorney General. I am talking about—

Attorney General MUKASEY.—troops that we capture.

Chairman LEAHY. I am talking about what the State Department said when they wouldn't—when they were unwilling to state unequivocally that in a situation like that it would be torture. And I am afraid this may, as some of the military people have said, this may put their people in more danger.

Let me ask you, because there are going to be others asking about this waterboarding, you mentioned FISA and the importance of it, the Foreign Intelligence Surveillance Act. A recent audit by the Department of Justice Inspector General found that the FBI re-

peatedly failed to pay its telephone bills, the failure resulting in the telecommunication companies cutting off wiretaps, including FISA wiretaps, of alleged terrorists. Over half of the nearly thousand payments studied were not done in time. The IG said this resulted in telecommunications carriers actually disconnecting phone lines established to deliver surveillance results to the FBI, including at least one case of a FISA wiretap.

Now, you and others from the administration have spoken repeatedly about how critical FISA surveillance is to our national security. I agree with you. I agree with the administration on that. So if it is that important to our national security, how did we screw up and not pay the bill and have it get cut off? I mean, you cannot have on the one hand the President lecturing the Congress saying we have got to have this immediately and his own administration does not pay the bill so it gets cut off. Is there a disconnect—no pun intended—here?

Attorney General MUKASEY. There is literally a disconnect. As I understand it, that resulted from a failure to have in place a mechanism for oversight, which, as I understand it, has since been put in place, so as to make sure not simply that bills get paid—that is pretty basic—but that proper procedures are followed.

Chairman LEAHY. Well, if they were cutting these off because they were not paid, what payments were made to these telecom companies to compensate for their participation in the surveillance efforts during the 5 years prior to it coming under FISA?

Attorney General MUKASEY. I do not know.

Chairman LEAHY. Can you get that answer for us?

Attorney General MUKASEY. If it is—if that subject itself is not classified, I can get the answer. Whether a company did or did not participate, as I understand it, is itself classified information. So that whether sums can be computed and presented in a way that does not betray that is something that I think would have to be worked out and then I would have to look at it, and I will look at it.

Chairman LEAHY. I know you are looking into these tapes, the CIA tapes of waterboarding that were destroyed. Are you looking into the question of the destruction or are you looking into the question of the conduct that was shown on the tapes?

Attorney General MUKASEY. Actually, I am not looking into it. I appointed an experienced prosecutor to act as—

Chairman LEAHY. Well, Justice, by "you," I mean the Justice Department has opened a formal investigation into whether destroying those tapes was a crime. Is that—investigators from the U.S. Attorney's Office, are they also going to look into the fact that what was on it, whether that was a crime or not?

Attorney General MUKASEY. That investigation is going to go step by step, fact by fact, witness by witness, the same way that any other investigation goes. If it leads to showing motive, then it leads to showing motive, and I am sure that will be explored, if it has to be. But the person who controls that is the prosecutor, who is very able and who has able assistants and an experienced FBI agent who is providing the investigative—

Chairman LEAHY. Well, we will be talking with him. My last question, I have been—we read in the paper this morning that you

were in line to receive a monitoring contract in connection with the diversion of a corporate criminal case, probably indicating again the sacrifice you have made financially to take this job. But some of these contracts have concerned me. There is one worth between $28 million and $52 million that the New Jersey U.S. Attorney Christopher Christie directed to the firm of former Attorney General John Ashcroft. No public notice, no bidding. And I have sent you a letter on that. I am waiting for an answer regarding that use and award.

How did you come to be considered in this? I realize not the one that we are talking about with the former Attorney General, but how did you get considered?

Attorney General MUKASEY. The short answer, I was—I believe I was proposed initially by the company. That process took a very long time, and a funny thing—I did not actually read this morning's news article, although I was told that it was going to be forthcoming. I learned when I visited the Fraud Section, which was doing the selection, that it had not been completed at the time that I was nominated—I would like to think that—and that it wasn't the fact that I had lost out and somebody else actually got it. But I was under consideration.

That said, the Justice Department has been looking at the phenomenon of monitorships because they have increased as prosecutions of corporations have increased, and deferred prosecution agreements or non-prosecution agreements have become more prevalent to assure that whatever happened is rooted out, people are prosecuted, and at the same time corporations are not destroyed as a result. That often includes the use of monitors. And we were aware of that, and we were taking a look at it to see whether we needed standards, whether standards could be formulated in a way that could be applied across the board or in distinct situations. There are monitors appointed in corporate prosecutions. There are monitors appointed when labor unions are found to have been dishonest. There are monitors appointed when civil rights violations are found to occur to make sure that they don't recur. So there are various situations.

So as far as it being a no-bid contract, I think it bears emphasis that we are not talking here about public money. The money came from or is to come from the corporation, not from the Government. But, yes, we are looking at the phenomenon. Yes, we are going to see whether we ought to have standards and whether there ought to be, in any event, a report to the Department every time—

Chairman LEAHY. Can you let us know?

Attorney General MUKASEY. I will

Chairman LEAHY. Thank you.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Mukasey, we have seen the expansion of assertions of Presidential authority under Article II, illustrated, as I said earlier, by his violating the Foreign Intelligence Surveillance Act, saying that he had Article II powers as Commander-in-Chief. We have seen the President disregard the National Security Act of 1947, which mandates telling the Intelligence Committees of both Houses when he undertakes a program like the Terrorist Surveil-

lance Program. And the question comes down to whether the President may assert Article II power to violate the U.S. statute prohibiting torture and to act at variance with the Geneva Convention to protect America.

I am going to read you a judgment by former Deputy Attorney General Phillip Heymann, now a Harvard professor, in a book he wrote to this effect: "For the extremely rare case of an immediate threat to U.S. lives, unavoidable in any other way, we would allow the President to personally authorize an exception to the U.S. obligation under the Convention Against Torture and the U.S. Constitution not to engage in cruel, inhuman, or degrading treatment short of torture, so long as the decision by the President is based on written findings documenting his reasons and is promptly submitted to the appropriate congressional committees."

My question to you is that under the standard which former Deputy Attorney General Heymann articulates, is there a legitimate argument that the President has Article II powers to undertake such conduct?

Attorney General MUKASEY. There are a number of concepts in your question, including whether he has authority to undertake torture. Torture, as you know, is now unlawful under American law. I can't contemplate any situation in which this President would assert Article II authority to do something that the law forbids.

Senator SPECTER. Well, he did just that in violating the Foreign Intelligence Surveillance Act. He did just that in disregarding the express mandate of the National Security Act to notify the Intelligence Committees. Didn't he?

Attorney General MUKASEY. I think we are now in a situation where both of those issues have been brought within statutes, and that is the procedure going forward.

Senator SPECTER. That is not the point. The point is that he acted in violation of statutes. Didn't he?

Attorney General MUKASEY. I don't know whether he acted in violation of statutes.

Senator SPECTER. Well, didn't he act in violation of the Foreign Intelligence Surveillance Act? It expressly mandates you have to go to a court to get an order for a wiretapping. There is really no dispute about that, is there?

Attorney General MUKASEY. It required an order with regard to wire communications when that was a surrogate for foreign communications—for domestic communications. When foreign communications became something that traveled by wire—

Senator SPECTER. I am not talking about foreign communications. I am talking about wiretapping U.S. citizens in the United States. The Terrorist Surveillance Program undertook to do that.

Well, I am not getting very far there. Let me move on to the foreign—what we are currently debating on retroactive immunity for the telephone companies.

Senator Leahy and I wrote to you on December 10th asking you for information about the destruction of CIA tapes, and we got back a letter very promptly saying that, "I will not provide information in response to your letter." A pretty flat refusal. And the reason here is because it involves pending matters.

Well, I am not going to go into our prior discussions of what I thought was a commitment from you under the legal authority for this Committee to go into pending matters. And you say here your policy is based in part in avoiding any perception that our law enforcement decisions are subject to political influence.

It is hard for me to say how a letter from Senator Leahy and myself constitutes political influence. But we now find last week that Judge Kennedy in the district court here in Washington has issued an order concerning information about the destruction of the tapes.

Do you intend to comply with the judge's request?

Attorney General MUKASEY. I have not seen the order. I don't know whether it is subject to appeal. I do know that the considerations underlying a declination to provide Congress with information relating to the destruction of tapes is not based—is certainly no absolute and is not a "never" issue. It is based on the fact that if—

Senator SPECTER. Well, you say it is not "never," but it is certainly not now. But let me move on to the central point about the amendment which Senator Whitehouse and I have offered, which seeks middle ground. It seeks to enable the Government to continue to get whatever information there are from the telephone companies by substituting the Government as a party defendant in the same posture—no governmental immunity defense. State secrets, yes.

I use the illustration of the CIA tapes because the congressional oversight has been so ineffective, notwithstanding Herculean efforts for the last 3 years, during my chairmanship and the last year under Senator Leahy's chairmanship. But the courts provide a balance, separation of powers, Rasul, the only effective way of dealing with what is argued to be executive excesses is through the courts.

Now, the amendment which Senator Whitehouse and I have offered would enable the Government to continue getting the information, but it would not shut out the plaintiffs, would not close down the courts. What is wrong with that as an accommodation, Mr. Attorney General?

Attorney General MUKASEY. I think what is wrong with it is that it would continue to make the conduct of the companies front and center the issue in the case. The only thing it would substitute is who pays in the event of a finding of liability.

Senator SPECTER. Well, why shouldn't that conduct be front and center? Why shouldn't it be subject to a challenge of an unlawful invasion of privacy? Why should the courts be foreclosed from making that decision? When this Committee under my chairmanship tried to get the records of the telephone companies, the Vice President, Vice President Cheney, went behind my back, contacted the members of the Committee, Republican side, never even saw me, first or last. What is wrong with having that issue front and center and having a judicial inquiry and a judicial determination since this Committee cannot get that information?

Attorney General MUKASEY. What is wrong with it is two things.

First of all, it puts—when I say it puts their behavior front and center, what I mean is it puts means and methods in the courts

for everybody to examine and for people to become aware of, people who shouldn't become aware of what the means and methods are.

Second, it casts in doubt the question of whether they acted in good faith or not in responding, as some of them may have, to a request that they had every reason to believe was made in good faith, that they helped the Government in the wake of September 11. And it becomes a lesson not only to them but to others later on that they can't trust that kind of inquiry, that they are obligated to push back whenever they can—and they always can—in order to guard against the possibility that somebody might later question their judgment. That is a dangerous thing because it could embroil us constantly in litigation with people we want to help us.

Those companies know how technology is going to develop. We don't. We don't just need their cooperation that can be forced. We can force them to help us. We need their willing cooperation in helping us going forward with a developing technology that is developed faster and faster and faster.

We are going to sacrifice that if we are litigating the propriety of their response to a request that has been found to have been reasonable and has been found to have been in good faith. And, again, it is a limited—

Senator SPECTER. Mr. Chairman, we will continue this debate on the Senate floor, but I think there is a much greater danger in having the Congress come bail out the administration with retroactive liability for future precedents contrasted with treating the telephone companies fairly by substituting the Government as a party defendant, which indemnifies, in effect, and eliminates the risk to them. Future people will know that we will act reasonably, but we won't give blanket immunity, carte blanche bailout.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Kennedy.

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

General Mukasey, I want to at the outset commend you for taking a number of positive steps to investigate the destruction of the CIA interrogation programs, including launching a full-scale criminal investigation, moving the investigation out of Main Justice; accepting the recusal of the Eastern District of Virginia's U.S. Attorney's Office; appointing John Durham, a seasoned and respected prosecutor, making the FBI the lead investigative agency. Each of these steps shows a sensitivity to potential conflicts of interest and a desire for a meaningful investigation.

I am troubled you decided not to make Mr. Durham an Independent Counsel and ensure against even the appearance of impropriety. I hope to have an opportunity to return to this subject later on, but I want to focus on two issues in the time that I have, and I will submit some other questions. One is on the waterboarding, and the other is about the Civil Rights Division and voting that I am very much concerned about.

In the issue, as you know, waterboarding has become the worldwide symbol for America's debate over the torture, and it became the centerpiece of your confirmation hearing after you refused to take a position whether it is lawful. In fact, even though you claim

to be opposed to torture, you refuse to say anything whatever on the crucial questions of what constitutes torture and who gets to decide the issue. It is like saying that you are opposed to stealing but not quite sure whether bank robbery would qualify.

So the courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture, but you refuse to say so. And then in a letter to the Committee sent last night, you once again refused to state the obvious, that waterboarding has been and continues to be an unlawful act of torture. Your letter told us that the CIA does not currently use waterboarding, but that fact had already been disclosed. What your letter completely ignored is the fact that the CIA did use waterboarding and no one is being held accountable.

In your letter, you would not even commit to refuse to bring waterboarding back should the CIA want to do so. You would not take waterboarding off the table. Your letter also ignored the fact that the CIA continues to use stress positions, extreme sleep deprivation, and other techniques that are every bit as abusive as waterboarding, techniques that our own Department of Defense has rejected as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and -women overseas.

So I will not even bother to ask you whether waterboarding counts as torture under our laws because I know from your letter that we will not get a straight answer. So let me ask you this: Would waterboarding be torture if it was done to you?

Attorney General MUKASEY. I would feel that it was. There are numerous—I remember studying Latin in school, and one of the people I studied was Cicero, and Cicero used to, when he made speeches, would list all the things he was going to pass over without mentioning them, and then he was pass over without mentioning them, and a lot of that is in your question. You say I am going to pass by this and not ask you about it and pass by that and not ask about it.

There are numerous things that I would differ with. You say that waterboarding is obviously torture, and you use the example of taking something—bank robbery obviously being stealing. That assumes, of course, the answer to the question, which is that waterboarding is, in fact, torture just the same way that bank robbery is, in fact, stealing. I think there are numerous other things that I would argue with. I simply point out that this is an issue on which people of equal intelligence and equal good faith and equal vehemence have differed, and have differed within this chamber.

During the debate on the Military Commissions Act when some people thought that it was unnecessary, some people thought that it obviously barred waterboarding, other people thought that it was so broadly worded that it would allow anything, and there were expressions on both sides.

I should not go into, because of the office that I have, the detailed way in which the Department would apply general language to a particular situation. Notably, when I am presented only with a question that tells me only part of what I would be asked to rule on, if I were ever asked to rule on—

Senator KENNEDY. Well, as you know, the Director of National Intelligence, Admiral McConnell, stated, "If I had water draining in my nose, oh, God, I just can't imagine how painful. Whether it is torture by anybody else's definition, for me waterboarding would be torture.

Now, you say facts and circumstances. Let me ask you, under what facts and circumstances exactly would it be lawful to waterboard a prisoner?

Attorney General MUKASEY. For me to answer that question would be for me to do precisely what I said I shouldn't do because I would be, No. 1, imagining facts and circumstances that are not present and thereby telling our enemies exactly what they can expect in those eventualities. Those eventualities may never occur.

I would also be telling people in the field, when I am not faced with a particular situation, what they have to refrain from or not refrain from in a situation that is not performing and in situations that they may find analogous. I shouldn't do either one of those.

Senator KENNEDY. Well, let me ask then finally, are there any interrogation techniques that you would find to be illegal, fundamentally illegal?

Attorney General MUKASEY. There are statutes that describe specifically what we may not do. We may not maim. We may not rape. There is a whole list of specifically barred techniques.

Senator KENNEDY. But waterboarding isn't on that list?

Attorney General MUKASEY. It is not.

Senator KENNEDY. OK. Let me go to another issue. It has been reported that the Department of Homeland Security received 1.4 million naturalization applications between October 2006 and September 2007. Over the past year, the naturalization backlog has increased from 6 months to 18 months. This is troubling. A significant number of potential U.S. citizens filed for naturalization hoping to vote in the upcoming November election. Thousands of applicants have been left in limbo. Basic fairness dictates that these naturalization applications are processed in time to allow these individuals the chance to participate in our democracy. The fees have been increased. The administration has not asked for any additional kind of help and assistance to do it. All they have told us is the line is growing longer and longer and longer and longer, and there are going to be hundreds of thousands of people who are qualified to be citizens and vote who will not vote.

What will the Justice Department do about it?

Attorney General MUKASEY. Well, as you point out, the question of processing immigration applications is within the jurisdiction of the Department of Homeland Security. That said, the Justice Department has done and is going to continue to do everything it can to make sure that everybody who is authorized to vote can vote. We have monitors going out to polls to make sure that people who are authorized to vote can vote. We have brought cases challenging—

Senator KENNEDY. Well, just on this, General, because my time is up, what is the Department doing to give a sense of urgency to the Department of Homeland Security to move ahead on this or to make sure that individuals who are otherwise eligible are not going to be excluded from participating? I mean, we are talking about suppression and all the rest. When you have got hundreds of thou-

sands of people who are going to be denied the opportunity to vote, it seems to me that we are not dealing with the fundamental issue.

Attorney General MUKASEY. I will admit to you candidly that I don't know what the contacts are between—

Senator KENNEDY. OK. Would you work with us? Would you, please?

Attorney General MUKASEY. I will do two things. No. 1, I will find out what the contacts have been, if any. And, No. 2, I will work with you, yes.

Senator KENNEDY. Thank you.

Chairman LEAHY. Just so we can have some idea where we are going here, Senator Grassley will be next, and I am going to recognize him in just a moment. We will then go to Senator Biden. I am taking the list from the Republican side of the order they are in. After Senator Grassley, Senator Biden, then Senator Sessions, just so everybody will know.

Senator Grassley, you are recognized.

Senator GRASSLEY. Thank you, Mr. Chairman.

I want to start by asking you for unanimous consent that my opening statement be made a part of the record, along with documents that I am going to discuss with my questions.

Chairman LEAHY. Without objection, it will be part of the record.

Senator GRASSLEY. Thank you.

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

Senator GRASSLEY. General Mukasey, during your confirmation hearing you assured me that you would assist my congressional oversight efforts with the Department. I appreciate your cooperation. You know I'll hold you to your word.

I'd like you to know that, prior to this hearing, the Department provided responses to requests dating back to March, 2007. Unfortunately, we received these responses on Friday and have had just 4 days to digest nearly 250 pages of answers. Buried in the responses from the FBI was response to questions 64 through 83 that said, "Answers will be provided separately." Of course, they were not provided separately.

For you, I am troubled when I get responses stating one thing, but then you do another. When can I expect this response from the FBI that I've been waiting for since March, 2007, and can I expect these answers before a full year has passed?

Attorney General MUKASEY. I will admit to you that I don't know precisely what questions, is it 64 through 83, are. But I will talk to the Director about what they are, and about why the delay, and about when we can foresee getting answers to them. I'm sorry for the last-minute part.

Senator GRASSLEY. Now, a question on whistle-blowers.

Attorney General MUKASEY. Beg your pardon?

Senator GRASSLEY. Another question. At your confirmation hearing, you testified about whistle-blowers at the FBI and said, "People ought to be encouraged to come forward and they should be protected." The FBI and the Justice Department have not always had a culture that supported whistle-blowers. Instead, the culture usually worked to prevent whistle-blowing through intimidation and retaliation.

One of the most difficult issues in whistle-blowing is that of national security whistle-blowers. These individuals have security clearances that prevent the disclosure of our Nation's closest-held secrets. I understand that a security clearance is a privilege and not a right. However, individuals with security clearances who witness wrongdoings often face a catch-22. They can either report the wrongdoing to supervisors who may retaliate against them, or they can sit silent and let the wrongdoing continue. Of course, either situation is unacceptable.

As a solution, the Senate unanimously passed S. 274, the Federal Employee Protection Act of 2007. This bill attempts to strike balance. It allows individuals who know of wrongdoing in classified matters to come forward and report that wrongdoing to Congress, but it only allows disclosure to specific persons cleared to hear classified information. This bipartisan legislation would ensure that national security information remains secret, while allowing Congress to conduct the oversight required under the Constitution.

On January 22, 2008, you, along with the Director of National Intelligence, Director McConnell, Secretary Gates, and Secretary Chertoff signed a letter objecting to S. 274.

[Letter appears as a submission for the record.]

I am concerned by statements in this letter which claim that secure reporting mechanisms for whistle-blowers are somehow unconstitutional or jeopardize national security. While I agree that this information needs to be secure, Congress must be able to conduct oversight of the executive branch on matters involving national security.

Further, I find it difficult to reconcile this letter with statements made at your confirmation hearings. Now, I am not for blanket privilege allowing whistle-blowers to release classified information at will. That would be impractical and it wouldn't be safe for our country. However, we need a secure mechanism to allow whistle-blowers to make protected disclosures to Congress.

Why doesn't Congress have a right to classified information when reporting that information is necessary to report wrongdoing, and why isn't it enough to require that whistle-blowers report classified information to those with the necessary security clearance?

Attorney General MUKASEY. The issue is, in part, but not entirely, security clearance. The process that you've described cuts off the supervisory chain and cuts off even the President from the chain of reporting. That raises separation of powers issues and creates a situation where somebody is essentially encouraged to bypass supervisors, not to take it up the line, not to take it as far as he can, but simply to go to a Member of Congress who may have a security clearance, but to cut off proper supervision. That may remedy the problem. I recognize that problems occasionally exist, but I, and the signatories to that letter, the DNI, the—I believe the Director of the FBI, and the Secretary of Homeland Security believe that that's not the way to do it.

Senator GRASSLEY. Well, isn't it funny that a law that passed the Senate unanimously, that surely had input from the administrative branch of government, now is not exactly the way to do it, so we wait another 5 years to get proper congressional oversight? You know, it just doesn't seem like the real thing. It just seems like

every road block is being put in the way of Congress doing its job, and can't you trust people that have a security clearance, whether it is Joe Blow, or whether it's Mary Smith, or whether it's Paul Jones. It seems to me, if they've got a security clearance, they've got a security clearance and that's the protection you need.

Attorney General MUKASEY. I don't think it's a question of trust. I think it's a question of maintaining the executive's right to supervise its employees, up to and including the President, and where in that chain you permit somebody to go to somebody else. I agree that it's a difficult issue. I agree that it's a sensitive issue. It was simply our view that that was not the way to do it.

Senator GRASSLEY. Then I think you have a problem. And I'll stop, Mr. Chairman, here. But it seems to me that you have a problem reconciling what you say about the chain of command that wants to hide wrongdoing in the first place. If you're talking about going all the way up to the President, in between the President and the janitor you've got plenty of people that don't want Congress to know if something is wrong because they don't want egg on their face.

Attorney General MUKASEY. I don't think it's a matter of wanting to hide wrongdoing. We are certainly willing to work with committees and with Senators, and we have, and we will in the future. I'm not saying that this is a drawing of the line in the sand. This is this particular bill, and it's something we're willing to work with you on, have worked with you on, and will continue to work with you on.

Senator GRASSLEY. OK. Thank you.

Chairman LEAHY. Thank you.

As you and I discussed yesterday, a bill that Senator Cornyn and I have done through bipartisan help on FOIA—and there will be questions on that too as we followup.

Senator BIDEN.

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

General, it's nice to see you. I'm sorry I haven't had a chance to formally meet you before.

Attorney General MUKASEY. Me, too. Although we did talk on the telephone, briefly.

Senator BIDEN. Yes. But you have a lot of fans who are friends of mine who have said very good things about you, and it's nice to see you in person.

General, I'm a little confused. I don't want to go into whether waterboarding is torture or not. I want to understand sort of the methodology you use in trying to—- because some of what you say—maybe it's just that I'm a little slow—doesn't seem to make a lot of sense to me about this issue of waterboarding.

When you boil it all down, in the answers I heard today and what I've read, what you've submitted, it appears as though whether or not waterboarding is torture is a relative question, whereas it's not a relative question whether or not you hung someone by their thumbs, or you hung them upside down by their feet. I mean, you talk about waterboarding in relative terms.

For example, am I getting it right? If a person in the government, CIA or any government agency, engaged in waterboarding of a captured prisoner and the purpose of it was because they be-

lieved that prisoner knew where there was a nuclear weapon hidden, about to be detonated in the city of Washington, then that might be OK. But if they just waterboarded them just to find out where they purchased their airline ticket, that might not be OK. That's what it seems like you're saying.

Attorney General MUKASEY. With respect, I don't think that's what I'm saying. I don't think I'm saying it is simply a relative issue. There is a statute under which it is a relative issue. I think the Detainee Treatment Act engages the standard under the Constitution, which is a "shocks the conscience" standard, which is essentially a balancing test of the value of doing something as against the cost of doing it.

Senator BIDEN. When you say "against the cost of doing it" do you mean the cost that might occur in human life if you fail to do it? Do you mean the cost in terms of—

Attorney General MUKASEY. No.

Senator BIDEN.—our sensibilities and what we think is appropriate and inappropriate behavior as a civilized society?

Attorney General MUKASEY. I chose the—I chose the—

Senator BIDEN. What do you mean?

Attorney General MUKASEY. I chose the wrong word. I meant the heinousness of doing it, the cruelty of doing it balanced against the value.

Senator BIDEN. Balanced against what value?

Attorney General MUKASEY. The value of what information you might get.

Senator BIDEN. That's what I thought you said.

Attorney General MUKASEY. In one of your hypotheticals, there was getting some historical information or some other information that couldn't be used to save lives, and one wouldn't have to get to the question of whether that was torture or not to find that it would shock the conscience to do it in those circumstances.

Senator BIDEN. I see. Well, I do understand it then.

Attorney General MUKASEY. That's—

Senator BIDEN. So the shocking of the conscience is, again, where the relevance comes in. If the purpose of the waterboarding was to, you know, save humanity from 20 nuclear weapons going off, that's one thing. If the purpose of the waterboarding was to find out who the commanding officer of that individual was, that's another thing. I've never heard the statute—I've never heard torture referenced in those ways.

Attorney General MUKASEY. That's not—that's not—

Senator BIDEN. I never heard—

Attorney General MUKASEY. That's not in the torture statute.

Senator BIDEN. Well, I've never heard any discussion of shocking the conscience in those ways. I didn't think shocking the conscience had any relationship to the end being sought. I thought shocking the conscience had to do with what we considered to be basic societal values, things that we held dear, what we consider to be civilized behavior. You're the first person I've ever heard say what you just said.

Now, I'd be delighted—and I don't want to pursue this, unless you do—to have your staff at the Justice Department give me anyone else who, in the past, referenced the discussion of shocking the

conscience in the context you just referenced it. I find it to be fairly unique. Matter of fact, it shocks my conscience a little bit. But I find it—I've never heard that discussion.

You know, you and I went to law school. I went to a Catholic school where I had to take two semesters in high school, two periods a day, of Latin. I remember Sister Rhode, too, although even as an alter boy I forget my Latin. But the truth of the matter is, I've just never heard the issue of torture discussed in—or what constitutes torture, which is defined by shocking the conscience, in terms of the relative benefit that might be gained from engaging in a technique. I find that pretty—none of the Aristotlean logic I was trained by ever got me there. I don't understand that premise.

But at any rate, let me move on. I find one of the—- you know, we are all Senators, very proud—hopefully very proud—of what we try to accomplish. One of the things I take great pride in, and it's self-serving, is having authored the Crime Control Act of 1994, putting 100,000 cops on the street and putting $10 billion into prevention, $10 billion into prisons. I thought that was a pretty good deal. I thought it worked pretty well.

I have essentially reintroduced that and gotten overwhelming support in the House and the Senate. We passed it, reauthorizing the COPS program, primarily, but it goes beyond that. The President—it was passed in the omnibus bill. The omnibus bill got vetoed. When the bill came back to us in a compromise, the Burn grants were dropped significantly and the COPS program was essentially all but eliminated again.

The rationale proffered to me was that, you know, violent crime is down. It's near historic lows. Your proposals relating to dealing with violent crime—your, the administration—are sufficient, although $1 billion less than we had been spending, to deal with the problem. We state statistics of violent crime being down or up by less than a percent in 2005, 2006, 2007, et cetera.

But the fact is, in 2006, there was still 1,417,774 violent crimes committed in America, and 17,034 murders. Now, that's down from the high of 1992 of 23,760. The numbers are not particularly relevant, except the point I want to make is this: I hope you'll reconsider the utility and the necessity of the Biden crime proposal that was put back in, with the help of a lot of people around this table, because I am not prepared to accept 1,400,000 violent crimes a year as an acceptable standard for American behavior.

Disraeli once said, "There are three kinds of lies: lies, damned lies, and statistics." I would respectfully suggest that the statistical analysis of crime being up or down begs the question. I find it absolutely unacceptable that, in the United States of America, we still have 1,417,774 violent crimes committed in 2006, 17,034 murders.

So I would think that the single biggest bang for the buck, based upon all the data your office has acknowledged in the past, that the more cops we have on the street, the further the violent crime drops. It's a simple proposition. I've been on this committee for years and years. I was chairman of it, or Ranking Member, for 17 years.

Chairman LEAHY. It is time.

Senator BIDEN. I will conclude with this comment. The only thing I learned for sure about crime is, if there are four corners,

three cops on three of the four corners, if the crime is going to be committed it will be committed where the cop is not. So, I'd urge you to take a look at the legislation again.

Attorney General MUKASEY. I agree with you that the strategy is not to tolerate any level of violent crime, certainly not at the level that you've suggested. What we are trying to do is to target grants to go where the need is and to gather information on what works best, and to get it out to the people who need it.

Senator BIDEN. With all due respect, we know what works best. As old Ronald Reagan used to say, "If it ain't broke, don't fix it." It was working. You guys broke it.

Chairman LEAHY. Senator Sessions.

Senator SESSIONS. Thank you.

General Mukasey, I'd like to thank you for your leadership. I do believe you've been a positive force at the Department of Justice. You've taken on a difficult challenge at a difficult time and we're glad you're there.

Just to clarify an issue that just continues to disturb me, it was said earlier that waterboarding has become a worldwide symbol, I suppose, of abuse by Americans of people who are captured. But I'd like to ask you this. That technique that has been so discussed was never used, and has never been used, by the U.S. military. Is that correct?

Attorney General MUKASEY. As far as I know.

Senator SESSIONS. This was basically a technique used by the CIA, apparently, in a few cases, a limited number of cases?

Attorney General MUKASEY. I'm not authorized to talk about what the CIA has done in the past. The only thing I was authorized to say is that it is not now part of the program.

Senator SESSIONS. And the—

Attorney General MUKASEY. The only way it can be put back in—

Senator SESSIONS. So it's not a part of the program. We've never had these reckless actions—repeated actions, as has been suggested—so often to abuse prisoners. The fact that the American military, at Abu Ghraib, identified not a problem of torture for information, but just prisoner abuse, the Abu Ghraib scandal, and they prosecuted those people. So I just wanted to make this clear, that I think our military, according to Mr. Goldsmith, and I believe the CIA, have lawyered this a lot. People can disagree, but it has not been a reckless activity that's gone on widescale throughout our government.

Attorney General MUKASEY. That's correct, so far as I know. And the Department of Justice has prosecuted a CIA contract employee for prisoner abuse, a man named David Pisaro, and got a substantial sentence when prisoner abuse took place. That was somebody in the CIA, not somebody in the military.

Senator SESSIONS. Well, I think this is important. I think it's been an embarrassment to our Nation from a lot of these hearings when we've suggested widescale abuse that is not true.

Let me ask you another question to followup on our discussions when you were confirmed. Under current Federal law, illegal entry into the United States is a crime: Section 1325, improper entry by an alien is a misdemeanor up to 6 months, and a felony for a second entry.

However, until the recent implementation of Operation Streamline,a zero-tolerance prosecution policy now in place in 3 of the 20 border sections, Del Rio, Yuma, Laredo, no U.S. Attorney's Office has been actively prosecuting those cases. Now almost every illegal entry in those areas is being prosecuted. So, this was an attempt, a testing of a zero-tolerance prosecution policy. It does seem to be paying results.

According to the Homeland Security briefing paper, since its implementation, arrests this fiscal year have decreased 50 percent in Del Rio and 68 percent in Yuma. This steep decline in illegal entries proves how important it is to prosecute routine crimes when you're trying to fix a broken system. This is the broken windows concept, I suggest, that New York made famous. Start with the smaller crimes.

According to a briefing document by Homeland Security, "It is critical that the second offense for illegal entry carries a minimum sentence of 30 days in jail and that a third offense carry a minimum sentence of 90 days." When I asked Attorney General Gonzales about the problem, he pledged he would pursue replicating it across the entire border and work to convince the Federal magistrate judges to participate, and their cooperation is necessary. I never got an update from him on that progress, but I hope that you'll give me one.

When you and I spoke about this issue at your confirmation hearing, you answered very ably, I thought. You said, "We can't have a system in which the only sanction that results from an attempt to come into this country illegally is that you get to try it again. That's the kind of catch-and-release program that we've had, and brought us to trouble." Well said.

I asked you to commit to examining Operation Streamline fully and you said you would "try to look at it and followup if we have the resources." You stated that you "recognized it's a problem of allocation of resources", but that you agreed "we need to try to bring to bear some sanctions so that the only result of coming in illegally is not that you get to try again."

Today in your written testimony, you described how you visited the southwest border last month and how the $7 million Congress has appropriated will allow you to deploy 40 prosecutors and 20 support staff to the border.

First, $7 million is not a lot of money. If we need more money, I think you should ask for it. We've been talking about $24 million contracts here just to supervise one corrupt business practice, apparently.

But, first, are you committed to expanding Operation Streamline to all 20 border sectors by the end of the year?

Attorney General MUKASEY. I am committed to pursuing Operation Streamline where it can be profitably pursued. The one thing that my visit to the southwest showed me was that it is hard to pursue a one-size-fits-all strategy simply because there are different problems being encountered in different parts of the border. They have one strategy that they follow of taking people who are confined for short periods of time after their prosecution and releasing them at a point that is very distant from where they first entered.

It's a relatively simple thing, but it makes it enormously harder for them to hook up with the people who got them in in the first place and to go back in. That's something that's being pursued. We have to make sure that we have a system behind the prosecutors who are putting cases into the pipeline to absorb those cases, to handle them, and to prosecute them properly.

Senator SESSIONS. Well, Mr. Attorney General, just to wrap up, I believe this works. I believe you've proven that it works. I believe that the cost—you may need some more money, but it's not too much. I believe we can afford that, because if you can achieve a 50 percent reduction in illegal entry by just following existing law, we ought to execute that. Will you continue to monitor it, and will you support expanding if you believe it works?

Attorney General MUKASEY. I will, and I think it has been an effective program.

Senator SESSIONS. Thank you.

Chairman LEAHY. Thank you.

I will put in the record at this point a letter from Admiral Gutter, who had been Judge Advocate General of the Navy, Admiral Hudson, who had been Judge Advocate General of the Navy, General Fugue, who had been Judge Advocate General of the Army, and Brigadier General David Brahms of the U.S. Marine Corps, who was Staff Judge Advocate to the Commandant, a letter in which they all say waterboarding is torture, other items, and a letter sent to you, Judge, from three of our colleagues, Senator John McCain, Senator Lindsey Graham, Senator John Warner, saying they consider it torture, and those will be made part of the record.

[The letters appear as a submission for the record.]

Chairman LEAHY. I would yield to Senator Kohl.

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

I would like to ask to comment on three local law enforcement programs. First, the Burn Justice Assistance Grant Program, which has been on the administration's chopping block. It's targeted for elimination in every budget proposed by the President. As a result of the President's veto threat last year, funding for the Burn Program was reduced by 67 percent in fiscal year 2008.

Back in 2001, my own State of Wisconsin received more than $9 million in Burn funding. However, due to cuts imposed by the President, Wisconsin will receive only about $1.6 million this year. This has had a real impact on our State's ability to fight crime. What we're talking about is losing prosecutors and shutting down drug task forces, and prevention and treatment programs all around the State.

Second, two other critical funding programs that have continually been targeted for cuts by this administration are the Juvenile Accountability Block Grant Program and the Title V Local Delinquency Prevention Program. Both of these programs expired last year, and we are currently working on legislation to reauthorize them. The Juvenile Accountability Block Grant Program, of course, provides funding for intervention programs that address the urgent needs of juveniles who have had run-ins with the law. Title V is the only Federal program that is solely dedicated to juvenile crime prevention.

As you know, when we cut funding local programs are forced to close their doors and an entire generation of young people do not receive the benefits of these very important programs. These programs need to be reauthorized and they need to be sufficiently well funded, something which this administration has not yet supported.

Can you provide us some idea of whether or not this funding will be a priority of yours, as it is for many of us here?

Attorney General MUKASEY. The funding of targeted programs are certainly a priority. In fact, the President, I believe as part of his budget, has a $200 million targeted grant program, of which a substantial amount—I'm not sure of the precise figure. I don't know whether it's 30 or 60—is targeted to go to Milwaukee, which has had a specific problem, a specific crime problem. That money is targeted to go to Milwaukee.

We have also had the Safe Streets Program Anti-Gang Initiative, a gathering of information and the allocation of people and funds out to those places where there is perceived to be, and there is, an increase in crime, whether it's gang crime or any other. So we're looking to use the funds and to use them intelligently and target them where they're needed. I know specifically about the issue in Milwaukee, and that we intend to address it.

Senator KOHL. I appreciate that. I will followup with you in the coming days on what we're going to do, particularly, as you point out, for Milwaukee.

On Guantanamo Bay, during your confirmation hearing last year we talked about the detention center at Guantanamo Bay. We talked about the long list of national security experts from inside and outside this administration who have argued that it is in the national security interest of the United States to close that prison. Since then, even the chairman of the Joint Chiefs, Admiral Mullen, has said publicly that we should close Guantanamo as soon as possible.

You would not add your name to that list. Instead, you said that you were prepared to recommend to the President that we take the responsible course in dealing with the people at Guantanamo. Then you went on to say that you would get the best people you can to give you the best advice that you can get about what to do with Guantanamo.

So I'd like to ask you whether or not that advice has been given and whether or not you're prepared to add your name of the list of those who believe that we should close Guantanamo.

Attorney General MUKASEY. I believe the President has said that he wants to close Guantanamo, so long as it could be done in a responsible way that permits us to deal with the people who are there without simply releasing them. There is a case before the Supreme Court with regard to the status of those people, Boomadin, and there are a couple of questions, issues, and matters that could result from that, including not only whether there is a constitutionally based habeas right, but rather—but also, I should say, whether there is some alternative to habeas that would be sufficient to deal with those people. That is a subject of litigation. It's a subject that's in the Supreme Court, and it's a subject we're facing.

There is another case in the DC Circuit involving the adequacy, or not, of combatant status review tribunals and what we can do to improve those. That is before the DC Circuit and it's something that we're conscious of and something we're trying to deal with.

Senator KOHL. Mr. Attorney General, I'd like to ask you about court secrecy. Many of us have been concerned for years about the use of secret settlements in our courts. This issue received a lot of attention back in the Bridgestone/Firestone cases in the late 1990's, and yet little has been done to reform the system in the wake of that scandal. As we learned in a recent hearing, judges continue to provide court-endorsed secrecy without considering public health and safety, which in many cases has resulted in injuries that could have been prevented.

Now, you're a former Federal judge and now you're the Nation's top law enforcement officer. Do you believe that in cases involving public health and safety, courts should be required to take a closer look at protective orders and weigh the public's interest and information about potential health and safety dangers, along with, naturally, the proponent's interest in confidentiality?

Attorney General MUKASEY. I think courts should always take a look at a protective order following settlement of a case, particularly when that involves public safety. I don't know of a case where somebody is essentially sweeping a public safety issue under the rug in a settlement, and I would not want any court to approve of that. That's all I can say.

Senator KOHL. Well, as I'm sure you know by the history of this whole issue, there have been many court secrecy awards that have occurred and that have resulted in substantial damage to individuals because those records were swept under the rug by the court secrecy order. My question is, do you agree that we should require that, in issues of this sort, a judge needs to consider public health and safety before issuing a court secrecy decision?

Attorney General MUKASEY. I think a judge should consider the effect on public safety of keeping any settlement secret.

Senator KOHL. My time is up. Thank you very much.

Chairman LEAHY. Thank you.

Senator Brownback, then Senator Feinstein, then Senator Kyl.

Senator Brownback.

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

Welcome, Attorney General. I want to continue with you on Guantanamo, if I could. I appreciate your articulation of factors that you're looking at on Guantanamo Bay, on closing it, and the President's point.

I want to invite you to my State and to Levinworth to the disciplinary barracks, which is the site most often cited, if we're going to close Guantanamo, to move the detainees to, is in my State and the disciplinary barracks. The reason I want to invite you there is, I don't think we're set for this set of detainees to move there to this facility. I've toured the facility. It's a relatively new facility. I think it's an excellent facility, but I don't think it's set for this sort of the detainees that would be coming out of Guantanamo.

So, just as a very pragmatic issue, if you close Guantanamo the detainees are going somewhere, and the current projection is, they go to Levinworth and to the disciplinary barracks there. I don't

think we're set for that to take place. I would hope you could come and look at it and try to appraise that particular issue, just as a pragmatic one.

A second issue is, right next to the disciplinary barracks is the Command and General Staff College of the military, so most of your military leadership is going through the place that's within three miles of the disciplinary barracks, maybe less than that. I'm not sure that's wise. You listed a series of legal questions about moving the detainees to U.S. soil which I think are appropriate. There are also a couple of very pragmatic questions that I don't think is necessarily a wise route to go at this point in time. I don't think we're ready to handle this.

Attorney General MUKASEY. I agree with you that there are practical considerations. I don't know of any representative from any State who has acknowledged that his State, or any facility in his State, is ready to accept people who are at Guantanamo. I just don't. But beyond that, our other considerations, such as the effect legally of bringing people Stateside, there are people who have said that they intend to bring a flurry of thousands of lawsuits to curtail the process of trying people, so that eventually they would have to be simply released. Obviously, bringing them here is going to make that a whole lot easier.

Senator BROWNBACK. Well, I just would hope you would consider coming and actually looking at the facility, or somebody, before, OK, we're shutting this down and we're sending them to Levinworth is the statement that happens.

Attorney General MUKASEY. Senator, I can assure you that before that ever happens, I will come to Levinworth.

Senator BROWNBACK. Thank you.

A couple of issues I want to raise with you in the time I have. It has come to my attention that the government is considering—I only say it's considering, but I just want to put it on your radar screen—intervening in a case captioned Knox v. The Palestinian Authority and the PLO to prevent U.S. citizen plaintiffs from collecting damages awarded to them against the Palestinian Authority for acts of terrorism.

The only reason I raise that is that some are seeking to vacate a $174 million judgment, and I had hoped that, if you're aware of this, that you would let the U.S. citizens be able to proceed and receive their awards. I don't know that the Agency, the Department, is looking at this at all. I just wanted to raise it for your radar screen.

Attorney General MUKASEY. I appreciate you raising it.

Senator BROWNBACK. A second issue is, we're going to be bringing up, I hope, a reauthorization of the Human Trafficking legislation and we're considering that now. There are some key issues on new definitions that we'll want to work with you and your Department on. I think the Department has done a very good job on a new topic. Senator Biden and I have been working on this since Senator Wellstone and I originally did this. It's a very important piece of legislation, from the level of human trafficking that's taking place globally now. The Department has been nicely on top of it.

I think as we look at renewing this, I hope we can build on our successes and not expand definitions to points that we cannot handle it. I don't know if you had any thought that you wanted to give us before we move forward with that legislation.

Attorney General MUKASEY. I think we have been aggressive in prosecuting human trafficking cases, and we'll continue to be.

Senator BROWNBACK. There is a DC gun ban case that's in front of the Supreme Court. The administration's position on this has raised some question about it. I'm just curious if you agree with the position that the Second Amendment protects an individual right to bear arms.

Attorney General MUKASEY. I do.

Senator BROWNBACK. What about, do you view it as a fundamental right? Because there's been a question raised about the administration's view of this.

Attorney General MUKASEY. The administration's view, as expressed in its brief, is that this is a right that is subject to intermediate scrutiny, that the administration's interest here was in making sure that proper laws that are on the books to regulate, for example, guns falling into the hands of felons, are not swept up and excluded here. But the standard is intermediate scrutiny, it is not simply rational basis. It's an intermediate scrutiny standard that would allow us to continue to enforce Federal firearms laws that we have to continue to enforce, and that was our reason for intervening. That's all in the brief.

Senator BROWNBACK. I want to ask you as well on your view, in the time I have left, on the FISA legislation. Some people are putting forward the idea that we should just substitute the Federal Government for telecommunications companies. This has come to be one of the central pieces of the legislation and the debate, is the immunity for telecommunications companies that do work with the government at the government's request. Some are saying, well, let's substitute the government for the telecommunications companies.

I want to ask you your thought on that particular issue, but before I do, because I'll probably run out of time on this, I want to thank you for stepping in to this job at a tough time. You get a lot of hard questions. I think you handle them very well. These are uncomfortable topics. They're ones that, a lot of times, we'd all look at and say, well, I'd rather just not deal with that and deal with other things. But it's a very practical world that you're in. I appreciate you, at the end of the administration last year, of a high-caliber career that you bring, and knowledge to this. I appreciate you stepping into the breach for it.

Attorney General MUKASEY. Thank you very much.

Senator BROWNBACK. God bless you, and Godspeed in carrying it on forward the rest of the year.

Attorney General MUKASEY. Thank you very much.

On the specific issue of substitution, the conduct of the companies would continue to be at issue, would continue to be a subject of dispute, which could do two things: it could open up their conduct and means and methods to scrutiny, and as well it could send a signal to them that they can't cooperate in the future without a court order, they can't cooperate in good faith.

The over-arching point, I think, to me here, is that this is a limited immunity in the sense that it's limited. It doesn't apply, obviously, to companies that didn't participate and it applies only to companies that participated on the assurance that what they were doing was lawful and that the request came from the President. So, those were the only two categories. But I agree with you that substitution is a bad idea.

Senator BROWNBACK. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Brownback.

Senator Feinstein.

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

Good morning, Mr. Attorney General.

Attorney General MUKASEY. Good morning.

Senator FEINSTEIN. I've been studying your letter, and I recognize that it is not dispositive on the question of whether waterboarding is legal or not. You conclude that the interrogation techniques currently used by the CIA comply with the law, and waterboarding, you disclose in the next couple of paragraphs, is not one of them. I believe that is correct.

For the first time, you disclose that, and you also disclosed the "defined process" by which any new method is proposed for authorization, and the fact that the President would have to approve of the use of the technique as requested by the Director and as deemed lawful by the Attorney General. Was this the case in the past?

Attorney General MUKASEY. I believe this has always been the case.

Senator FEINSTEIN. OK. OK.

Attorney General MUKASEY. I mean, I should say, I'm not authorized to say what happened in the past, but I wasn't told—

Senator FEINSTEIN. And so you didn't look at this.

Attorney General MUKASEY. I was told that this wasn't new. Beg your pardon?

Senator FEINSTEIN. You didn't look at this, because it is widely alleged that in the past at least three people were, in fact, waterboarded. My question is, did the President approve that?

Attorney General MUKASEY. I can't speak to whether people were, in fact, waterboarded or whether the President approved of that.

Senator FEINSTEIN. OK. All right. I thought I'd ask—

Attorney General MUKASEY. I can't speak to it because I'm not authorized—

Senator FEINSTEIN. I thought I'd ask—

Attorney General MUKASEY. I'm not authorized to discuss it.

Senator FEINSTEIN. I thought I'd ask the question. It's my understanding now, where we are is that both the Military Commissions Act and the Detainee Treatment Act really combine to provide the law for the military that waterboarding is prohibited. The loophole is the CIA. I the Intelligence Authorization Conference, I proposed an amendment which would put the entire government under the protocols of the Army Field Manual with respect to enhanced interrogation, and that was accepted by the House, it was accepted by the Senate. It is, in fact, in both bills.

If it comes to the floor of the Senate and remains in the bill and assigned by the President, once and for all, waterboarding will in effect be prohibited throughout the government. So, I very much hope that is the case. But I believe that how the enhanced interrogation treatment is administered, and who administers it, the timing of it, is really all-important. I would like to ask that you describe the scenario that you describe in that top paragraph on page 2, how it would work legally if the interrogation is being carried out in a foreign territory. If you look at the—I don't mean to—this is not a trick question. If you look at the—

Attorney General MUKASEY. I could hardly say somebody is posing a trick question if it's something in my letter. I just—

Senator FEINSTEIN. No. You point out in your letter, the process would begin with the CIA's determination that the addition of the technique was required for the program. The Attorney General would have to determine the use and lawfulness. Under the conditions and circumstances, the President would have to approve the use of a technique as requested by the Director as deemed lawful.

Assume that most of these take place on foreign territory. How would this work?

Attorney General MUKASEY. The same way as is outlined in this letter.

Senator FEINSTEIN. Now, are you saying that the interrogator would cable the CIA Director? How would it work? How would it be carried out legally?

Attorney General MUKASEY. The scenario outlined here would require that the CIA Director become aware, however he becomes aware, of a technique, describes the circumstances under which it's to be done, including the safeguards, limits, and as you put it, length, and so forth. To me, I consult with whoever I have to consult with and reach a determination, and then it goes to the President. I—

Senator FEINSTEIN. All right. I'm not trying to—

Attorney General MUKASEY. I realize that we—that this paragraph—

Senator FEINSTEIN. I'm just trying to define a process. I know how they say it works. I don't know whether that's legal or not, and that was what I was asking.

Attorney General MUKASEY. I recognize that this problem does not account for, or perhaps consider, a problem with communication. That's, I guess, my fault because I didn't—

Senator FEINSTEIN. All right. That, I think, is up to us.

Attorney General MUKASEY. It's my letter.

Senator FEINSTEIN. Let me ask you one other question along that line. Is it illegal—is it legal for an interrogation which employs EITs, Enhanced Interrogation Techniques, to be carried out by a non- governmental employee?

Attorney General MUKASEY. There—well, as you know, there is what's called—what you've called an Enhanced Interrogation Technique that authorizes the CIA to—

Senator FEINSTEIN. Right.

Attorney General MUKASEY [continuing]. To do those programs. I don't know whether it includes the right for others than CIA—people employed by the CIA. Are you talking about subcontractors?

Senator FEINSTEIN. That's correct. Contractors.

Attorney General MUKASEY. The short answer is, I don't know. I know—

Senator FEINSTEIN. I would like to ask to get an opinion on that, if I might.

Attorney General MUKASEY. I know we prosecuted a contractor for—as I said, for an offense against a prisoner and he got a—what may or may not look like a substantial sentence. He got 100 months.

Senator FEINSTEIN. Well, I think it's—I think I would like to know—as a member of the Intelligence Committee, I'd like to know whether in fact it is legal to contract out the interrogation, using enhanced techniques, to a contractor. OK. Thank you.

Let me move on. You received a letter from Special Counsel Scott Block stating that his investigations of possible legal violations in the U.S. Attorney filings and of alleged politicization of hiring at DOJ is being impeded by the Department of Justice. That letter is dated January 25th. I have read the letter. Can you give us some clarity on why the Department has not responded to the Special Counsel? He essentially says he is being stiffed, not responded to. It's a rather lengthy letter.

Attorney General MUKASEY. I think it ought to be clear, first of all, that there are investigations going on by OPR and OIG into the subjects you refer to. But as I understand it, a response is in the works with respect to Mr. Block's letter, and I'm sorry it hasn't gone out. But his letter, you're right, has been received. And you're right, it's a lengthy letter.

Senator FEINSTEIN. I mean, "After receiving no cooperation for 4 months, we received a letter from Steven Bradbury. Mr. Bradbury reiterates the request that we step down." So I assume there is some conflict with the Special Counsel on this.

Attorney General MUKASEY. I think it should be clear that Mr. Block is in an office that is not within the Department, I believe.

Senator FEINSTEIN. Well, this outlines a whole litany of refusals to cooperate in the investigation the Special Counsel is trying to carry out with respect to the firing of U.S. Attorneys, which this committee spent a good deal of timing looking into last year, as you well know.

Attorney General MUKASEY. I will see to it that he gets a response.

Senator FEINSTEIN. All right. And would you make a copy of that available to this committee, please? Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

We'll take a short break at this point.

Senator KYL. Mr. Chairman, I can be real brief.

Chairman LEAHY. Then we'll go to Senator Kyl. The witness has asked for a short break.

Senator KYL. If the witness needs a break, you bet.

Attorney General MUKASEY. Thank you, Mr. Chairman.

[Whereupon, at 11:51 a.m. the hearing was recessed.]

AFTER RECESS [12 p.m.]

Chairman LEAHY. The committee will be in order. Senator Kyl, as I indicated before, you're next.

Senator KYL. Thank you, Mr. Chairman. Thank you, General Mukasey.

Mr. Chairman, first let me ask, on behalf of Senator Sessions and myself, unanimous consent to submit opening statements for the record.

Chairman LEAHY. Without objection. And without objection, anybody who wishes to have an opening statement, the record will stay open for that purpose.

[The prepared statements of Senator Sessions and Senator Kyl appear as a submission for the record.]

Chairman LEAHY. Senator Kyl.

Senator KYL. Second, General Mukasey, I specifically want to commend you for the letter that you sent on January 29th. It is, I think, a demonstration of good faith that you communicate in that fashion to the committee. I appreciate it. I'm sure the rest of the committee does as well. And also for the contents of it. There's an old saying that for every complex problem there's a simple and wrong solution. It's always good to be reminded of how complex and difficult sometimes these issues are, particularly when they are, or can be, fact-specific. It's very difficult in those situations then to render generalized opinions.

Third, we have an oversight responsibility for your Department. We also have some other responsibilities, including acting on nominations to fill slots that are vacant. I can find out what those all are, but it might be useful if you could simply send up to the committee a list of all the vacant slots that this committee needs to act on so that we'll know specifically the task ahead of us so that we can act as quickly as possible to get those slots filled.

Fourth, as Senator Sessions talked to you about Operation Streamline, you were in Arizona, and I can confirm what I'm told by Department of Homeland Security and Border Patrol too, that there is a great deterrent effect for people that otherwise would cross the border illegally, knowing that if they're apprehended they're going to be put in jail for about 60 days. For the 10 to 15 percent who are criminals who come across, obviously it's potentially going to be a lot more than that. But for those who simply come across to work, they can't afford 60 days in jail.

My understanding is the same as you testified, that there is a significant deterrent effect, that apprehensions are down significantly in the Yuma sector, which is also, I suspect, due to the fact that there is a great deal of double fencing and other barriers that have been put in place.

Here is my plea to you, and my question. You noted some relationship to resources available, and I know that you've added some prosecutors in the southwest border States, but for the last couple of years, because there has been such a strong support for enhanced law enforcement securing of the border and the like, Congress has been willing to spend, I think the simple way to put it, is just about anything that's necessary to get this problem under control. We passed an emergency spending that wasn't offset of $1.3 billion.

What I would recommend, even though I understand that you have to submit a budget to OMB and the Director has to be careful in spending taxpayer money, we need to know what would be nec-

essary, both in terms of additional detention spaces, because that's one of the key elements, and second, any additional prosecutors or other Department of Justice personnel, or expenses of which you're aware that would need to be covered in order to extend this program to other areas where it could be efficacious. I'm wondering if you could respond to that, and specifically if you could be able to send us that information in a timely fashion for us to act this spring.

Attorney General MUKASEY. I thought I sent up the information. I did see, in fact, on an Indian reservation, the dearth of detention space that essentially causes them to have to decide which criminals they will confine and which they will simply let roam free. It's a very difficult thing. Bureau of Prisons has taken, I don't think it's any secret, a big hit. It's very hard to find space. It's very hard for them. It's hard for the marshals who have to ferry these people around. So that is a very difficult problem.

Senator KYL. And the detention space is, primarily, I think, a Department of Homeland Security issue. Secretary Chertoff—I believe this is a rough order of magnitude correct—had asked us for about 43,000 or 46,000 detention spaces and that has been provided now. We need to find out whether that is adequate, or more are needed. But I'm also aware that there's a limit on the number of prosecutors.

When I was back home this winter, I was accosted by both State and Federal folks complaining about the increased minimal levels for prosecution. I may be wrong, but my recollection is, unless it's 500 pounds of marijuana, the Federal prosecutors won't even prosecute. The county prosecutors are, of course, going crazy because they have to pick those cases up. It would be very helpful to know what resources would be needed to effectively control this problem, because I have a sense that today the Congress, unlike a couple of years ago, is willing to provide those resources if we have good justification for them.

Attorney General MUKASEY. I think that 500-pound limit has been relaxed in particular areas, so to deal with what is a substantial problem of people running across with just under and then putting it all together. There's also obviously a question of how fast and how many cases can move through the courts. There's a question of judges and defense lawyers, and so forth.

Senator KYL. Sure. Mr. Attorney General, I'm very familiar with that. The whole tale—we've added a lot of Border Patrol. We've enhanced our ability to apprehend, but all throughout the rest of the criminal justice system, from the public defenders, to jail space, judges, clerks, the whole thing, we have a problem, I understand. We need to know the order of magnitude of the problem so that we in the Congress can fund that. It would be helpful to get your take on what would be appropriate in that regard.

Also, and I've raised this with you before and I'll just publicly make reference to it, you know of my interest in the issue of supporting crime victims. It's my understanding that the Department of Justice, at least one individual, has announced plans to take $35 million from the Victims of Crime Act Fund for management and administration. Now, that was a fund that was supposed to go to

support victims. It comes on top of a $35 million reduction in the VOCA cap, from $590 million to $625 million.

Crime victims are the ones who suffer if this money is taken out for management. It seems to me that management of the Department is the subject of another account, so I would ask your staff to continue to visit with my staff about the best way to continue to support crime victims, and hopefully not raiding the VOCA funds for management of the Department.

Attorney General MUKASEY. The issue there is not singling out the Victim Fund for a tax on management, rather that other funds have, as part of the—as I understand it, as part of the appropriated money, had to pay a certain proportion of that as the cost of administering the particular fund. That was not unusual for other funds. Up until now, there's been enough money to prevent that general rule from being applied to the Victim Compensation Fund. Regrettably there wasn't this time around, but that's not a decision that somebody made to in any way try to deprive victims or—

Senator KYL. Well, I appreciate that answer. We do have the ability to affect funding, and rather than allowing victims to suffer it would be good to know what additional needs you have so that we can provide them in terms of appropriation.

Since the red light is on, Mr. Chairman, I had one last question. Perhaps I'll simply state it and let the witness respond for the record.

But it has to do with your views on the so-called Media Shield legislation. I think it would be very useful for the committee to have the benefit of your views. You indicated in your confirmation hearing that you would look into that and share those views with us, and I think it would be important now for you to do that, and would appreciate that very much.

Chairman LEAHY. Yes. If you could submit that, please.

Attorney General MUKASEY. I would simply note that I am one of a number of signatories on a letter relating to that that include the Director of the CIA, the Secretary of Defense, the Director of National Intelligence, and a number of other people involved in the gathering of intelligence, all of whom have indicated problems with that legislation.

Senator KYL. Thank you, Mr. Chairman.

Chairman LEAHY. And if I could also follow up with Senator Kyl's request for a list of vacancies. If you could also add to that the list of vacancies for which there are no nominations at all. I'm thinking of the Office of Legal Policy and Office of Justice Programs. There are no nominations. If there are nominations that have come up here where the paperwork is not yet complete, like the FBI reports, the list of, I think, 20 U.S. Attorneys, we've received no nomination. Also, Senator Durbin requested that you might send us a list of letters from this committee, both Republicans and Democrats, who have not yet been answered. Thank you.

[The information appears as a submission for the record.]

Chairman LEAHY. Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Welcome, Mr. Attorney General.

Attorney General MUKASEY. Thank you.

Senator FEINGOLD. I'd like to start off by thanking you for the call on Friday to let me know of the steps you are taking to end the disparate treatment by the Department of gay, lesbian, bisexual, and transgendered employees at the Department. This was very welcome news, and I am heartened by the fact that you followed through on your commitment to me at your confirmation hearing, and you did it really quite promptly. So, I thank you.

Sir, another commitment you made at your hearing was that you would not be a "yes man" for the President, that you would not hesitate to express disagreements you had with him. Given what happened during the tenure of your predecessor, many of us thought this was very important.

Reading through your written testimony for today's hearing, it struck me that on just about every issue you discuss, from FISA to the Media Shield law to the McNulty memorandum, you embrace the President's or previous DOJ positions, apparently without reservation. I was hoping to see a little more evidence of independent judgment, but perhaps we're going to see that in the future.

You said today that one of the reasons you do not want to say whether waterboarding is torture is because that would tip off our enemies as to "how this country applies its laws". Those were your words. But every time we prosecute a crime in this country we tip off people as to how we apply our laws. We have a system of public laws and public prosecutions in the United States of America.

Your statement suggests that you would be unwilling to enforce the laws against torture by prosecuting a government official who is suspected of violating those laws. I'd like to give you a chance to explain whether you'd be willing to prosecute such crimes, and if so, how you would reconcile that with your statement that we shouldn't let our enemies know how we apply the law.

Attorney General MUKASEY. I don't see the inconsistency because the CIA program is one that requires an elaborate process of authorization to determine that what goes on is not unlawful, and how that decision gets made is different from saying that because we prosecute crimes every day, we are thereby tipping off criminals. We are dealing with two separate phenomena. I have said already, and I'll repeat, that we did prosecute actually a subcontractor, an employee of the CIA, for abusing a prisoner. There was no hesitation there.

I don't think that the measure of the degree to which I simply follow the law should necessarily be the degree to which my positions may differ from positions that have been adopted by the administration. I go to work every day, I follow the law, I do my best, I go home, I go to sleep, and I do it again the next day. That's my idea of the job.

Senator FEINGOLD. But how do you prosecute in a situation like this without tipping off the enemy?

Attorney General MUKASEY. I'm sorry. A situation like which?

Senator FEINGOLD. In the scenario I've presented. How do you avoid that if you prosecute?

Attorney General MUKASEY. If somebody is guilty of violating the laws of the United States, then they get prosecuted. That is dif-

ferent from talking about the circumstances in which a particular interrogation technique might or might not violate those laws.

Senator FEINGOLD. Let me move on. In the letter you sent to us last night you indicated that you believe the current CIA interrogation program is legal. As a member of the Intelligence Committee who has been briefed on the program, I disagree. But what Congress needs to know, and what I've asked you for in the letter I sent to you on December 10th, is your reasoning and analysis. When will you come to Congress, presumably in a classified setting, and explain your view of the legality of the details of the program, interrogation technique by interrogation technique?

Attorney General MUKASEY. Those letters are classified. They remain classified. I don't—what I undertook to do, was to review the letters which do, in fact, analyze the techniques and to see whether they comply with the law. I think what you've asked me to do is to go and do something different from what's in the letters and I don't see—and I will not do that.

Senator FEINGOLD. You won't come to Congress and explain your view of the legality of the details of the program?

Attorney General MUKASEY. The view that I have of the details of the program is embodied in classified letters, which I have reviewed and found to comply with the law. They explain it. They explain it far beyond my ability to do it in an off-the-cuff—not off-the-cuff, but in a session with Congress where I'm not sitting with the authorities in hand and with the people at hand to do that review, which has been done in those letters.

Senator FEINGOLD. Well, this seems somewhat unacceptable. At your confirmation hearing you promised to let Congress know your views of the program, and to me that means explaining those views. And I'm glad you corrected yourself that we're not talking about an off-the-cuff setting, we're talking about a classified setting where, obviously, you could have the people that you need to have with you and the resources. It is important for us to be able to do more than have just a one-way conversation about this. We need to have an opportunity to talk to you about it and ask you some questions about it, so I'd urge you to reconsider.

In your written testimony, you said granting retroactive immunity to telephone companies who may have cooperated with an illegal government surveillance program was necessary to encourage the companies' cooperation in the future. I assume you agree that we don't want to encourage telephone companies—or anyone else, for that matter—to break the law, correct?

Attorney General MUKASEY. That's correct.

Senator FEINGOLD. Is that correct?

Attorney General MUKASEY. That's correct.

Senator FEINGOLD. So let's take a hypothetical situation in which cooperating with a government request for assistance would constitute a clear violation of the law. That is not the kind of thing we want to encourage, is it?

Attorney General MUKASEY. We don't want to encourage anybody to violate the law and that covers helping, say, a policeman rob a bank.

Senator FEINGOLD. OK. Well, as you know, FISA prohibits companies from complying with requests from the government to con-

duct electronic surveillance that are not accompanied by a court order or a proper certification. Specifically, under Section 2511 of Title 18, telephone companies may cooperate with a government request for assistance only if the company receives either a court order or a certification from the Attorney General or another high-level government official stating "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required."

Now, that law has been on the books for 30 years. It hasn't been repealed or modified during that period, isn't that correct?

Attorney General MUKASEY. That law remains on the books.

Senator FEINGOLD. Should the telephone companies be expected to comply with this law?

Attorney General MUKASEY. The telephone companies have been compliant with the law. We are now in a regime in which all of this is brought under the Foreign Intelligence Surveillance Court, and that's where we are now.

Senator FEINGOLD. Mr. Chairman, I know I'm over my time. I apologize. Thank you.

Thank you, Mr. Attorney General.

Chairman LEAHY. That's quite all right.

Then just so people will understand the schedule, we will next hear from Senator Hatch, then Senator Durbin, then we will break until approximately 2.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

General Mukasey, I think you've done your best to work with the legislative branch, while at the same time preserving the interests of the executive branch here today and in the past. It's not easy and it can really be frustrating, but I for one believe that not only are you sincere, but you're doing your best.

I read the letter you sent yesterday regarding the issue of interrogation techniques. And as you did in your confirmation hearing, you approached this issue thoughtfully and fairly. You have made an effort to be as forthcoming and cooperative as you can. You drew the line in your letter between real situations on the one hand, and facts and hypothetical speculation on the other.

You wrote in your letter that this area involves "application of generally-worded legal provisions to complex factual situations in an area of the highest national interest." That is not an area in which speculation, hypothetical scenarios, and abstract questions are appropriate. In fact, even the Washington Post this morning called this a "lawyerly response". But you are, of course, the Nation's top lawyer, and this is a legal question. I believe that you've drawn an obviously fair and legitimate line, and I respect it.

So having said that, let me just ask a few questions that I think need to be asked. Your prepared statement addressed several high-priority legislative issues. FISA reform tops the list. I think both you and I feel that, and hopefully everybody else. It was probably the most important piece of legislation that we will consider in the 110th Congress.

The Protect America Act expires this Friday. Last night, we passed only a 15-day extension. Now, I agree with you that stopping terrorists requires knowing their intentions, which requires

intercepting their communications. Your testimony discusses the Department's grave concerns with legislation which takes what you call a short-term approach to modernizing FISA. That is what a sunset provision on FISA would be, a short-term and intermittent approach to national security.

Stopping and starting, changing authorities and restrictions and policies—I don't think that's the way to proceed or to protect our country. That's why I'm strongly opposed to sunsets in this area. We didn't have any in the 1978 Act and it's worked, more or less, until we got to these particularly high-tech problems of today. FISA, the Foreign Intelligence Surveillance Act, itself had no sunset, as I mentioned.

Nearly every one of these laws that have amended FISA had no sunset. Now, does Department of Justice believe that the current FISA Modernization Act should include a sunset?

Attorney General MUKASEY. It does not.

Senator HATCH. OK. Regarding the proposal of some of my very sincere colleagues here to substitute the government in the place of the telecoms, answer me this: would that allow third-party discovery?

Attorney General MUKASEY. Yes.

Senator HATCH. Interrogatories?

Attorney General MUKASEY. Yes. The whole—I mean—

Senator HATCH. Classified document requests?

Attorney General MUKASEY. Precisely.

Senator HATCH. Trade secrets?

Attorney General MUKASEY. Yes.

Senator HATCH. These would all become public?

Attorney General MUKASEY. Yes.

Senator HATCH. Well—

Attorney General MUKASEY. And that's what I meant by saying we would still be litigating the conduct of the companies, and all of these confidential matters, plus the costs imposed on the companies of meeting those requests, would continue to be there regardless of who a substituted party was.

Senator HATCH. Wouldn't any verdict in the case reveal whether the government had a specific relationship with a specific telecom?

Attorney General MUKASEY. It would have to.

Senator HATCH. Yes. Isn't all that information highly classified?

Attorney General MUKASEY. It is. And it would all be—

Senator HATCH. The basis for classification is to protect the information from getting in the hands of the wrong people, right?

Attorney General MUKASEY. It would all—that's right. And it would all be betrayed by the continuation of the litigation.

Senator HATCH. In this case, terrorists. In this case, in the hands of terrorists.

Attorney General MUKASEY. Right.

Senator HATCH. And others, too. I mean, there are other people who would do our country in.

Now, I have a copy of a recent letter from the Director of National Intelligence, Admiral Mike McConnell, to Senator Kit Vaughn. The letter contains unclassified examples of extremely important information the Intelligence Committee has gathered under the Protect America Act. Some of the information related to efforts

by terrorists to obtain guns and ammunition, movements of key extremists to avoid arrest, information on terrorist money transfers, and just to mention one other, efforts of an individual to become a suicide operative. Now, these are just a few of the many successes that were listed, yet some say that the Act does not protect Americans overseas. They infer that the government could be targeting American families on overseas vacations, and even our military members defending our country.

Are you aware of any instances whatsoever in which an intelligence analyst utilized authority provided from the Protect America Act to target innocent Americans overseas?

Attorney General MUKASEY. No, I am not.

Senator HATCH. Now, the topic of reverse targeting has been mentioned often during the FISA reform debate and it refers to targeting a foreign person with the real intention to target a U.S. citizen or a U.S. person, thus circumventing the need for a warrant. From an intelligence perspective, reverse targeting makes no sense. From an efficiency standpoint, if the government was interested in targeting an American, it would apply for a warrant to listen to all of that person's conversations, wouldn't it?

Attorney General MUKASEY. I should think.

Senator HATCH. Not just his conversations with terrorists overseas.

Attorney General MUKASEY. Correct.

Senator HATCH. OK. Now, I asked Attorney General Weinstein about this during a Judiciary Committee hearing last October and he reiterated the government's view that FISA itself makes reverse targeting illegal. Does the DOJ still consider reverse targeting under FISA?

Attorney General MUKASEY. Absolutely.

Senator HATCH. Are you aware of any instances of intelligence analysts utilizing reverse targeting?

Attorney General MUKASEY. I am not aware of any such instances.

Senator HATCH. One last question, because my time is running rapidly.

Our national security is greatly dependent on the cooperation of telecom providers. We cannot protect America against terrorist threats alone. They are essential to the process. From a law enforcement perspective, can you elaborate on our government's dependence on the voluntary cooperation of telecom providers? And without getting into any classified information, has the Department of Justice seen a change in the willingness of the private sector to voluntarily assist the government?

I might add, if I was general counsel of one of these companies that was going to be subject to civil lawsuits that could disclose all kinds of other things, ruin them in the stock market, and create a whole bunch of other problems, including danger to their employees overseas, just to mention a few, I wouldn't be very cooperative.

Attorney General MUKASEY. The short answer to your last question is, have we gotten push-back, yes. The over-arching point to be made here is, this is a war unlike any other that we've ever been involved in.

Senator HATCH. You've got that right.

Attorney General MUKASEY. The others have all involved particular countries and particular places where we could go bomb and destroy their infrastructure, and so on. These folks live in and among civilian populations. They target civilian populations. They use all of the techniques of the 21st century. There is only one weapon that we have to defend ourselves, and that is intelligence.

Senator HATCH. Thank you, Mr. Chairman.

And thank you, General. We appreciate the candor that you have.

Chairman LEAHY. Senator Durbin.

Senator DURBIN. Mr. Attorney General, thank you for being here. When I first met you in my office, I asked you if you would tell me who your heroes were, and you told me that you keep a picture of George Orwell on your office wall because of his essay, "Politics and the English Language", which I had not read. I got a copy and read it. It's dense. It's profound. I find it difficult to understand, but I respect you for looking at it carefully and admiring his thought process.

In that essay, Mr. Orwell is critical of misleading political speech and says, "As soon as certain topics are raised, the concrete melts into the abstract." I would say, Mr. Attorney General, on the subject of waterboarding, that some of your words have melted into the abstract. The last time that we met here was in a similar circumstance, with the room half empty, and I asked a question which continues to be asked to this day about waterboarding. I am still troubled as I listen to your answers. Let me try to be specific and ask you three specific questions.

The first, is this. You say in your letter to the committee, "reasonable people can disagree" in reference to waterboarding. So could you tell me who those reasonable people might be who disagree? Can you cite any court cases, legal scholars and others? You refer to them as "people of equal intelligence, good faith, and vehemence," I believe. So I'd like to know who you're going to cite as the reasonable people who disagree that waterboarding is not torture.

The second thing I'd like to ask you, when you replied to Senator Biden, you suggested that waterboarding under certain circumstances would not shock the conscience. I think the reference was made to nuclear weapons, and discovering nuclear weapons. If that is the case, can you explain to me why our government has now discontinued and prohibited this form of interrogation if there are circumstances which, in your mind, could justify it?

The third question. You said that your lack, or your refusal, or your unwillingness to take an unequivocal position on torture couldn't jeopardize anyone because our troops all wear uniforms, and so they're protected against torture under existing conventions and statutes. But certainly there are American personnel, special forces, CIA agents, employees of the State Department, who could be in jeopardy or in danger, who don't wear uniforms, if there is uncertainty about the U.S. position on the issue of waterboarding.

Attorney General MUKASEY. With respect to your first question you asked, who are the reasonable people who have disagreed about whether waterboarding is torture, there have been people in this chamber who have disputed whether under certain cir-

cumstances it wouldn't be legal for the President to engage in techniques described by at least one of them as torture, but then pulled back in order to obtain information to save American lives. Those are matters of record.

Senator DURBIN. Mr. Attorney General, this body in this chamber, if you refer to the Senate—

Attorney General MUKASEY. I'm referring to the Senate.

Senator DURBIN [continuing]. Has voted clearly, on a bipartisan, overwhelming vote, that we would prohibit such practices with the McCain amendment. So if you're going to rely on the chamber, the chamber has expressed its will in exactly the opposite position you've taken.

Attorney General MUKASEY. And the chamber, on another occasion, declined, voted down a bill that would forbid waterboarding. And there were people in the course of the debate on the measure that you mentioned who said that the language was so general that it would open things up to all sorts of behavior that they considered objectionable and cruel, which I would think would include waterboarding, because there are people who say that.

Senator DURBIN. If the Detainee Treatment Act, I think, is clear in terms of the law of the land and the expression of this chamber, and even went so far as to offer amnesty, immunity to employees of the government who have been engaged in it, do you still think that the jury is out on whether the Senate believes that waterboarding is torture?

Attorney General MUKASEY. The question is not whether the Senate is out on this or that technique. The question is whether the Senate has spoken clearly enough in the legislation that it has passed, and that the Congress and the law has passed, and that the President has signed, which is all anybody has really got to work with.

Senator DURBIN. So where is the lack of clarity in the McCain legislation?

Attorney General MUKASEY. The words of the legislation, of all the legislation that's thus far been passed, are words that are general and upon which, as I said, people on both sides of the debate have already disagreed. To point to this language or that language, it seems to me is to pick nits at this point. People have disagreed about the generality of the language and have said that it can be read two ways.

Senator DURBIN. I might just say, as the Chairman has noted here as a matter of record, Senators McCain, Warner, and Graham, the lead sponsors of this legislation, have said that under the Military Commission Act, waterboarding is a war crime. It is unequivocal. At this moment in time, you have employees of your Department in Iraq, counseling the police and army there not to use waterboarding and torture.

In their standard, unfortunately, at least leading up to this moment, has been that it depends on the circumstances. Do you see the problem with your ambivalence on this issue when it comes to setting a standard that we are trying to teach to the world, a standard we want our own people to be protected by?

Attorney General MUKASEY. The standards—the problems posed by what you call "ambivalence", which I don't think is really ambiv-

alence but rather a due caution for the reasons that I outlined, are already matters of record. I want to answer the second question because it suggests that I said I would—

Senator DURBIN. It's in the Biden question.

Attorney General MUKASEY. I'm sorry?

Senator DURBIN. It was on Senator Biden's question. Is that it?

Attorney General MUKASEY. No. It was your second question, which regrettably, my notes aren't—

Senator DURBIN. The two other questions related to Senator Biden's question about shocking conscience.

Attorney General MUKASEY. That I said that waterboarding would not shock the conscience. What I described was a situation in which it would shock the conscience. And so far as it being a relative standard, that was something that was put in place by the person who wrote the decision in which that first appears, so that wasn't something that I put there.

Senator DURBIN. So for clarity then, I assumed—and correct me, please—that you were arguing that the use of such techniques to discover nuclear weapons would not shock the conscience.

Attorney General MUKASEY. No. What I was saying was that the use of such techniques to discover information that could not be used to save lives and was simply of historical value would shock the conscience.

Senator DURBIN. Well, that's half the answer. So let's go to the other half. What about the circumstances where the information would save lives, many lives?

Attorney General MUKASEY. Those circumstances—

Senator DURBIN. Would that justify it?

Attorney General MUKASEY. Those circumstances have not been set out. That is not part of the program. We don't know concretely what they are, and we don't know how that would work.

Senator DURBIN. Under the military standards, clearly military interrogation standards, they are not interested in the danger. They have just said unequivocally that their personnel cannot engage in this technique. So you're saying that when it comes to the non-military, that is still unresolved as to whether they can use these techniques?

Attorney General MUKASEY. It is unresolved.

Senator DURBIN. In your mind.

Attorney General MUKASEY. Because I have not been presented with a concrete situation. And I would—

Senator DURBIN. I've gone over my time and I apologize, Mr. Chairman.

Thank you, Mr. Attorney General.

Chairman LEAHY. Thank you very much.

We will stand in recess until 2. The next Senator on the Republican side will be Senator Coburn. If he is not here, Senator Cornyn. On our side, Senators Whitehouse, Schumer, and Cardin.

We stand in recess.

[Whereupon, at 12:37 p.m. the hearing was recessed.]

AFTER RECESS [2:07 p.m.]

Chairman LEAHY. Welcome back. And Mr. Attorney General, thank you. It is not a lack of interest that you don't have a larger audience than this. What is happening on the—both Democratic

and Republican leadership in key committees are trying to work out some of the basics of the stimulus package. They have got an area where both Democrats and Republicans want to work closely with the President, not in a partisan way, but a way for the country to see if there is a stimulus package we can do.

I just came from a meeting where a number of members of this committee are at, and I'm sure there are similar meetings on the Republican side who are trying to do that. We're also trying to work out some agreements on FISA. We have this 15-day extension, which is something, again, Republicans and Democrats worked out. Now we're working out some of the things that would be in order for votes for any change. I say that as a matter just to let you know why many on both sides of the aisle are missing.

Attorney General MUKASEY. I understand people have other things to do.

Chairman LEAHY. Well, you probably do, too, but I appreciate you being here.

Attorney General MUKASEY. Not today.

Chairman LEAHY. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

General Mukasey, we took advantage of the break to mention a matter that the Chairman and I had particular concern about, just to make sure that you are aware of that. But let me now do that in open session just so everyone knows of the issue.

This has to do with the Open Government Act of 2007 that Congress passed, and was signed by the President into law in December. Chairman Leahy and I have been working on FOIA reform, Freedom of Information Act reform, and a key component of that legislation creates the Office of Government Information Services, located within the National Archives and Records Administration.

I have been concerned, and I know the Chairman has because I have heard him speak on the floor, about statements made within the administration about the possibility of moving that office that was created by that legislation to the Department of Justice, or perhaps somewhere else. I have reservations about that.

I wanted to let you know that, and I know the Chairman does as well. I hope that we can follow up with you after you've had a chance to look into that in greater depth so we can resolve that. My opinion is that the legislation forecloses that. I realize there can be things done through the budgetary process, but it is a concern and I wanted to alert you to that.

Attorney General MUKASEY. I understand that you did, and I'm grateful for that. I understand that these requests are often filed by people who are lay people and don't know precisely what it is they're asking for, or how to ask for it. So, it's helpful to have a third person in the middle.

Senator CORNYN. As a former judge myself, and as a former judge yourself, anything that could avoid litigation and resolve things informally, I think, would be in an expeditious fashion. I bet you would agree with me that's a good thing.

Attorney General MUKASEY. I would. Yes, sir.

Senator CORNYN. Let me also address FISA reform, something that's very much on Congress' agenda. Our leaders have announced

a 15-day extension, but that, in my view, is kicking the can down the road and something we should do on a permanent basis.

Let me just talk about this in very human terms. Yesterday I talked to the father of Corporal Ryan Collins, who was a Texan killed in Iraq in May of 2007 during search operations for several U.S. soldiers who had been kidnapped by al Qaeda. At a previous hearing held by this committee on reforms to the Foreign Intelligence Surveillance Act, I detailed the troubling facts that had been highlighted actually in a New York Post story on October 15, 2007.

The title of that is: "Wire Law Failed Lost G.I." What the story details is a 10-hour delay necessitated by a FISA application in a circumstance that perhaps would not have been necessary if FISA reform had been passed, in other words, intercepting a foreign-to-foreign communication.

I just wanted to raise the point that in talking to Corporal Collins' father, who lives in Vernon, Texas, yesterday, he expressed concern that if in fact the kind of FISA reform that we're trying to pass on a permanent basis that would not require a lengthy and lawyer-intensive application process when trying to listen to foreign intelligence, that his son might be here today. So this is something that is not just hypothetical, it's something very human and very personal, and I wanted to raise that issue.

But do you continue to see that as a problem that cries out for resolution? In other words, making sure that we don't have to go through a laborious FISA application process where, clearly, you're talking about intercepting foreign intelligence? Is that a problem that this legislation, you believe, attempts to resolve?

Attorney General MUKASEY. You've put a human face on the problem we're trying to prevent from recurring. I don't think anybody believes that it should ever be necessary for any court to pass on whether we can conduct foreign surveillance for intelligence purposes, to find things out. We want to make sure that that's clear. We want to lower the burden on the government to—in all its presentations to FISA, not to the point where we don't have a legitimate burden, but just to make sure that what gets approved, that all that has to get approved are procedures and that we don't have to go on a case-by-case basis to get involved in the sort of thing that you describe.

I mean, I believe—I hope—that the Justice Department acted with all the speed that it could act in that case, but we never want to be in a situation where, in order to conduct foreign intelligence, we need to go with a pile of papers to a courthouse, get a judge to look through them, before we can do what we think we need to do. That's—

Senator CORNYN. I agree, General Mukasey.

Attorney General MUKASEY. That's a human face on the problem.

Senator CORNYN. Let me just ask you, in the brief time that I have remaining, I know there's been questions about interrogation techniques, including waterboarding, and some allusion to the ticking time bomb scenario. I understand your hesitancy to express a categorical view on particular interrogation techniques, because as I understand your response, under the "shocks the conscience" standard, it really depends on the facts. Would you care to com-

ment on the latitude that has to be provided within the law to make sure that we are using every legal means to intercept intelligence that can perhaps detect and deter terrorist acts?

Attorney General MUKASEY. What I understand the case to be today is that we have in place a program that the Director of the CIA believes is adequate to what we face. What I have also said is that, yes, there are circumstances where waterboarding is clearly unlawful. What I have said is that, simply, there may be circumstances in which that presents a difficult question.

I haven't said that there are circumstances in which it's clearly lawful, and I'm not going to get into any discussion in the abstract of circumstances in which it might be, because I'm not going to give anybody the play book, nor am I going to call into question what people do or have done when it's not necessary to do so.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Attorney General Mukasey, referring to your January 29th letter that we received yesterday, it strikes me that in its mode of analysis, you have assumed the role, in essence, of sort of a corporate counsel to the executive branch. The steps it takes are to assure that there is no lawbreaking currently going on, but the letter is unwilling to look back, as a corporate counsel might be unwilling to look back, and dredge up past unpleasantness and risk potentially creating liability for the corporation.

I can see the role for that kind of analysis in a corporate context, but it strikes me that you are not just the corporate counsel to the executive branch, you are also a prosecutor. You are the top law enforcement officer of the United States. Prosecutors do look back. Prosecutors do investigate things that have happened in the past. They do dredge up the past in order to do justice.

You know, it's the mission statement of the Department of Justice to seek just punishment for those guilty of unlawful behavior. The famous decision of Berger v. United States emphasizes the duty of the U.S. Government, a sovereignty whose interest is that justice shall be done. It is as much your duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. The President has said that we will investigate and prosecute all acts of torture. You just said today, if someone is guilty of violating the laws of the United States, they get prosecuted.

If you look at the United States Code, 18 United States Code, Section 2340(a) on torture: "Whoever outside the United States commits, or attempts to commit, torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection shall be punished by death or imprisoned for any term of years, or for life. There is jurisdiction over the activity prohibited if the alleged offender is a national of the United States, and a person who conspires to commit an offense under this section is subject to the same penalties, other than the penalty of death, as the penalties prescribed for the offense."

So we have a statute on point. You are, I believe, the sole prosecuting authority for that statute, correct?

Attorney General MUKASEY. I am at the top of—

Senator WHITEHOUSE. The Department of Justice is.

Attorney General MUKASEY [continuing]. The Department of Justice, which is the sole prosecuting authority.

Senator WHITEHOUSE. In reference to your letter and in your prosecutor's responsibility, not your advisory—you have two hats. You advise the administration. You're sort of the corporate lawyer to the administration. You're also a prosecutor. In the prosecutor's hat, could you tell me in what way, looking back, is there an absence of concrete facts and circumstances about waterboarding to even look at whether this statute should apply? Where is the absence of concrete facts and circumstances in the events of the past?

Attorney General MUKASEY. First, let's talk about how many hats I wear. I wear one hat. It's as Attorney General of the United States. There are a number of duties under that, but as far as I'm concerned there is no divided responsibility or divided loyalty. There is one responsibility.

Senator WHITEHOUSE. All right. Well, let's talk about the two duties, in the terms of one providing advice to the administration in the same way that a corporate counsel—

Attorney General MUKASEY. When it comes—

Senator WHITEHOUSE [continuing]. Provides advice to a corporate—

Attorney General MUKASEY. When it comes—

Senator WHITEHOUSE [continuing]. And being an independent prosecutor whose job is to look at the criminal laws and enforce them.

Attorney General MUKASEY. When it comes to past conduct, one of the many questions involved in past conduct, in addition to what was done, is what authorizations were given, what authorizations were reasonably relied on? My current evaluation of the statute, if there is one, has only tangentially to do with that, because if it has directly to do with that, then the message is, your authorization—you who did whatever you did, your authorization is good only for so long as the tenure of the person who gave it, and maybe not even for that long. It's good as long as it's current, as long as it's within the limits that are recognized in the debate that's currently going on, as long as the political winds don't start to blow in the other direction. That's a—

Senator WHITEHOUSE. So otherwise, as long as—

Attorney General MUKASEY. That's a message that I'm not going to send.

Senator WHITEHOUSE. The message you send otherwise is that "I was only following orders" is a fine response.

Attorney General MUKASEY. It's not a fine response. It was a response at Nuremberg that was found unlawful, as we both know.

Senator WHITEHOUSE. And yet it's the one that you're crediting right now. I had authorization and therefore I'm immune from prosecution. Isn't that where that analysis leads, inductively?

Attorney General MUKASEY. No. It's, I had authorization and let's take a look at the authorization and the circumstances under

which it was given and what was done, and a whole wide range of variables that I don't have before me.

Senator WHITEHOUSE. Has that been done? Has there been a thorough, independent analysis under your administration of whether or not any national of the United States is potentially in violation of Section 2340(a) as a result of—

Attorney General MUKASEY. I don't start investigations out of curiosity, I start investigations out of some indication that somebody might have had an improper authorization. I have no such indication now.

Senator WHITEHOUSE. Well, it just strikes me as odd that where the question of whether the taping—the destruction of the taping of an interrogation was a criminal act is at issue. There we have a council geared up to look at that question and make a solid determination whether or not laws were violated, but whether the underlying interrogation was itself a criminal act is not entitled to examination or investigation. Isn't that worth at least examination or investigation?

Attorney General MUKASEY. I don't know that that's what I've said. The way that started was, we were told that there was a destruction and a preliminary inquiry was made. When that preliminary inquiry showed some reason—some reason—to believe that some statute may have been violated, which is a very low standard, it's well below probable cause, when that was met, that low bar, we were required to, and did, begin a criminal investigation.

Senator WHITEHOUSE. Shouldn't that apply? There is evidence that there was an interrogation in this case. There is a statute on point that could very well be applied. If the bar is low, isn't it worth taking a look at? Who is taking a look at this?

Attorney General MUKASEY. You've alighted one point when you say that there was evidence that there was an interrogation. Evidence of an interrogation and evidence of a crime are two different things.

Senator WHITEHOUSE. Well, the way you said it was there was evidence of a destruction. The destruction could or could not be a crime, depending on how facts apply to law. The interrogation could or could not be a crime, depending on how facts apply to law. There really isn't a principal distinction between these two.

Attorney General MUKASEY. I think there's a principal distinction when the head of the CIA tells you that somebody destroyed tapes, apparently without proper authorization, which is what he disclosed.

Senator WHITEHOUSE. And so I don't see how that gets you anywhere. I don't see how that—

Attorney General MUKASEY. And all that started—all that started was a preliminary inquiry, and the preliminary inquiry showed the possibility that a crime was committed, and then we started an investigation.

Senator WHITEHOUSE. I don't see how that resolves the Nuremberg defense problem. If the reason that you're giving us for investigating the destruction of the tapes, but not investigating the underlying interrogation, is that it appears that the interrogators were following orders and it appears that the destroyers were not, isn't that the Nuremberg defense?

Attorney General MUKASEY. No, because you're assuming what was on the tapes. You're assuming that the interrogation was unlawful.

Senator WHITEHOUSE. I'm not assuming any such thing, any more than you'd be assuming that the destruction was unlawful. What I'm suggesting is that you should investigate it and there should be at least somebody who at least takes a look at this in a principled, thoughtful way. If the answer that comes back is, no, there was not a crime and here's why, then we can lay the question to rest. But if what you're telling me is that this hasn't even been investigated, although the destruction of the tapes is being investigated, it strikes me that there is a split standard there and I'm trying to understand why.

Attorney General MUKASEY. It seems to me that, since there was an ongoing investigation into the destruction of the tapes, that may well disclose what was on them and it may also well disclose whether there's anything further to be investigated. I think we ought to await that.

Chairman LEAHY. The—

Senator WHITEHOUSE. The theory—have I used my time?

Chairman LEAHY. You have.

Senator WHITEHOUSE. I apologize. I will desist.

Chairman LEAHY. That was a question I had earlier this morning. You'll have time to go into it further.

Senator Schumer?

Senator WHITEHOUSE. I apologize to the Chairman.

Senator SCHUMER. Thank you, Mr. Chairman.

And Judge Mukasey, I want to welcome you to your first oversight hearing as Attorney General. In many ways, both good and bad, you are the type of Attorney General I expected you to be when I voted for your confirmation. On the good side, you have acted decisively in several ways to clean up some of the stench of politics and ideology at the Department of Justice. You allowed an OPR investigation to continue that had stalled under Attorney General Gonzales. As Senator Kennedy noted, you launched a full-blown investigation into the CIA tapes with a good prosecutor. You reinstituted rules limiting contacts between the White House and the Justice Department. You recalled a much-criticized U.S. Attorney in Minnesota to Washington. You made good on your promise to Senator Feingold to address the question of equal access to DOJ facilities by gay and lesbian groups, and it seems in many ways there has at least been a beginning of the return of morale at the Department. So, on issues where I expected you would be a good Attorney General, you have largely been.

On other issues, however, especially related to executive power and torture, I never expected your views to be mine, and in fact they differ dramatically from mine and those of many of the members of this committee, many experts, and the majority of the American people. Nonetheless, I thought there was a hope—not large—that you just might rise to the occasion. So, I'm not surprised with your testimony, but I do remain disappointed.

I'd like to talk to you about that issue, the issue of waterboarding. Now you've had a chance to further educate yourself about coercive methods of interrogation. Having done that, do

you still find the method of waterboarding described in our October letter repugnant, as you stated in the letter back to us?

Attorney General MUKASEY. As a personal matter?

Senator SCHUMER. Yes.

Attorney General MUKASEY. Yes.

Senator SCHUMER. That's how you stated it.

Attorney General MUKASEY. Yes, I do.

Senator SCHUMER. Yes. OK.

Now, separate from the pure legal question, which is what we've talked about mostly here today, given that the method is repugnant to you, do you support a ban on waterboarding, whether by statute or executive order?

As you know, there is such a statute that Senator Feinstein—I was a co-sponsor of it—has in the—was very good at putting in the intelligence authorization. I think it's now in the Intelligence conference, so it's going to come close. So do you support—let me repeat that. This is not asking the legality. Do you support a ban on waterboarding, whether by statute or executive order?

Attorney General MUKASEY. There are two parts to that. One part, as a general matter, as a matter of principal, I don't—and I try to avoid—I tried it when I was a judge, I try it—I try to do it now. I try to avoid using the blank canvas of either existing laws or proposed laws on which to paint my own moral tastes and my own beliefs as to whether something is repugnant or not.

Passing that, the question of whether waterboarding should be outlawed or shouldn't be outlawed is a question on which other people own a substantial part of the answer, notably the people involved in gathering intelligence, using intelligence, processing intelligence, explaining our position abroad—that is, the State Department, which does, by the way, a superb job of it—all of those people have to be heard.

Senator SCHUMER. Judge, we know that.

Attorney General MUKASEY. OK. One of the things, though, that I would want to do before expressing my own view as the junior member of the entire assemblage I've just named, is hear them.

Senator SCHUMER. OK. I really—that is not up to your usual standard of answer here. I didn't ask you—I know you'd want to hear from a whole lot of people and stuff, but you've already stated something to be repugnant. I'm asking you, one of your roles as Attorney General is not simply a decider of what's legal or not legal—that's your most important function—but it's an advisor on policy.

Now, I find it hard to understand how you personally, when asked for advice, would not be able to say that something that's repugnant should be outlawed. I mean, I'm asking you the hypothetical not of what existed 3 years ago and not what even exists today. You've stated what exists today. I'm asking you, there's a statute. It's not an irrelevant question.

You're likely to be asked the question if you haven't been already. There's a statute that is likely—very likely—to get to the President's desk, and I'm just asking you, in terms of the advice you would give the President, your own personal view, whether by statute or executive order, should waterboarding be outlawed, period. You said it's repugnant. I don't understand how you can now

say, well, I have to ask a whole lot of other people. I'm asking you your view.

Attorney General MUKASEY. Senator, I don't want to trivialize the question and so I'm going to refrain from telling you all the other things that I find repugnant. But suffice it to say that whether something is or isn't repugnant to me, taken by itself, isn't the basis for my recommendation about whether it ought to be outlawed. I want to hear from other people. I want to hear other views. I want to analyze it as a policy matter. I want to be able to imagine, if I can, all of the facts and circumstances in which the question might arise—

Senator SCHUMER. Now, when you have the—

Attorney General MUKASEY [continuing]. With the assistance of the people, the talented people that I have at the Justice Department.

Senator SCHUMER. When you had the discussion, I think, with Senator Biden, then Senator Durbin, you were talking about a standard and you'd have to see the fact situation meet the standard. You didn't say that to us. You didn't say waterboarding is sometimes repugnant, or might be in certain circumstances repugnant. You said it's repugnant. You didn't have any qualifiers. And—

Attorney General MUKASEY. The qualifier was to me, yes. That's a big qualifier.

Senator SCHUMER. So I just find it—you have an opportunity here to be something of a leader, I guess. And you are going to be asked whether we should pass a law. This does not get into the conundrum of what to do about the past, which I know you wrestle with. But we have an opportunity not to simply say at this time there won't be waterboarding, but it's the policy. We all know that the military has made it its policy.

We all know that, you know, there are all kinds of experts in the same sort of—in a more difficult situation than you on the battlefield who say it should be outlawed. You find it repugnant, and yet you can't say that it's your view there ought to be a law to outlaw it? That doesn't put into jeopardy any of the people you are supervising, I guess, in a broader sense.

Attorney General MUKASEY. When I was a judge, I was not a settling judge because to me it posed the danger of taking the authority of my office and putting my personal tastes into it and putting my thumb on the scale one way or the other. I'm now the Attorney General, and for me to take my personal reaction to something and put the authority of that office on the scale, when I haven't heard all of the things I've told you I think I have to hear, is to me just as big a mistake, for a lot of the same reasons.

Senator SCHUMER. I have to tell you how profoundly, in this particular situation, I disagree with you.

Attorney General MUKASEY. I'm happy to hear that I lived up to expectations. I'm very sorry to hear that I lived down to them.

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

Chairman LEAHY. Thank you.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Attorney General Mukasey, there had been some comments in the media about Acting Assistant Attorney General Steve Bradbury, with questions being apparently raised by some about his renomination, and I just wanted to take this occasion to give you my endorsement of Mr. Bradbury.

I've had considerable dealings with him in his capacity. I worked with him very closely 2 years ago on the issue of legislation to bring the Terrorist Surveillance Program under the Foreign Intelligence Surveillance Court and found him to be an excellent lawyer. I worked with him on a number of the top secret matters on very involved legal issues, and I think he's a first-rate lawyer. I hope he will be confirmed by the Senate, but in any event, my strong recommendation is to see him retained in the Department of Justice.

Moving on, I wrote to you by letter dated November 13, 2007 inquiring about two of the matters discussed at the confirmation hearing. One is on the Reporter's Shield, and the second on the McNulty memo on attorney/client privilege. It would be my hope that we could move forward to get whatever positions you have here, because we're going to be moving forward, I think, fairly promptly on legislation on the attorney/client privilege, and on Reporter's Shield as well.

On the issue of Reporter's Shield, it passed the House 398:21, reported out of committee 15:4, so I think there is very strong support in the Congress. The House number is well in excess of two-thirds, and the majority in the Senate committee is in excess of two-thirds, regardless of the President's view on the subject.

There had been a citation that there were only 24 subpoenas issued as to reporters, and in a letter from the Department of Justice to Senator Grassley dated November 28, 2001, there were details of some 88 subpoenas which had been issued, and I would like to have this made a part of the record, Mr. Chairman.

Chairman LEAHY. Without objection.

[The information appears as a submission for the record.]

Senator SPECTER. The matter came into sharp focus on the jailing of New York Times reporter Judith Miller, and I am still at a loss to know why Special Prosecutor Fitzgerald proceeded to get a contempt citation there. It was disclosed that the source of the information was Deputy Secretary of State Richard Armitage. There are many indications of the chilling effect of what the Department of Justice has done.

So my request to you would be that if you have some modifications on a balancing test to protect national security, I would very much like to see those considered in the legislation to do what Congress can to protect vital national security interests. So it would be my hope we could have that meeting that you and I talked about where we could sit down with staff and try to work through it to see if an accommodation could be reached.

On the subject of the McNulty memorandum, it continues to be hard for me to understand why this is a bone of contention. The issue was considered in the case of United States v. Stein, with Federal Judge Kaplan in the Southern District of New York writing an excoriating opinion, calling the government's conduct on this issue "shocking the conscience".

But when you start with two very fundamental propositions, Attorney General Mukasey, one is that the Commonwealth has the burden of proof, and the second is that there is a constitutional right to counsel, which necessarily involves privilege, why should there be any inducement or benefit, let alone coercion, by the Department of Justice to secure a waiver? Senator Leahy and I have had considerable experience in the prosecution of matters. District Attorney of Philadelphia for 8 years. Senator Leahy—

Chairman LEAHY. State's Attorney in Chittenden County, Vermont.

Senator SPECTER. Senator Whitehouse. The place is full of prosecutors. I would never have dreamed as D.A. of trying to prove a case from the mouth of a defendant. How can you reconcile or justify this sort of conduct by the Department of Justice to prove its cases?

Attorney General MUKASEY. I understand. I don't justify, or reconcile, or encourage, or condone any coercion of anybody to waive the attorney/client privilege. I think we've made that clear—I hope we've made it clear—to our prosecutors. We have put in place another memorandum relating to the question of when it is that information can be sought. Prosecutors need to basically raise their hands and say "may I". The need to approach the Department and to ask the Department whether there is information that they can seek that may be considered privileged in two categories. One is simply facts.

Senator SPECTER. Attorney General, I don't want to cut you short, but I've got less than a minute left.

Attorney General MUKASEY. I'm sorry.

Senator SPECTER. I would like this to be a follow-up matter for us to sit down and talk about at length. We've had former Attorney General Meese and former Attorney General Thornburgh criticize the memo. I think the McNulty memorandum is not the appropriate approach. Rather than take more time today, I think that perhaps we can come to an accord on it. I'd like to sit down with you on it.

Attorney General MUKASEY. The one point I simply wanted to make was that, under the McNulty memorandum, there have been no, zero, requests for a waiver of the attorney/client privilege. No requests for a waiver.

Senator SPECTER. During your tenure, you mean?

Attorney General MUKASEY. During the duration of the McNulty memo.

Senator SPECTER. Of the McNulty memorandum?

Attorney General MUKASEY. Yes. Corporations have been allowed, if they wanted to, to come forward and ask for that as a consideration for avoiding indictment, which they want to do. And to say that they can't do that is to sacrifice their welfare for the good of—I mean, it's to deny them the right to be the judge of what's good for them. I don't think that's advisable either. But I'd like to—I'd be happy to talk to you further about it.

Senator SPECTER. Well, even in the situations you state, the corporation may find it to its advantage, but what's happening to the individuals who are being asked to give up the attorney/client

privilege? Let's go over this in some detail, if we may. Would you agree to sit down with us and talk about it?

Attorney General MUKASEY. Yes.

Senator SPECTER. OK.

A couple of other points, very briefly. I note in the Wall Street Journal today a report that the FBI is picking up a criminal investigation on possible fraud and possible insider trading on subprime, and I'd just encourage you to give that a very, very high priority because of the very heavy impact. This committee is considering legislation by Senator Durbin, and separate legislation by myself on it.

The final point I want to bring up with you is whether, with your administration, we might take a fresh look at the issue of the contempt citations which are outstanding against some of the executive branch officials. I think it is very unfortunate to have those contempt citations outstanding because those individuals are just the messengers.

Senator Leahy and I, for the past several years, have been trying to work out a formula where we could question former White House counsel Harriet Miers and others to try to satisfy ourselves as to the investigation of the discharge of the U.S. Attorneys. I think if we could come to terms on the transcript, that we might well be able to unlock the controversy on it.

In your confirmation hearings, you spoke favorably about the desirability of a transcript. This is a matter that has been on the President's personal agenda. He appeared on national television when this matter broke and said that he would make available Ms. Miers and others, providing that no oath was administered. Well, I think an oath is desirable, as one was administered to you today. But I personally would be willing to forego it because there is a penalty for false official statements. It carries the same penalty, 5 years.

He didn't want to have both houses have people at the hearings, and I think that's something that could be accommodated with a joint inquiry by the House and Senate Judiciary Committees.

He didn't want to have it public, which I think is a bad idea, but I would concede that. They wanted to have no transcripts. I believe that the transcript issue really is indispensable, more for the protection of the witness than for anybody else. My question to you is, would you be willing to revisit this with your new administration to see if we can come to some terms?

I think the contempt citations will amount to nothing more than wheel-spinning and will take years to resolve. We face the obstacle that the action has to be brought by the U.S. Attorney for the District of Columbia. I understand your position is that that would not be authorized. Is that correct?

Attorney General MUKASEY. There are opinions of the Office of Legal Counsel going back many administrations confirming that senior advisors to the President are immune when the privilege is invoked as to testimony for their executive acts, otherwise serious separation of powers issues are raised. The history of executive powers issues and oversight issues has long been one that has been deferred or avoided by accommodation. People have been accommo-

dated in all kinds of different ways, ways that I know about and a lot of which I don't.

Senator SPECTER. But Attorney General Mukasey, isn't the matter of immunity of those executive officials a matter for the courts, not a matter for decision by the executive solely? That's why the Congress brings a contempt citation and seeks to have it enforced. It ought to be a judicial determination, not a unilateral ex parte determination by the executive giving immunity to itself.

Attorney General MUKASEY. Most respectfully, if the topic on which they are to be interrogated involves their official duties and they are senior advisors to the President, it's my understanding that if they are instructed to invoke executive privilege—

Senator SPECTER. Where does that immunity come from, an executive order or executive practice?

Attorney General MUKASEY. A direction by the President, just as—I mean, it is something that has been recognized by the courts. The same way it is not mentioned in the Constitution any more than congressional oversight is mentioned in the Constitution, but these are two—

Senator SPECTER. Attorney General Mukasey, I don't—

Attorney General MUKASEY.—matters that are basic.

Senator SPECTER. I don't think that's correct when there's been an effort for enforcement of a contempt citation. There's been a determination by the judicial system. Well, let us—I'm way over time and I appreciate the indulgence. But would you be willing to reconsider the whole issue to see if we can find an accommodation in an era now starting off a new session, where we're trying to have cooperation between the executive and legislative branches?

Attorney General MUKASEY. I'd be willing to try to find an accommodation, but I don't want to suggest that I'm going to overturn longstanding opinions.

Senator SPECTER. Well, OK. There's no longstanding rule against a transcript, is there?

Attorney General MUKASEY. I don't know that.

Senator SPECTER. You don't know that?

Attorney General MUKASEY. No, I don't.

Senator SPECTER. Sometimes, Attorney General Mukasey, it's hard to get an answer on something that's very fundamental. How can there be a longstanding tradition against having a transcript when executive officials are questioned by members on congressional oversight?

Attorney General MUKASEY. This is different from congressional oversight. These officials are—I mean, these officials are, as I understand it, senior advisors to the President who are being subpoenaed. This is not the Attorney General. These are people who are senior advisors to the President.

Senator SPECTER. But the President has agreed to make them available. It comes down to a narrow issue of the transcript.

Attorney General MUKASEY. To the circumstances.

Senator SPECTER. And you're suggesting there is a rule and a precedent against a transcript?

Attorney General MUKASEY. If I suggested that, I didn't mean to suggest it. I said I don't know whether there is.

Senator SPECTER. So it's not what you're suggesting, it's just that you don't know?

Attorney General MUKASEY. Correct.

Senator SPECTER. Well, let's try to find out.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you. I would note, when you look into this, you'll find that at least one of the witnesses who testified and claimed executive privilege at one point—testified partially, claimed executive privilege partially, also said that she had never discussed this matter with the President, never had any of these matters discussed with those who were going to discuss it with the President, and frankly we found the claim of executive privilege to be a tad broad.

I don't want to use the word "cover-up", although that was the first thing that occurred to me. Actually, it was the second thing that occurred to me, too.

But let me go and follow up on Senator Whitehouse's questions on the CIA tapes. If waterboarding was shown on these destroyed CIA tapes, how would you determine—suppose we find that there's a back-up to the tapes, and usually in these kind of instances you do find there is a back-up. But let's suppose there is a back-up and you were in there, and it found waterboarding. How do you determine whether that's evidence of a crime or not when there seems to be ambivalence by you regarding the legal status of waterboarding?

Attorney General MUKASEY. John Furman is in charge of this investigation and he is going to follow it where it leads, and that means wherever it leads.

Chairman LEAHY. Well, let me ask you about that. John Durham is the—

Attorney General MUKASEY. I said "Furman". I meant "Durham."

Chairman LEAHY. I knew what you meant. Is doing this because it normally would have been the U.S. Attorney for the Eastern District of Virginia who has recused himself. Why did he recuse himself?

Attorney General MUKASEY. I believe he recused himself over issues relating to a case that he had and the fact that he generally has a relationship with the CIA because they're located in his district. I can't—

Chairman LEAHY. Well, if Mr. Durham is going to use some of his team, how do we determine, one, what the conflict was, and whether anybody else has that conflict in that team?

Attorney General MUKASEY. His team reports to him.

Chairman LEAHY. To?

Attorney General MUKASEY. To Durham.

Chairman LEAHY. But some of them are taken from the Eastern District of Virginia, are they not?

Attorney General MUKASEY. So they are. The Eastern District of Virginia has a requirement that when people appear in court on behalf of the government, at least one of them be a member of the bar of that court. People have been taken from that office who do not have, potentially—it wasn't that there was a conflict determined. There were things that were teased out to determine the

possibility that there may be a conflict and he wanted to avoid that.

Chairman LEAHY. But he made a recusal. In his recusal request, did he lay out what it was that he was recusing himself or why he was recusing himself?

Attorney General MUKASEY. I'm not going to get into the details of what it was he laid out, what it was responded. Facts were teased out in such a way as to present the possibility that there could be a conflict and in order to avoid—

Chairman LEAHY. You granted his recusal. Can you assure us that nobody else in the office who is going to be working with Mr. Durham has the same conflict?

Attorney General MUKASEY. It's my understanding that the people who were selected were selected because they didn't, and couldn't, have the same possible conflict that was possible if others worked on it. Mr. Durham is the person to whom they report, not the U.S. Attorney.

Chairman LEAHY. We sent you a letter that said, "When and how did Department officials or attorneys first become aware of the evidence of videotapes of detainee interrogations?" Do we have an answer for that?

Attorney General MUKASEY. You mean, beyond this case? No, I don't.

Chairman LEAHY. Well, in any case, when and where did the Department officials or attorneys first become aware of videotapes of detainee interrogations?

Attorney General MUKASEY. That, I do not know.

Chairman LEAHY. Did they ever view any of these tapes?

Attorney General MUKASEY. I don't know that. And what was done within the Department is not something that I would disclose if I knew it.

Chairman LEAHY. Well, wouldn't that be fairly important? If they had viewed the tapes, that would mean that either their tapes have not been destroyed or the Department of Justice was looking at them prior to a decision being made to destroy them, which raises all kinds of other questions.

Attorney General MUKASEY. I didn't say I wouldn't look into it. I said I wouldn't simply disclose it here.

Chairman LEAHY. Well, perhaps you and I should discuss this after you've had a chance to look into it in private, perhaps with Senator Specter, because you understand the conundrum I see in this case? If they had viewed them, that meant that at some point they were there. There is a reason for the Department of Justice to view them. Then the question becomes, who gave the order to destroy them? Unless some are still there.

Attorney General MUKASEY. The question of who gave the order to destroy them is, it seems to me, separate from whether anybody from the Justice Department viewed them, and if so, when.

Chairman LEAHY. It depends upon when they viewed them.

Attorney General MUKASEY. It may.

Chairman LEAHY. For example, was anybody in the Department asked about the advisability or legality of destroying the tapes?

Attorney General MUKASEY. I've seen a report relating to that. I have seen no evidence relating to that.

Chairman LEAHY. No evidence related to what?

Attorney General MUKASEY. To somebody in the Department advising as to the advisability of destroying the tapes. And in any event, John Durham would be conducting that investigation.

Chairman LEAHY. And you don't recall when and how the Department became aware that the tapes had been destroyed?

Attorney General MUKASEY. I recall when and how I became aware of it.

Chairman LEAHY. And that was?

Attorney General MUKASEY. That was when I opened the door to my apartment and picked up the Washington Post.

Chairman LEAHY. I remember the time of a CIA Director no longer alive who used to come to the Hill and say, usually the day after the New York Times had reported a number of things going on, I really meant to have told you about that, I was as required by law to tell you about it. I forgot to tell you. The third time he came up, the Intelligence Committee would say to him, well, just mark the New York Times "Top Secret" and we'll get the information—or the Washington Post, but in this case the Times—and we'll get the information faster, second, we'll get it in greater detail, and third, we'll get this wonderful crossword puzzle.

Attorney General MUKASEY. In fairness, it may well be that that issue was on its way to me before that story appeared, but that's—

Chairman LEAHY. And I realize there's a million things that come to you, so I—

Attorney General MUKASEY. It's not that it came to me and I forgot.

Chairman LEAHY. This was a pretty big one.

Attorney General MUKASEY. Yes.

Chairman LEAHY. Were there communications between your Department and the White House about the destruction?

Attorney General MUKASEY. Not—I don't understand. I'm sorry, I don't understand the question.

Chairman LEAHY. Well, obviously at some point there was a plan to destroy them. Was there any communication between the Department of Justice and the White House about that?

Attorney General MUKASEY. That is something Mr. Durham, it seems to me, would look at.

Chairman LEAHY. And when he's finished his investigation, do you have any problems with him testifying before this committee?

Attorney General MUKASEY. We don't—we have never—I think U.S. Attorneys have not testified as to pending cases, and I don't see any reason to make an exception here.

Chairman LEAHY. We may come back to that if we're unable to find some of these other answers.

You've doubtless heard about how the White House, even though they're required by law to maintain records, e-mail records, now say they've destroyed many from the first couple of years, or over a period of 2 years. Have you seen that in the press?

Attorney General MUKASEY. I saw a story that there were e-mails that should have been there that aren't.

Chairman LEAHY. Of course, we then also have that they were using the Republican National Committee server, and we were told that's all been destroyed. We were told that, oops, it's all there on

a back-up, but we're still not going to show it to you. If they were not following the law on maintaining these records, the laws are fairly clear that White House records have to be retained. You may recall that Congress asked extensive questions about that during the last administration. Is this anything—if it turns out that they have not followed that law, is that something your Department would look into?

Attorney General MUKASEY. It seems to me I would know the circumstances under which the records were not retained. There are—

Chairman LEAHY. Well, if the law—let's assume that the law is clear that records have to be retained, but instead records were destroyed. Does that raise any questions in your mind?

Attorney General MUKASEY. It's something I would want to know more about.

Chairman LEAHY. Well, I would hope somebody would find out about it, that when we'd get stonewalled by the White House when we ask the questions why the law wasn't followed, I would hope that the Attorney General would ask the questions.

I see Senator Grassley is here and it's his turn. Go ahead, Senator Grassley.

Senator GRASSLEY. Thank you. I'm glad to be back again with you. Maybe you aren't glad that I'm back here, but I wanted to leave our mark-up of the stimulus package to come over here and finish some more questioning.

As you know, in the 1990's, whistle-blowers exposed major problems with the FBI Crime Lab. Dr. Frederick Whitehurst, who testified before you when you were a judge in New York, raised concerns about the lack of expertise in the FBI crime labs. In response, the former Attorney General recruited five outside forensic experts to carefully review the work of the Crime Lab and all of Dr. Whitehurst's concerns, and to make recommendations. One of the changes was to ensure that the FBI place scientists in charge of the lab. In other words, the FBI put people with expertise in leadership positions.

Now there's another FBI whistle-blowers named Bassam Youssef, who is prepared to testify about major problems with the FBI's counter-terrorism operations. The FBI has taken the position that neither Arab skills, nor expertise with Middle Eastern counter-terrorism are required for management positions in the counter-terrorism programs. This sounds too much like the days when the FBI didn't think it needed a scientist to run the crime labs.

After your confirmation hearing I asked you about these issues and whether you would consider appointing an independent panel of experts to give them serious consideration. In your written answers, which we just received, you said you were unfamiliar with the problem outlined by Youssef and that it would be among your highest priorities to familiarize yourself with the Bureau's counter-terrorism efforts.

Special Agent Youssef, through his counsel, provided my office with a copy of a 10-page letter dated October 11, 2007, filed with your office, detailing threats to our Nation's security caused by the failure of the FBI to hire and promote subject matter experts with-

in the FBI's Counter-Terrorism Division. The examples set forth in that letter are extremely troubling.

I'd like to have that letter included in the record, Mr. Chairman.

Chairman LEAHY. Without objection.

[The letter appears as a submission for the record.]

Senator GRASSLEY. What action has your office taken to investigate the issues and concerns raised by Mr. Youssef's October 11, 2007 letter?

Attorney General MUKASEY. As I understand it, the matter with Mr. Youssef is in litigation and, that being the case, I can't, at this point, get into it.

Senator GRASSLEY. Well, can I ask you if you would plan to seek an independent review of Youssef's allegations about how the lack of expertise among FBI managers is hindering its counter-terrorism efforts? Why or why not?

Attorney General MUKASEY. I think we await the progress of that litigation.

Senator GRASSLEY. OK.

Attorney General MUKASEY. Which raises that and other issues.

Senator GRASSLEY. So we've got somebody in the FBI who says our counter-terrorism efforts are being weakened, and we are going to wait for the courts of the United States to make a decision, and while we're under threat of attack from terrorists every day, we're told? I believe that we are under threat of attack every day.

Attorney General MUKASEY. We are. The FBI has been improving its counter-intelligence section and adding to its counter-intelligence section, wholly apart from Mr. Youssef's allegations. That's an ongoing process in which I am actively involved, and the Director is actively involved.

Senator GRASSLEY. Mr. Youssef is also a central figure in controversy over the so-called exigent letters issued by the FBI. These letters obtained phone records by falsely claiming an emergency and promising that a grand jury subpoena would be issued later. According to Youssef, he helped the FBI identify and fix problems with these letters. The FBI General Counsel recently briefed committee staff and claimed that her office did not know of the letters "at the time".

However, according to page 93 of the Inspector General's report, a division of the General Counsel's Office did know about the exigent letters as early as 2004, long before the FBI stopped sending them. We should not have to rely on misleading statements from FBI officials when there is evidence available that would clarify exactly how this mess happened. The Committee requested all of the e-mails related to the exigent letters last year. DOJ promised them to us, but we have received only one small batch of heavily redacted documents. When are these documents coming? It has been almost a full year since they were asked for.

Attorney General MUKASEY. I will find out about the review of the documents. It was my understanding that, following the IG report, there were changes put in place in the oversight of that, of the issuance of the letters, and that those oversights are being given a chance to work, and hopefully they are working. But the problem was lack of an oversight mechanism.

Senator GRASSLEY. In this week's State of the Union address, President Bush outlined the steps the administration has taken to address the ongoing challenge of illegal immigration. Specifically, the President spoke of increasing work site enforcement, expanding the number of agents at the southwest border, and the construction of the fence. As a follow up to the remarks, is the Justice Department committed to actively pursuing cases against employers who knowingly hire illegal aliens, and do you see this as a priority with the Department of Justice?

Attorney General MUKASEY. It is, we are, and I do.

Senator GRASSLEY. In November, Senator Bond and I wrote to you about the disturbing case of former FBI agent Nada Prouty. She is a Lebanese national who recently plead guilty to immigration fraud and unauthorized access to information about cases involving fundraisers for terrorist organizations like Hezbollah.

In response to that letter, the FBI provided briefings on the case, where we learned that before hiring her the FBI's background investigation failed to uncover the following information: (1) Prouty had overstayed her student visa; (2) Prouty engaged in a sham marriage in order to obtain citizenship; and (3) Prouty's brother-in-law and former employer was a Hezbollah supporter.

According to the FBI, they missed all of this because they assumed she was checked out before getting her U.S. citizenship. I was pleased to learn that in response to this incident the FBI will now be reexamining the background of all of its agents originally from foreign countries.

Can you explain a little more about this effort? For example, how many agents' backgrounds will have to be reviewed, and how long will it take? Will agents who were originally citizens of certain high-risk countries be targeted for scrutiny? Will all non-native born agents be reexamined?

Attorney General MUKASEY. I can't tell you how many agents and whether it's going to involve a reexamination of all non-native born agents. That said, I believe it was more than simply reliance on Prouty having become a citizen. But there are additional safeguards that I understand are being reviewed, contemplated, and put in place.

Senator GRASSLEY. The Inspector General's recent report on its recommendations following the Robert Hanson spy case said that the FBI resisted dedicating a special unit exclusively to internal security. The FBI finally agreed to implement this Inspector General's recommendation only recently, years after the Hanson case. If the FBI had a unit focused exclusively on internal security, then perhaps Prouty could have been caught sooner. How long will it be before this dedicated unit is actually up and running, and will the new unit be involved in the project to recheck the backgrounds of foreign-born FBI agents?

Attorney General MUKASEY. My understanding is, the FBI does internal security on an ongoing basis.

Senator GRASSLEY. Would you start over again, please?

Attorney General MUKASEY. I'm sorry. It was my understanding that the FBI does internal security on an ongoing basis, and I will discuss that with the Director.

Senator GRASSLEY. OK.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Grassley. I know this is an area where you've had a great deal of interest and you've followed up on these type of questions, whether it's a Democratic or Republican administration. I appreciate the fact that you show that kind of concern.

Senator GRASSLEY. I hope that helps my credibility.

Chairman LEAHY. It does with me.

Senator GRASSLEY. OK.

Chairman LEAHY. Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Thank you, Attorney General. I guess I'm trying to sort out the process question related to the determination of whether waterboarding is torture. In terms of your advisory responsibilities to the government, you've said you're not going to engage those because there is not a set of concrete facts or circumstances that necessitate a determination because you've disclosed to us that waterboarding is not part of the CIA's enhanced interrogation technique regime.

That still leaves open this question whether, under 2340(a), which uses the term "torture" specifically in the statute, there are concrete facts and circumstances that would necessitate or justify an analysis toward that purpose.

Given that the concrete facts and circumstances justification evaporates, in terms of 2340(a), in that they're arguably, whatever it is, it is and you can go back and find it, it's as concrete as the past ever is, I'm trying to determine if that is taking place, the analysis, if you are waiting, as you suggested for John Durham's investigation to look more into what happened, and then it would kick off from that once the preliminary determinations were made, or if there has been a policy determination made that because there has been a claim of authority, there will be no analysis, there will be no investigation, there will be no determination, or some fourth category. What is the process for coming to this decision vis-a-vis 2340(a)?

Attorney General MUKASEY. The process for coming to any determination under any criminal statute is that facts come to the attention of the Department that warrant an investigation. As of now, so far as I'm aware, John Durham's investigation is into the destruction of the tapes. That may very well engage the question of what was on the tapes, if what was on the tapes was something that is barred by the torture statute. That is several removes.

Senator WHITEHOUSE. Couldn't you and I, but for the non-classified nature of this particular setting, engage in a very concrete and factual discussion about subject matter that would at least give cause for inquiry?

Attorney General MUKASEY. We could engage in a discussion. It would not be a concrete and factual discussion because we would be talking about if this, if that, if the other. We would—

Senator WHITEHOUSE. In a classified setting?

Attorney General MUKASEY. In a classified setting. That's all we—talking about.

Senator WHITEHOUSE. It may or may not be "if".

Attorney General MUKASEY. I beg your pardon?

Senator WHITEHOUSE. In a classified setting, it may or may not be an "if."

Attorney General MUKASEY. I'm not entirely sure what that suggests.

Senator WHITEHOUSE. Well, I'm trying to be careful not to step outside of the boundaries that I'm obliged to pursue, to honor here, of not being—not disclosing classified information. At the same time, I'm trying to get some more information because I don't think it's fair to say that nobody has any basis from anywhere. I mean, just read the New York Times, read the Washington Post, read what people have said on television. There's been a former CIA official who has been on the air waves.

If that's not enough to at least open the first red flag as to whether an inquiry should go forward, I don't know what on earth could be. So that answer, to me, is just totally not credible. So then the question is, you know, where do we stand? Because I think anybody who even has a public view of what's going on would suggest that there's something that might at least merit the beginning of inquiry as to whether an investigation might be opened.

Attorney General MUKASEY. All of that depends on whether certification was given, whether permission was given, and whether it was permissibly relied on. It would not—it should not turn on one person's current view of what the statute requires or doesn't require, because if it does the message is, it all changes.

Senator WHITEHOUSE. But aren't there two questions here? There is no exemption under 2340(a), depending on whether the conduct was authorized by a supervisory official or not. There is no Nuremberg defense built into this criminal statute.

So if you are to apply it, it would strike me that you would want to apply it not before an investigation has taken place, but once an investigation had reached a point where you were able to say, OK, here's what we think took place, here is whether or not it's in violation, and here is the legal analysis as to whether or not mens rea is adequate given the nature of the authorization.

But it strikes me that you're telling me that nothing in that process is taking place because the certification alone obviates any further inquiry, irrespective of how developed the facts are. I'm just trying to get, which is this? Is it that there aren't facts well developed? That doesn't seem credible. Is it, because there's authorization we're not going to look at this no matter what? If that's your position, fine, but let's just say so and then I'll understand.

Attorney General MUKASEY. That's not my position.

Senator WHITEHOUSE. What is your position?

Attorney General MUKASEY. My position is that there is an ongoing investigation and that I'm not going to speculate on what might or might not have happened, particularly with regard to authorizations.

Senator WHITEHOUSE. But the ongoing investigation, as far as we know, is only into the destruction of tapes. It has nothing to do with the underlying interrogation. Unless you're telling me that that's the forum. Is that the forum in which this will get decided?

Attorney General MUKASEY. That is, in part, dependent on what John Durham's investigation shows.

Senator WHITEHOUSE. Well, let's hypothesize that a little further. If it shows that waterboarding took place—

Attorney General MUKASEY. Let's not hypothesize anything.

Senator WHITEHOUSE. Well, there are only two choices, so it's not going to take us a long time to discuss the alternatives. It either did or didn't.

Attorney General MUKASEY. It's not a question—it's not a question of taking a long time, it's a question of telling agents out there that we are investigating the CIA based on speculation about what happened and whether they got proper authorizations, and I don't think that ought to be the message.

Senator WHITEHOUSE. Well, there's an American public—my light has just gone on. If I may, I would like to thank you for the—and applaud you for the re-erection of the firewall between the Department of Justice and the White House. I thought the manner in which it was done was excellent. I'm sorry we seem to be at loggerheads again on this subject, but I didn't want to close my questioning without letting you know that, in that area and many others, I appreciate and applaud the work you are doing at the Department of Justice.

Attorney General MUKASEY. Well, this is a good faith exchange. I'm not suggesting that if you hadn't said that that it wouldn't—you know, that there would somehow be a problem. I appreciate that you said it, but—

Senator WHITEHOUSE. I also want to be fair.

Attorney General MUKASEY. Me, too.

Chairman LEAHY. Before I go to Senator Cardin, just one thing to make sure on a question that Senator Cornyn and I were talking to. I don't expect an answer on this here. I discussed this with you out in the anteroom, Mr. Attorney General. But the FOIA legislation that we worked on in a bipartisan way that was passed overwhelmingly, signed into law by the President, that required the Office of Government Information Services, OGIS, which is at the National Archives and Records Administration, required that be there, the ombudsman, all the other things we talked about.

Now we see in the Department of Justice, in the 2009 budget for the administration, there may be an attempt to move that into the Department of Justice from where the law says for it to be. The law says, keep it in OGIS and the National Archives, because it's the one place it stays as far away from politics as any department in our government. I'm not looking for an answer, but those who are taking notes of our conversation who are here from your Department, will you please look at that closely? I would like to know, and I know that Senator Cornyn will want to know.

Attorney General MUKASEY. I will look at it.

Chairman LEAHY. It's obviously not a partisan request. This is something where the two of us are joined, and we just want to make sure it's done.

Attorney General MUKASEY. I understand that.

Chairman LEAHY. Senator Cardin—

Senator CARDIN. Thank you, Mr. Chairman.

Chairman LEAHY.—has been presiding over the Senate—I remember those days. Would you like to go ahead, sir?

Senator CARDIN. Well, thank you very much. As I was explaining to our Chairman, I might have been back a little bit earlier, but the person speaking on the floor was the junior Senator from Vermont, so it took a little bit longer.

First, General Mukasey, as many have said, or most, to compliment you in so many ways in which you have opened up communication with Members of the Congress, but also opening up to try to correct some of the problems that have been very much documented over the last several years, and we certainly appreciate the ongoing working relationship between Department of Justice and the Congress.

I want to make a couple observations first, because at least from my point, I want to clarify a couple things that have been said here by my colleagues and yourself. Waterboarding, of course, is an issue that was deeply involved in your last appearances before this committee. I just really want to make an observation about waterboarding, if I might.

First, from any standard on basic human rights, you cannot justify waterboarding. I think we all acknowledge the horrible process it is. Second, from the point of view of U.S. leadership internationally, we are tarnished when we try to defend any use of waterboarding. Then the third point I would make, is that if it's fair under extraordinary circumstances for us to try to justify the use of waterboarding, then it's going to be difficult for us to protect American interests when powers that are in a war with us decide that they will use it against U.S. soldiers.

So for all those reasons, I would just urge you, as we go forward in this debate—and I know you've only been in office for 3 months and there's a lot of issues that you have been confronting—that I believe clarity is needed here and would just urge you to reflect on that.

I'm not asking you to respond any further on the subject, but to reflect on that, because I think it is troublesome. I chair the Senate Helsinki Commission, which is involved in international human rights. I must tell you, it's very difficult for us to explain why the administration is hedging on this issue.

The second point, on the issue we're going to have to deal with next week on FISA, on the retroactive immunity, I understood your responses to several of our Senators, including Senator Specter, but I would urge you also to take into consideration what Senator Specter said about the precedent of giving retroactive immunity as to the further review by our courts of potential abuses and whether giving retroactive immunity could have permanent damage on the appropriate role of the judiciary in protecting the civil liberties and rights of the people of this country.

I think that there have been good-faith suggestions made that would protect the telephone companies, but also try to preserve the rights of our courts. I applaud Senator Specter and Senator Whitehouse for their proposals. There are other proposals that are out there. I would urge that you take a look at this to see if maybe there isn't a common ground that we could come together on in order to work out the issue of the telecommunication companies without jeopardizing the roles of our courts.

The third point I would raise with the sunset of this law, which you have in your statement urging against the sunset because of predictability of the statute, the Senate bill that's on the floor has a 6-year sunset, the House bill has a 2-year sunset. I have an amendment for a 4-year sunset. I believe it's important for the next administration to engage this issue. I would just point out that whoever is responsible for using the power contained in FISA, it's going to be a much stronger position if Congress is engaged on the subject.

It's easy to say, well, we'll provide the information. But if there isn't a date in which Congress has to act, the level of cooperation generally between agencies and the Congress is not as much, and Congress' interest is not as much. I think it would be very helpful for a continued role between Congress and the intelligence community and the administration on these subjects, and I think a sunset is very important.

But that's not what I want to question you about. I just wanted to make observations on those points. Again, I'll give you time if you want to respond on any of those three. But I want to make sure we get, in this hearing, to the election issues and the Civil Rights Division. I don't believe there's been enough attention so far asked on those issues.

We have an election coming up in 2008, and if this election is any indication of what's happened in 2006, then I think we can anticipate there will be efforts made by candidates, or political parties, or individuals to try to suppress minority voting. You and I have talked about that. We agree that that should have no place in American politics. We've seen in previous elections fraudulent material and information that has been used in minority communities to intimidate voting.

I just would like to get some clarification from you, going into this election cycle, how you intend to have the Department of Justice engaged in this election to make sure that those type of tactics do not go unchallenged and that, if necessary, from your point of view the laws are amended. We have a law pending here that we hope to get passed that would strengthen the Federal Government/Department of Justice role and making sure that type of activity does not take place in politics in America. But I would hope that you would give fair warning to any candidate, or political party, or individual, that those type of tactics will be challenged by the Department of Justice.

Attorney General MUKASEY. We have monitors, and will have monitors, out to make sure that there is access to the ballot by people who should have access to the ballot. Also, there is in draft a memo that I am sending to all prosecutors, indicating to them that their sensitivities in a time of election have to be heightened to address in part those issues, and in part the dangers posed by bringing prosecutions that could be perceived as somehow affecting the outcome of elections and—to that too.

I want us to enforce voting rights. I want us to make sure that there is no perception that any prosecution or withholding of prosecution is done for the purpose of affecting the outcome of an election, and that any investigations are carried forward only based on what the facts show, what the law shows, and whether a case is

ready to go or not and based on whether it would or would not be appropriate timing for any political party or group.

Senator CARDIN. I appreciate that. Let me be more specific. If your office learns of activities that are aimed at suppressing vote by giving out wrong information, such as, you find an orchestrated process where a candidate is giving out information telling minorities that they'll be arrested if they have unpaid parking tickets, that I just want to make it clear—I hope it's clear in your agency that you will look at those types of allegations and investigate them, and if necessary prosecute to the full extent that you can under law.

Attorney General MUKASEY. You and I have discussed statements that are clearly fraud. This isn't a matter of opinion about one candidate about another.

Senator CARDIN. Right.

Attorney General MUKASEY. This is misinformation about voting places, about having parking tickets be the excuse for denying somebody the right to vote, and so on. We are going to make every effort to make sure, and use every resources at our command to make sure, that that does not happen.

Senator CARDIN. I thank you for that answer and I appreciate that answer. Just one more comment or question dealing with the Civil Rights Division. You and I have talked during your confirmation hearings about the priority of that Division. I know that the head is subject to confirmation and there is a nomination that has been made. I again ask you to give your personal attention to the Civil Rights Division and return it to its historic role of being the protector of the rights of minorities and look for those types of actions that will have impact to empower all people in our country to the civil liberties and rights of our Nation.

Attorney General MUKASEY. We observed the 50th anniversary of the creation of the Civil Rights Division this year, which means in my lifetime there was no Civil Rights Division. Yet, that division has become emblematic of the role of the Justice Department. I know that. I've met with the nominee to be Assistant Attorney General in charge of that division. I've met with the unit chiefs within that division to encourage them and to reinforce them in their historic mission, and it is my belief that they are so encouraged and so reinforced, and I intend to make sure that they are. I appreciate your interest in this because it just—

Senator CARDIN. Yes. And I look forward to working with you in that regard. I think it would be helpful. There are several members of this committee, many members of the Senate and House, that are interested. I think it would be helpful to continue this dialog, and I look forward to the confirmation process for the Assistant U.S. Attorney.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Whitehouse, did you say you had one more question? One more little question?

Senator WHITEHOUSE. Mr. Chairman, what I think I'll do, actually, is put it in the form of a letter so that I don't extend the hearing any further. It has to do with the Office of Legal Counsel,

which for a long time has been sort of the internal legal compass for the Department.

And, as you know, some of the declassified opinions, some of the declassified sections of highly classified opinions that I've had access to give me cause to worry that it has become sort of a hot house for rogue ideological opinion protected from the winds of scrutiny and peer review and other things by the "classification" shield, and I think some of the ideas need to be reviewed.

And I would like to take that up, but I will take that up at a later time. I appreciate very much the Chairman's indulgence, and I appreciate the Attorney General's responding to that.

Chairman LEAHY. No. I think that's an area I'm quite interested in, too. I realize some of these we may have to discuss in a classified section. We have read—there's actually been books written on this, on the disarray of the Office of Legal Counsel and the problems that it has caused all the way through the administration. The Senator from Rhode Island raises a good question. Perhaps that's something that we can meet privately first to talk about, unless you wanted to say something here.

Attorney General MUKASEY. I know that the regnant wisdom is that if you comment when there's no question, that you're putting your foot in your mouth.

Senator WHITEHOUSE. Good call. [Laughter.]

Attorney General MUKASEY. But the book, or a book that you refer to in referring to OLC says that, regardless of what you think or don't think about the opinions, nobody in that unit ever believed that they were violating the law, or ever intended to violate the law. Those are two important points that Jack Oldsmith made in his book, and that, in my view, too rarely get discussed.

Chairman LEAHY. No, I agree with that. I'm not suggesting that you break the law. I just want to make sure that we have opinions of that nature done because it's the best law, not because it's an ideological—

Attorney General MUKASEY. Absolutely. We agree on that.

Chairman LEAHY. I have no problems with whoever is President to say, OK, if we can act within the law, here's policies I want carried out. But I want to make sure somebody looks at the law and says, well, you can do that, Mr. President, or you can't do that based on what the law is. In fact, I had one other area on this, actually raising from two different writers who often have different views. Nat Hentoff raised concerns about Mr. Durham's lack of independence. He said that "Durham will report to a Deputy Attorney General, who then reports to the Attorney General, and thereby will not be autonomous."

Then conservative scholar Bruce Fein, who served in the Reagan Justice Department, who has testified before this committee a number of times, raised similar questions. He said the flaw in the current arrangement is that the Attorney General is still entrusted with determining whether to invoke State secrets of executive privilege to withhold critical evidence from the prosecutor. It would be like President Nixon determining what evidence to give Archibald Cox or Leon Jaworski, investigating Watergate.

I read both those articles. The question came to my mind, why wasn't he just given the kind of authority that Special Counsel Patrick Fitzgerald was given in the CIA leak case?

Attorney General MUKASEY. There is a regulation regarding when you appoint a Special Counsel and when you don't. You appoint a Special Counsel when there's a conflict. To suggest that every time a big case comes up in which the government is under investigation in some fashion there's a conflict, does two pernicious and unnecessary things.

Chairman LEAHY. So what you're saying is that there may have been a conflict with a U.S. Attorney, but you don't see a conflict in your office, therefore he doesn't have to have the position of Mr. Fitzgerald?

Attorney General MUKASEY. Correct. I don't want to tell everybody that, every time that happens, they can't have faith in the Justice Department because they can't, and I don't want to tell the Justice Department, we don't have faith in you because this is a big investigation.

Chairman LEAHY. Of course, then that raises the question I asked earlier, what was the conflict that required the U.S. Attorney to recuse himself.

Attorney General MUKASEY. That was the result of a consideration of possible facts, and the act that was done was done out of an excess of caution.

Chairman LEAHY. I realize we're going in a bit of a circle. We probably will have this conversation more. But I see Senator Durbin is here. Senator Durbin will ask his questions, and then I have a couple of closing remarks and you'll be able to go back to running the Department and we'll be able to go back to seeing what mischief we can cause on the floor of the Senate.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

General Mukasey, I wanted to ask you a question or two. Are you familiar with former Deputy Attorney General Jim Comey?

Attorney General MUKASEY. Yes.

Senator DURBIN. Do you have an opinion of him as—

Attorney General MUKASEY. Yes.

Senator DURBIN [continuing]. An attorney, an individual?

Attorney General MUKASEY. I worked with him when he was U.S. Attorney, I was the chief judge. He had occasion to be before me, both in his capacity as a lawyer and because there are administrative matters that the U.S. Attorney has to deal with with the chief judge, which I then was for a period of time. I have since, since what put me here put me here—I have since had occasion to talk to him to get his counsel on the Justice Department in general. He is a very sound, able person.

Senator DURBIN. I take it from that you respect his judgment?

Attorney General MUKASEY. I do.

Senator DURBIN. So let me ask you about a man by the name of Steven Bradbury. When you first came before this committee, I asked you if you were familiar with Mr. Bradbury's background in the Department and you said that you were not, and you would like to look into it. You're probably familiar with the fact that he's been associated with some of the most controversial decisions by

the Department of Justice under Attorney General Gonzales and has raised serious questions about memos that he was involved in relating to the issues of interrogation, for example, and warrantless wire tapping, so much so that it's raised some serious questions for myself and many others who serve in the Senate about his fitness to serve in the Office of Legal Counsel.

When Mr. Comey was asked about some of these memoranda that Mr. Bradbury was involved in, he said that the Justice Department would be ashamed if the memos became public. You said of Mr. Bradbury recently, "Steve Bradbury is one of the finest lawyers I've ever met, and I've met a lot of very good ones. I enjoy working with him. I want to continue to work with him."

I'd like to ask you, have you reviewed all of Mr. Bradbury's opinions?

Attorney General MUKASEY. I can't say that I've reviewed all of Mr. Bradbury's opinions. I've reviewed some of them. You asked me whether I know Jim Comey, and I know him somewhat because of the dealings that I described and because of the contact that I described afterwards. I also have come to know Steve Bradbury. I had some limited contact with him before my confirmation. I've worked with him more closely since I've been there.

To say that Jim Comey has good judgment is not to say that he is inevitable in every judgment he makes or that the judgment he makes about one document is a reflection, a permanent scar on the reputation of the author of that document.

Senator DURBIN. Well, let me ask you about two specific areas which you've been called on, probably more than any others, to comment on. First, is the area of interrogation techniques and torture, and the second relates to warrantless wire tapping surveillance. I mean, these are areas of great concern to all of us, and to you. Have you reviewed the opinions that he wrote on those two subjects?

Attorney General MUKASEY. I have reviewed the—principally the opinion that he wrote relating to the current program and reviewed it with the assistance of others outside OLC, and arrived at a determination, and that determination was that that program was lawful.

Senator DURBIN. Let me ask you this. Did you happen to review the opinion where he spoke of the so-called combined effects which authorize the CIA to use multiple abusive interrogation techniques in combination?

Attorney General MUKASEY. If it's the opinion relating to the current program, then I necessarily reviewed it.

Senator DURBIN. Now, according to the New York Times, then-Attorney General Alberto Gonzales approved this opinion over the objection of Deputy Attorney General Jim Comey, who said the Justice Department would be ashamed if the memo became public.

Attorney General MUKASEY. The opinion—

Senator DURBIN. Did you have a chance to review that opinion?

Attorney General MUKASEY. The opinion that I reviewed relating to the current program was dated in 2007, so I don't think the timing works out.

Senator DURBIN. I don't think it does, either. But could I ask you, as I did in the previous hearing, if you would consider reviewing

that opinion and perhaps get back to me if you are still of an opinion that he is a man of good judgment after you read that opinion which Mr. Comey said would be a source of shame to the Department if made public?

Attorney General MUKASEY. I will look at it again.

Senator DURBIN. I would appreciate that very much. I made that request of you during your confirmation hearing, that you review all of Mr. Bradbury's opinions, and it appears that you haven't had that opportunity. I hope you will soon.

Mr. Bradbury has been the source of praise by some members of this committee, but others, myself included, have serious reservations, not only about his continued service, but the fact that he appears to be serving in violation of the Vacancies Reform Act. He is the de facto head of this agency, when in fact he has not been approved by the Senate.

So I would say, do you feel that he is the effective head of the Office of Legal Counsel at this point?

Attorney General MUKASEY. I have dealt with him as the person—as the principal person at that office.

Senator DURBIN. Doesn't this violate the spirit of the law, the Vacancies Reform Act, since adequate time has lapsed since his nomination was returned by the Senate?

Attorney General MUKASEY. I believe he has been re-nominated.

Senator DURBIN. I believe he has, too. But pending that, the fact is that he has taken over the head of a very—or is the head, effective head, of one of the most important parts of your Department and appears to be serving in violation of the law. I won't go any further with that line of questions, other than, we may see one another again in this context. I will then ask you again if you've had a chance to read Mr. Bradbury's opinions, and I hope that you will. I would suspect that his nomination will depend on your review of those opinions and your testimony on those.

Attorney General MUKASEY. I think those opinions would be considered principally in light of whether they relate to things that are current or not. But I will review them.

Senator DURBIN. Well, let me just close, Mr. Chairman, and thank you, to say that I don't think that's adequate. I think to ignore what happened before in the Department relative to some opinions which have been disavowed by this administration because they were so excessive, is to raise some serious questions about this man's fitness to continue in this capacity.

Attorney General MUKASEY. And I would point out that his opinions were not—his opinion was not that opinion.

Senator DURBIN. Well, I will suggest to you that if this opinion was viewed as shameful by Mr. Comey, that it deserves your close scrutiny. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Well, Mr. Attorney General, one, I appreciate the fact that you have kept in touch on a number of issues. I have appreciated the things we've done that have been on a personal basis and not necessarily business. I also appreciate the fact that you want very much to restore if need be, and to maintain if that works, the high morale of the Department of Justice, a Department that has some

of the finest, finest lawyers in America. I said to you the other day, if you or I spent a lot of time with many of them we wouldn't have any idea what their politics are. I think that is very, very necessary because we rely on that.

But I'm worried we're not getting enough clarity on critical issues. We have heard references to legal opinions, to justifications. Facts remain hidden from the Congress and the American people. It's a hallmark of our democracy that we say what our laws are and what conduct they prohibit. We have seen what's happened when hidden decisions are made in secret memos and that's held from the American people, held from their representatives here in Congress. It erodes our liberties, but it undermines our values as a Nation of laws.

As I said when I opened this hearing, it's not enough to just say waterboarding is not currently authorized. The Attorney General of the United States, I feel, should be able to declare that it's wrong, that it's illegal, that it's beyond the pale. It's been that way since the time of President Theodore Roosevelt.

Now, earlier today I put in the RECORD a letter I received from Major General John Fugue and Rear Admiral Don Gutter, and Rear Admiral John Hudson, and Brigadier General David Brahms. I want to quote from that letter: "Waterboarding is inhumane, it is torture, and it's illegal." These were all Judge Advocates General. They also quote the sitting Judge Advocates General of the military services from our committee's hearing last year in which these sitting generals unanimously and unambiguously agree that waterboarding is inhumane, illegal, and in violation of the law.

I'm afraid that when the administration doesn't declare waterboarding as off limits, it undermines our moral authority of the United States. We've seen the oppressive regimes around the world who are saying that whether they waterboarded or tortured would depend upon the circumstances, whether they think they need to, and then they cite the United States. That endangers American citizens and military personnel around the world. It lowers the standards of human rights everywhere.

On a personal basis, I was at the World Economics Summit last week. I heard from a number of countries who are friends of ours, historically friends of ours, that wonder why we can't just unequivocally say such things are wrong. I think my two colleagues would agree that if an American were waterboarded anywhere in the world, no Senator, no American would have to know the circumstances or the justification for it. We would condemn it. There would be a resolution passed by both bodies unanimously to condemn it.

I think it's unfortunate. I realize you are acting within the restraints of the administration, but I think it is unfortunate, a reflection of our laws and our values, if the Attorney General cannot say even that waterboarding of an American is illegal. That's how far from our moorings we've strayed.

Now, oversight helps make governments work better, something that Senator Grassley, Republican from Iowa, has said. Hearings like these are accountability moments. I think that while we want accountability, we're short on it. The one thing you should know and that many of us feel should have been different, or more thor-

ough answers, I think I can state that every member of this committee wants the Justice Department to work well. We want the Justice Department to be the best of any such department in the world. We'll work with you. We may disagree with you on some things, but we'll work with you to help it become that.

Mr. Attorney General, you are free to say anything you'd like. You actually get the last word here.

Attorney General MUKASEY. Well, all I'll say by way of the last word is that yesterday you and I had a conversation in which I expressed the hope that whatever our disagreements were, they would be such as they were the last time, that enabled us to go out, shake hands, agree to work together and proceed from there and actually work together and proceed from there, and they have been. I am grateful to you and to the members of this committee for that because it allows me to continue to do my job and it allows us to work together. I can't ask any more than that.

Chairman LEAHY. I said I'll give you the last word. Let me just add to what you said. As one who has been in, now, my 34th year in the Senate, who looks at my earlier career as a prosecutor as one of the highlights of my public life, I will work with you on those things to make it better. I think both you and I would agree that we need the best Department of Justice, and when this President leaves, that he leaves the Department of Justice in the best shape possible for the next President, whomever that might be.

With that, we stand in recess.

[Whereupon, at 3:48 p.m. the hearing was adjourned.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

June 27, 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 Attorney General Michael B. Mukasey following his appearance before the Committee on January 30, 2008. 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,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part One

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 8 According to the New York Times, officials from the Justice Department and the State Department told the House Judiciary Committee at a December briefing that there were legal obstacles to the prosecution of Blackwater security guards for killing 17 Iraqis in Nisoor Square last September. These obstacles are said to include a limited form of immunity purportedly given by the State Department to Blackwater employees in the course of its inquiry into the killings and problems asserting jurisdiction over private security contractors who are not held accountable under U.S. law. Human Rights First disagrees that these obstacles would prevent prosecution of the contractors, instead describing it as a choice not to prosecute. What is your view of whether State Department immunity is an obstacle to prosecution?

ANSWER: Because the Department is actively investigating the September 16, 2007 shootings at Nisoor Square, we cannot comment on the progress of that case. As a general matter, the Department does not view limited use immunity that may be granted in a particular case as an absolute bar to prosecution. Such limited use immunity, however, can prove to be a serious constraint on prosecution, and it is one of many factors government prosecutors must consider before charging a defendant with a Federal crime.

Leahy 9 What about the limits of U.S. jurisdiction over private security contractors, is that an obstacle as well?

ANSWER: Existing federal jurisdiction over private security contractors is governed by several federal statutes, including 18 U.S.C. 3261(a) (the Military Extraterritorial Jurisdiction Act). Whether a particular private security contractor falls within the jurisdictional provisions of such a statute is governed by the facts of the particular case. Under long-standing Departmental policy, we cannot comment on whether Federal jurisdiction would exist without knowing the specifics of a particular case. The Department cannot comment on a matter under investigation.

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Leahy 10 Do you favor expanding the scope of the Military Extraterritorial Jurisdiction Act (MEJA) to cover all government security contractors worldwide, as well as any contractors working in a country where the United States is conducting military operations?

ANSWER: The Department supports legislative efforts to hold U.S. contractors accountable for serious misconduct they may commit abroad. We have concerns, however, about the proposed amendments to MEJA the House adopted in H.R. 2740. We look forward to working with the Congress to ensure that we have the laws we need to hold U.S. contractors properly accountable.

Leahy 11 While the Nisoor Square killings have drawn the most publicity, those shootings were not an isolated event. Blackwater forces have a documented history of shootings in Iraq where civilians have been seriously injured and killed. There were two other shooting incidents in the same month as the Nisoor square killings, where five civilians were killed and fifteen more were wounded. Since 2005, there have been nearly 200 other shootings by Blackwater guards in Iraq, and in more than 160 of those incidents, the Blackwater guards fired first. Is the Justice Department's investigation limited to the Blackwater killings in September, or will the Justice Department also investigate the other shooting incidents by Blackwater and other private security contractors in Iraq? If not, why not?

ANSWER: As a general matter, the Department does not comment on referrals made to it by other Departments, including State and DOD. In addition to being law enforcement information that we generally don't disclose publicly, referral numbers paint an incomplete picture and raise law enforcement sensitive questions that we are unable to answer.

Leahy 12 How many full time prosecutors and agents at the Justice Department are assigned to investigate criminal allegations against private security contractors overseas? What steps have you taken to make sure that shooting incidents by private security contractors in Iraq and Afghanistan are aggressively investigated and prosecuted?

ANSWER: Most MEJA cases involving private security contractors are initially investigated by the Department of Defense or the Department of State. Department of Justice agents and prosecutors do not typically become involved until those Departments refer a given case to the Department of Justice for criminal prosecution. When MEJA cases are referred to the Department for prosecution, the Department assigns agents and prosecutors as needed from the FBI, the offices of the United States Attorneys, and the Criminal Division.

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The Department is committed to investigating and prosecuting criminal acts committed by private security contractors overseas. To that end, we continue to work with the Departments of Defense and State to ensure that there are clear procedures for those Departments to identify and, where appropriate, to refer for prosecution allegations of criminal misconduct involving private security contractors. We are also working with the Congress to explore legislative amendments that would increase the USG's ability to hold private security contractors accountable under federal law.

Leahy 13 According to press accounts, on January 24, 2008, a federal grand jury in Alexandria issued a subpoena to New York Times reporter Jim Risen reportedly seeking information about his confidential sources for a chapter in his 2006 book, "State of War" focusing on the CIA's alleged efforts to infiltrate and destabilize Iran's nuclear program. Mr. Risen's book also expanded on his reporting about the Administration's warrantless wiretapping for which he and another New York Times reporter won the 2006 Pulitzer Prize. Under the Department's guidelines, a subpoena to the media must be approved by the Attorney General. Did you approve this subpoena? What process was followed by the Department in considering whether to subpoena Mr. Risen?

ANSWER: Because Federal Rule of Criminal Procedure 6(e) imposes a secrecy requirement on all pending Grand Jury investigations, we cannot answer any questions pertaining to a specific Grand Jury subpoena or specific Grand Jury proceedings. We can say, however, that the Department's internal guidelines concerning media subpoenas, reprinted at 28 CFR 50.10, set out the specific factors to be considered before issuing a subpoena to a member of the media and require Attorney General approval before any such subpoena is issued.

Leahy 14 As we head into a critical national election, I hope that you will be supportive of our efforts to prevent the Administration's political appointees from influencing the outcomes of any election. In a recent book, one of the Republican operatives convicted in a scheme to jam the phone lines of the Democratic Party on election day in 2002, describes the complicity of the Bush Justice Department and how the Department intervened to delay a civil suit so that the Republican scheme would not come to light on the eve of the 2004 election. Is the conduct of the political appointees involved in the New Hampshire phone jamming case within the scope of the on-going joint internal Justice Department investigation into the inappropriate partisan influence this Administration's political appointees have had on the law enforcement responsibilities of the Justice Department?

ANSWER: At the outset, we assure you that the Department of Justice places a high priority on investigating and prosecuting federal crimes affecting voting rights and the integrity of the federal election process. All credible allegations are investigated and, where appropriate, prosecuted to the full extent of federal law.

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The Department of Justice and the FBI conducted an investigation into a scheme to jam telephone lines that were used for get-out-the-vote and ride-to-the-polls programs on Election Day in New Hampshire in November, 2002. The investigation was conducted aggressively by career prosecutors in the Department's Criminal Division and FBI agents. On July 28, 2004, Charles McGee, the former Executive Director of the New Hampshire Republican State Committee, pled guilty to conspiracy to commit telephone harassment. McGee was sentenced to seven months incarceration. On June 30, 2004, Allen Raymond, a private consultant and former Regional Director of the Republican National Committee, pled guilty to conspiracy to commit telephone harassment. Raymond was sentenced to three months incarceration. On December 15, 2005, James Tobin, a former Regional Director of the Republican National Committee and of the National Republican Senatorial Committee, was convicted at trial of conspiracy to commit telephone harassment and of aiding and abetting telephone harassment. Tobin was sentenced to 10 months incarceration. On March 30, 2007, a federal appeals court reversed Tobin's conviction, and the case was remanded to the United States District Court for the District of New Hampshire for further proceedings. On February 21, 2008, the trial judge issued an order granting Tobin's motion for a judgment of acquittal, and the Department of Justice is considering an appeal. Finally, Shaun Hansen, formerly a telemarketing vendor from Sand Point, Idaho, is under indictment for his role in the phone-jamming scheme. The Hansen case is pending.

These cases were handled by the Criminal Division's Computer Crime and Intellectual Property Section and the Public Integrity Section, in addition to the FBI. We are not in a position to provide additional non-public information about the Tobin and Hansen cases based upon our long-standing policy on pending matters and Rule 6(e) of the Federal Rules of Criminal Procedure. We can advise you, however, that we have no information indicating that the FBI was ever asked or directed to refrain from gathering evidence regarding any person or from any geographical location.

Prior to trial in the Tobin case, the Department intervened in a state civil lawsuit between the New Hampshire State Democratic Party and the New Hampshire State Republican Party. The Department asked the New Hampshire state court to stay civil discovery until the conclusion of the Tobin trial. The state court agreed, and discovery in the civil matter was held in abeyance until after Tobin's jury verdict. After Tobin's jury conviction, the Department withdrew its request for a stay, and civil discovery proceeded in the state litigation.

Leahy 16 I await an answer to my letter to you from last month asking for information related to lucrative no-bid contracts companies awarded to former political office-holders and appointees at the direction of Department of Justice officials for monitoring compliance with settlements and deferred prosecution agreements in criminal cases. According to a story in The New York Times, New Jersey U.S. Attorney Christopher Christie directed companies to award monitoring contracts to Republicans such as former Attorney General John Ashcroft, whose consulting firm was awarded an18-month contract awarded without public notice or

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bidding worth between $28 million and $52 million. Other stories make clear that the practice of funneling these contracts to former political office-holders and appointees has become widespread with the proliferation of these type of settlement agreements since 2001, with U.S. Attorneys in Alabama, New York, and Virginia hiring former prosecutors and SEC officials with ties to President Bush, former President Bush, and other prominent Republicans. What is the current policy at the Department governing the award of these contracts? What oversight is there?

ANSWER: On May 15, 2008, the Department submitted a letter to Senator Leahy in response to his letters of January 10 and February 26, 2008. The May 15 letter addresses the issues raised in Question 16, including the process by which monitors are selected. In particular, as noted in the May 15 letter, the current policy governing the selection and use of corporate monitors is set forth in a memorandum dated March 7, 2008, from Acting Deputy Attorney General Craig S. Morford, entitled "Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations" (the "Monitor Principles"). Section II of that memorandum describes key aspects of monitor selection, including oversight. Among other things, monitor candidates must be considered by a committee, and the Office of the Deputy Attorney General must approve the monitor.

Leahy 17 How does the Department avoid political or personal favoritism in decisions regarding these contracts?

ANSWER: The Monitor Principles are designed to ensure that the monitor selection process produces a high-quality and conflict-free monitor. Political and personal favoritism have no place in this process. Toward that end, the Monitor Principles require, among other things, that (a) Government attorneys must be mindful of their obligation to comply with existing conflict-of-interest guidelines; (b) the Government must create a committee in the Department component or office at issue to consider monitor candidates; (c) United States Attorneys and Assistant Attorneys General may not make, accept, or veto the selection of monitor candidates unilaterally, and (d) the Office of the Deputy Attorney General must approve the monitor.

Leahy 24 In 2004, Congress passed and the President signed the Justice for All Act. That bipartisan bill included the Innocence Protection Act, a piece of legislation I worked on for years providing important reforms to help reduce the risk of error in capital cases. A key component of that Act was a grant program for post-conviction DNA testing. The program is named in honor of Kirk Bloodsworth, the first death row inmate exonerated as a result of DNA testing. To ensure that other innocent people avoid the ordeal Mr. Bloodsworth went through and that the guilty are caught and convicted, it is crucial that states receive the funding authorized and appropriated for the Bloodsworth program. Instead, the Department of Justice has interpreted the very reasonable evidence preservation requirements that Congress included for this program so stringently, and contrary to Congress's intent, that all applications to the program have been rejected and not

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a dime has been awarded. This Committee held a hearing last month on this issue, and the Department's representative assured us that he would work to award the grant money that has been sitting unused these past three years. Will you make sure that the Department does everything it can this year to get the money appropriated to the Bloodsworth program out to the states that can use it for good?

ANSWER: Yes. In the FY 2007 postconviction DNA solicitation, in accordance with section 413 of the Justice for All Act and the Fiscal Year (FY) 2006 and FY 2007 appropriations, applicants were required to demonstrate compliance with certain stringent eligibility requirements set by section 413. Language in this year's (FY 2008) appropriation has the effect of allowing the Department of Justice's National Institute of Justice (NIJ) to ease the section 413 requirements with respect to funds appropriated for FY 2006 - FY 2008. The FY 2008 solicitation – which was posted on January 22, 2008, and updated in response to concerns expressed in connection with a Senate hearing – accordingly eases the requirements of section 413, in a manner that we believe remains consonant with the policy objectives of section 413.

Leahy 25 Congress gave the Department an out in this year's appropriations bill that allows the Department to loosen the requirements for the Bloodsworth program. Will you nonetheless make sure that the Department does not ignore Congress's clear intent that states be held to reasonable standards of evidence preservation since money for DNA testing does no good if the evidence is not there to test?

ANSWER: The FY 2008 solicitation eases the requirements in a manner that we believe remains consonant with the policy objectives of the statute. Under the FY 2008 solicitation to establish eligibility, the chief legal officer of the State must certify that the State "[p]reserves biological evidence secured in relation to the investigation or prosecution of a State offense of forcible rape, murder, or nonnegligent manslaughter under a State statute, local ordinances, or State or local rules, regulations, or practices, in a manner intended to ensure that reasonable measures are taken by all jurisdictions within the State to preserve such evidence." We believe that this requirement, which includes language derived generally from section 413 of the Justice for All Act itself, calls for a meaningful certification. We will rely on the chief legal officer of each State to accurately assess whether the certification properly can be made based on the State's particular circumstances. We note that the certification template explicitly states that "I am aware that a false statement in this certification may be subject to criminal prosecution, including under 18 U.S.C. § 1001."

Moreover, the FY 2008 solicitation for these funds puts States on notice that funding in future fiscal years may be contingent on the more stringent requirements regarding evidence retention established by section 413 of the Justice for All Act. In addition, through the DNA and Coverdell programs, NIJ provides significant assistance to States and units of local government to purchase equipment and other resources to provide for retention of biological evidence. Finally, NIJ is studying the extent of

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evidence preservation in DNA laboratories generally to identify ways to improve evidence storage practices.

Leahy 27 Do you agree with me that the Justice Department must encourage the reporting of serious allegations of lab misconduct for investigation in order to ensure that any federally-funded forensic labs have the highest level of integrity?

ANSWER: Yes, the Justice Department believes that allegations of serious negligence or misconduct should be appropriately investigated. Beginning with the upcoming FY 2008 solicitation, Coverdell program solicitations will strongly encourage the reporting of this misconduct.

Leahy 28 Prior to 2005, in order for states to "opt in" to a system giving death penalty defendants less time for habeas corpus appeals, a federal court had to find that the states ensured defendants access to adequate and competent lawyers. The courts were an effective check on the executive, setting high but appropriate standards that states had to meet. In the PATRIOT Act reauthorization in 2005, Congress transferred this check to the Attorney General, who is required to similarly ensure that states adequately safeguard defendants' right to effective counsel before certifying states for the streamlined process. This summer, the Department of Justice issued draft regulations to go with this change in the law, regulations which make a mockery of the notion that the Attorney General would be an effective check. These regulations would allow the Attorney General to certify states to reduce key rights of defendants, on little or no real showing that the states are providing defendants with effective counsel. The proposed regulations ignore the intent of Congress because they fail to flesh out how the Attorney General would adequately ensure effective capital defense systems in the States. Senator Specter joined me in asking for more time for comments on these regulations, and Senators Feingold and Kennedy joined me in submitting comments pointing out the inadequacy of the regulations.I understand the regulations will likely go into effect this spring without any significant change from the wholly inadequate draft version. Why does the Department remain unwilling to add substance to the proposed regulations in order to require effective counsel for capital defendants as Congress intended?

ANSWER: The requirements for chapter 154 certification are expressly stated in chapter 154 itself and the Attorney General has no authority to add to these requirements. *See* 28 U.S.C. 2265(a)(3) ("There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter."). Beyond the 60-day comment period originally provided in the proposed rule, an additional 45 days was provided for public comment in response to requests for additional time. *See* 72 FR 44816 (Aug. 9, 2007). The Department of Justice has carefully considered all public comments received on the proposed rule and will make any changes in the final rule that are warranted on the basis of the comments.

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Leahy 30 When he resigned Attorney General Ashcroft famously declared that "The objective of securing the safety of Americans from crime and terror has been achieved." Of course those threats continued and under your immediate predecessor as Attorney General crime-- including violent crime-- was on the rise for the first time in years, particularly in rural areas and smaller cities. Many of us think it is in part the consequence of this Administration's failure to provide financial assistance to our state and local law enforcement partners. Despite our repeated warnings, the Bush Administration has systematically tried to dismantle federal support for local and state law enforcement through our successful Community-Oriented Policing Services (COPS) program, Byrne grants and others. Indeed, during the Bush Presidency billions have been cut from our State and local law enforcement efforts while we continue writing blank checks for law enforcement efforts in Iraq. Recently, you announced with great fanfare at the conference of mayors that you would propose new federal assistance to state and local law enforcement to help them fight violent crime. Of course $200 million does not begin to make up for the billions that have been cut. Moreover, I did not hear the President mention crime or your initiative at all in his State of the Union address. In these days in which we are challenged to pay for new programs, how do you propose to pay for this program, what cuts are you proposing to offset it?

ANSWER: The President's Budget for FY 2009 seeks $200 million for the Violent Crime Reduction Partnership Initiative to support law enforcement task forces in those communities that face violent crime challenges. This program builds on a proven crime fighting model that has developed under the Byrne Justice Assistance Grant (Byrne/JAG) program—multijurisdictional task forces. As you know, the Byrne/JAG program disburses money to states and localities by formula based on population. These funds can be used for virtually any justice assistance purpose. Many states on their own initiative, however, have invested Byrne/JAG funds in multijurisdictional task forces. In FY 2007, $103 million of the $510 million appropriated by Byrne/JAG were spent on task forces. The President seeks $200 million to support task forces to be awarded to jurisdictions—big and small—on the basis of need.

Leahy 31 What prevention component are you proposing?

ANSWER: In addition to the Violent Crime Reduction Partnership Initiative, the President's Grant consolidation proposal seeks funding for three programs (for a total of four programs), each of which contemplates prevention as an allowable purpose area.

1. **Byrne Public Safety and Protection Program** - includes $200 million that can be used to fund prevention activities such as *Weed and Seed*, *Drug Court*, and the *Faith-Based Prisoner Re-entry Initiative* (to prevent criminal recidivism among recently-released offenders).
2. **Child Safety and Juvenile Justice Programs** - includes $185 million that can be used to fund prevention activities such as *Juvenile Justice Grant Pr*ograms, *ICAC,*

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AMBER Alert and the *Missing and Exploited Children Program, Project Childsafe*, and *Boys and Girls Clubs of America* projects.

3. **Violence Against Women Grants** - includes $280 million that can fund prevention activities such as *Safe Havens/Supervised Visitation, Rural Domestic Violence and Child Abuse Enforcement Assistance*, and *Child Witness*.

Leahy 32 What are you proposing for rural areas and the smaller cities where crime has risen the most?

ANSWER: DOJ is committed to providing the technical assistance necessary to ensure that applicants need not employ professional grant writers to successfully compete for funding. But more, objective criteria such as crime rates allow communities and grantees to compete on equal footing.

This has been borne out in practice. A total of 18 sheriffs offices were funded in the FY 2007 Targeting Violent Crime Initiative Program - all that applied were successful. While several large sheriffs' offices applied and were funded, many small agencies also applied and received funding (some with as few as 20 or 30 sworn staff). Awards to larger agencies often included support for smaller agencies in the surrounding areas, including sheriffs' offices (showing multi-jurisdictional character was an important factor in this program).

- Tulsa, Oklahoma – the Tulsa Police Department will partner with the Tulsa County Sheriffs Office, the local community services council, the FBI and ATF to address gang- and drug-related gun crime in the greater Tulsa area.
- Wilmington, North Carolina – this town will use TVCI funds to address a violent drug gang problem using long and short term investigative strategies and relying on a partnership with the local FBI task force.
- Moss Point, Mississippi - this Gulf Coast community (population 15,512) will use TVCI funds in addition to building on existing DEA and FBI taskforces to address local violence, which appears to be drug- and gang-related.
- Redding, California – this Shasta area community will address local gang problems using TVCI funds in collaboration with federal agency support.
- Lowell, Massachusetts – this suburban community will use TVCI funds to support an analytical, intelligence-driven "Ceasefire" approach to address gun, gang, and drug violence in the community.
- Akron, Ohio – this Midwest community will broaden an anti-gang initiative with Summit County Sheriff's Office and the Greater Akron High Intensity Drug Trafficking Area project. Funds will also be used to support prevention and prosecution of crimes in that area.
- Leech Lake Tribe in Minnesota.

The Bureau of Justice Assistance within OJP also has a program of training and technical assistance designed exclusively for small law enforcement agencies (those with less than 50 sworn staff). This program provides assistance to small departments in

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developing anti-crime strategies, managing departments, and accessing resources such as grants. This program is administered by the International Association of Chiefs of Police).

Leahy 33 Will you commit to working with me during the regular FY09 appropriations cycle and on the upcoming emergency supplemental appropriations bill to restore the hundreds of millions in funding cuts to the COPS Program, the Byrne grant program, and other programs that have proven effective in cutting crime?

ANSWER: We appreciate the support shown for the Department by the Senate Appropriations Subcommittee on Commerce, Justice and Science and pledge, consistent with the President's budget request, the Department's assistance to the subcommittee in getting the information it needs to formulate its FY2009 appropriations bill. If Congress were to pass a supplemental appropriations bill in 2008, the Department would be glad to consider supporting the request so long as it was consistent with Administration priorities.

Leahy 34 Sixteen years after Congress authorized the National Motor Vehicle Title Information System (NMVTIS), there are still major loopholes in the system that allow crooked mechanics and sellers to "wash" data from car titles that would alert prospective buyers if a car has been totaled in an accident or stolen. Consumers face dangers when they unknowingly buy improperly repaired vehicles with a history of serious damage. An article about airbag scams published last month in Reader's Digest documents several deaths due to nonfunctioning airbags in vehicles whose titles had been "washed" and whose repairs were fraudulent. Due to gaps in NMVTIS reporting, the owners did not know that their cars had been previously totaled, much less improperly repaired. They delay in full implementation of NMVTIS is the result of the Justice Department's failure to issue long-overdue rules requiring insurers and junkyards to provide data about totaled vehicles. Why, when consumer safety is at stake, has the Department failed for over a decade to issue these rules? When will the rules be issued?

ANSWER: The key to an effective vehicle titling system is the cooperation and participation of all of the states. Since responsibility for the National Motor Vehicle Title Information System (NMVTIS) was transferred from the Department of Transportation (DOT) to the Department of Justice, the Department of Justice has been working with the American Association of Motor Vehicle Administrators (AAMVA) to implement NMVTIS. AAMVA is a nonprofit, tax exempt, educational association representing U.S. and Canadian officials who are responsible for the administration and enforcement of motor vehicle laws. AAMVA has been acting in the capacity of NMVTIS operator since 1992, when DOT was responsible for the system. The focus of the efforts of the Department of Justice and AAMVA has been to set up a working system and to get all of

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the states to participate in NMVTIS. Unfortunately, many states have been slow to participate because of competing demands on their resources.

Currently, 35 states are actively involved with NMVTIS. Thirteen states are participating fully in NMVTIS, 12 states are regularly providing data to the system, and an additional 10 states are actively taking steps to provide data or to participate fully. The 13 states participating fully in NMVTIS are Arizona, Florida, Indiana, Iowa, Kentucky, Massachusetts, New Hampshire, Nevada, Ohio, South Dakota, Virginia, Washington, and Wisconsin. The 12 states providing regular data updates to NMVTIS are Alabama, Georgia, Idaho, Louisiana, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Wyoming. The 10 states actively taking steps to provide data or participate fully are Arkansas, California, Delaware, Missouri, Montana, New Mexico, Oklahoma, South Carolina, Vermont, and West Virginia. States that participate fully in the system provide data regularly and make NMVTIS inquiries before issuing a new title. These states also send updates to the system when necessary. States that regularly provide data to the system do so through a batch upload process but do not check NMVTIS before issuing a new title. Currently, more than 60% of the U.S. vehicle population is represented in the system. The Department of Justice's goal is to have more than 75% of the U.S. vehicle population represented in the system by the end of 2008.

The Department of Justice has recently submitted a proposed rule to implement NMVTIS to the Office of Management and Budget. That rule is currently under review.

Leahy 36 As of May last year, the Justice Department reported to the Judiciary Committee that it had approximately 100 criminal investigations open into contracting fraud in Iraq and Afghanistan, and of those, about 25 had been either closed or were the subject of pending prosecutions. Can you provide the Committee an update on the approximately 75 unresolved cases, as well as any new ones? Please identify how many new cases have been referred to the Justice Department for investigation, how many have been closed, and how many cases now remain pending. Also, please identify any new prosecutions that have been brought publicly against individuals or companies alleging contracting fraud in Iraq or Afghanistan, and briefly describe the facts of these cases and any dispositions and/or sentences imposed in the cases.

ANSWER: The Department of Justice has established a unified and coordinated approach to combat procurement fraud, including fraud relating to the wars in Iraq and Afghanistan and reconstruction efforts in those countries. The Department has devoted a panoply of resources and expertise to this important mission. The Criminal Division's Fraud Section, Public Integrity Section, Asset Forfeiture and Money Laundering Section, and Office of International Affairs, along with the Antitrust Division and the Fraud Section of the Civil Division, are all involved in the fight against procurement fraud and each contributes its resources and unique expertise. The Criminal Division's Fraud Section, which has well-established relationships with many IGs and has prosecuted numerous procurement fraud cases in the past, leads the effort to combat fraud. The

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Public Integrity Section also has longstanding relationships with the IG community and participates in investigations that involve corruption by government or military officials, as many procurement fraud cases do. The Asset Forfeiture and Money Laundering Section leads the effort to recover taxpayer dollars stolen through procurement fraud by assisting in the swift and comprehensive use of seizure warrants and forfeiture remedies.

In addition, U.S. Attorneys' Offices such as the Central District of Illinois, through its LOGCAP Working Group, have brought numerous criminal and civil procurement fraud cases and are drawing upon their extensive experience to prosecute high profile and sophisticated procurement fraud schemes.

Moreover, in coordination with the Department, a number of law enforcement agencies, including FBI, Army CID Major Procurement Fraud Unit, DOD IG, DCIS, Department of State-OIG, USAID-OIG, and SIGIR, have established the International Contract Corruption Task Force (ICCTF). The mission of the ICCTF is that of a joint agency task force that deploys criminal investigative and intelligence assets worldwide to detect and investigate corruption and contract fraud resulting primarily from the Global War on Terror (GWOT). The ICCTF member agencies currently have special agents deployed throughout Europe and the Middle East. This task force is led by a Board of Governors derived from senior agency representatives who handle all major GWOT cases to defend the interests of the United States overseas.

Procurement fraud cases, especially those involving the wars in Iraq and Afghanistan, are usually very complex and resource intensive. The cases often involve extraterritorial conduct as well as domestic conduct, requiring coordination between appropriate law enforcement agencies. In order to improve coordination and information sharing, the ICCTF has established a Joint Operations Center (JOC) based in Washington, D.C. The JOC currently serves as the nerve center for the collection and sharing of intelligence regarding corruption and fraud relating to funding for GWOT. The JOC coordinates intelligence-gathering and provides analytic and logistical support for the ICCTF agencies. As a result of this concentration of efforts, the Department has significantly increased the number of prosecutions relating to contract fraud associated with GWOT.

You indicate in your question that "as of May last year, the Justice Department reported that it had approximately 100 criminal investigations open into contracting fraud in Iraq and Afghanistan, and of those, about 25 had been either closed or were the subject of pending prosecutions." To clarify, in May 2007, the Department reported that those 100 matters, which involved anywhere between one and 20 individuals and/or corporate subjects, included 25 individuals who had been charged criminally. Since then, the Department has charged an additional 21 individuals and companies (for a total of 46) for contract fraud relating to the efforts in Afghanistan and Iraq (which includes additional related cases in Kuwait). The Department continues to aggressively pursue procurement fraud and corruption associated with the government's war efforts. The Department is in the process of gathering data to determine how many new fraud and corruption cases have been opened and closed by the Department (including individual U.S. Attorney's

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Offices, nationwide) since May 2007. Descriptions of the cases associated with these 21 individuals who have been charged since May 2007 are provided below:

On January 24, 2008, in the United States District Court for the Eastern District of Kentucky, a former government contractor, Ali N. Jabak, and his wife, Liberty A. Jabak, were indicted for conspiracy, wire fraud, money laundering, and forfeiture, stemming from the theft of $595,000 from the 15th Finance Battalion of the United States Army, based in Baghdad, Iraq, in connection with a contract to build concrete barriers to protect American troops.

On January 25, 2008, Wallace Ward, a fuel technician employed by KBR, pled guilty in the Eastern District of Virginia to conspiracy to defraud and accept bribes in connection with a scheme to divert fuel intended for Bagram Airfield to the black market in Afghanistan. On February 7, 2008, James Sellman, another KBR fuel technician participating in the conspiracy, pled guilty to the same offense. According to the indictment, the scheme involved the diversion in 2006 of over $2 million in lost fuel. The investigation is continuing.

On January 23, 2008, Elie Samir Chidiac (Chidiac) and Raman International Inc. (Raman) were indicted on conspiracy charges in connection with bribes paid between May 2006 and March 2007 to a contracting officer at Camp Victory in Iraq. Chidiac is the former Iraq site manager for Raman, a military contractor based near Houston, Texas. Raman and Chidiac allegedly paid bribes to induce a Department of Defense (DOD) contracting officer to steer contracts to Raman. Chidiac is also charged with participating in a second scheme whereby the same contracting officer altered contracting documents to allow him to fraudulently obtain payment – which he split with the contracting officer – for work that neither he nor Raman performed. A preliminary audit indicates the contracting officer received over $400,000 from Chidiac.

On December 5, 2007, a grand jury in the District of Maryland returned a three-count indictment charging two DOD contractors, Christopher Cartwright and Paul Wilkinson, and their affiliated companies, Czech Republic-based Far East Russia Aircraft Services Inc. (FERAS) and the Isle of Man-based Aerocontrol LTD, with conspiring to defraud the United States, commit wire fraud and steal trade secrets. On January 7, 2008, a separate charge was filed in the District of Maryland against a third individual, Matthew Bittenbender, alleging the same criminal conduct. Cartwright, Wilkinson, FERAS, Aerocontrol and Bittenbender are charged with conspiring to steal information relating to fuel supply contracts for DOD aircraft worldwide, including to Bagram Air Force Base in Afghanistan. Bittenbender was a former senior contract fuel manager at Maryland-based Avcard, a company which provides fuel and fuel services to commercial and government aircraft. Bittenbender is charged with taking confidential bid data and other proprietary information related to DOD fuel supply contracts from Avcard, and selling that information to competitors Cartwright, Wilkinson, FERAS and Aerocontrol. In return, Bittenbender is alleged to have received cash payments and a percentage of the profit earned on the resulting DOD fuel supply contracts. Cartwright, Wilkinson, FERAS and Aerocontrol are alleged to have subsequently used that illegally obtained information

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to bid against Avcard at every location where the companies were bidding head-to-head, thereby subverting DOD's competitive bidding procedures for fuel supply contracts.

In November 2007, United States Army Chief Warrant Officer Joseph Crenshaw (Crenshaw) was charged in a criminal complaint with participating in a scheme to steal fuel from Camp Liberty in Baghdad, Iraq. The arrest was made after law enforcement authorities learned Crenshaw accepted cash to assist another individual in obtaining fuel from a military depot even though the person was not entitled to the fuel. Crenshaw subsequently was indicted for bribery. A trial date has not been set.

On November 20, 2007, Terry Hall, a civilian contractor from Georgia was indicted by a federal grand jury in the District of Columbia for allegedly soliciting bribes while working at Camp Arifjan, an Army base in Kuwait. Hall operated companies that had contracts with the U.S. military in Kuwait, including Freedom Consulting and Catering Co., U.S. Eagles Services Corp., and Total Government Allegiance. The indictment charges that Hall's companies received more than $20 million worth of military contracts for providing, among other things, bottled water to the U.S. military in Kuwait.

On August 22, 2007, U.S. Army Major John Cockerham, his wife Melissa Cockerham, and Cockerham's sister, Carolyn Blake, were indicted in federal court in San Antonio, Texas, on charges of conspiracy to defraud the United States and to commit bribery, conspiracy to obstruct justice, and for a money laundering conspiracy. Major Cockerham was also charged with three counts of bribery. The scheme ran from late June 2004 through late December 2005, while Major Cockerham was deployed to Camp Arifjan, Kuwait, serving as a contracting officer responsible for soliciting and reviewing bids for DOD contracts in support of operations in the Middle East, including Operation Iraqi Freedom. The contracts were for various goods and services to DOD, including bottled water destined for soldiers serving in Kuwait and Iraq. All three defendants accepted millions of dollars in bribe payments on Major Cockerham's behalf, in return for his awarding contracts to corrupt contractors. Cash bribes paid to the defendants totaled approximately $9.6 million.

In August 2007, United States Army Captain Austin Key (Key) was charged in a criminal complaint for accepting a $50,000 bribe to steer military contracts in Iraq. The arrest was made after law enforcement authorities recorded conversations and witnessed a money exchange between Key and a confidential informant. Key pleaded guilty to several counts of bribery.

In July 2007, John Allen Rivard, a former major in the U.S. Army Reserve, pleaded guilty to conspiracy, bribery, and money laundering in connection with his accepting bribes for his fraudulent awarding and administration of U.S. Government contracts in Balad, Iraq. Rivard admitted to receiving over $220,000 in bribe payments, as well as to laundering illegal proceeds. On October 19, 2007, Rivard was sentenced in federal court in Austin, Texas, to 120 months in prison and three years of supervised

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release. A $1 million preliminary order of forfeiture and order to pay a $5,000 fine was also issued.

On July 24, 2007, in the United States District Court for the Southern District of Texas, the owner of American Grocers LLC, Samir M. Itani, a subcontractor to DOD, was indicted for conspiracy and false claims stemming from the submission of millions of dollars in fabricated trucking fees associated with the company's contract to provide food product to military personnel in Iraq.

On July 20, 2007, Kevin Smoot, who worked for Eagle Global Logistics ("EGL") as Managing Director of EGL Houston's Freight Forwarding Station, pled guilty to making a false statement and providing a kickback. On December 18, 2007, Smoot was sentenced to 14 months' imprisonment and ordered to pay restitution in the amount of $17,964.00.

On July 13, 2007, Anthony Martin pleaded guilty to accepting a kickback. Martin worked for KBR as a subcontracts administrator and, later, as a subcontracts manager. Martin agreed to accept kickbacks related to a trucking sub-contract. The initial payment to Martin occurred in June 2003. Under the kickback agreement, Martin was to receive a kickback of approximately $50,239.

Leahy 37 As of May last year, the Justice Department declined to identify for the Judiciary Committee the number of civil false claims cases that have been referred to or remain pending at the Justice Department, and only identified one case where the Justice Department has joined a qui tam relator in a case involving allegations of contracting fraud in Iraq or Afghanistan. Will you provide the Committee with an update on the status of these unresolved civil false claims cases? Please identify how many false claims cases have been referred to the Justice Department for investigation, how many the Justice Department has joined, and how many cases the Justice Department has declined to join. Also, please identify any new public settlements under the False Claims Act related to allegations of contracting fraud in Iraq or Afghanistan, and briefly describe the facts of these cases.

ANSWER: As of April 18, 2008, fifty-one *qui tam* actions have been filed under the False Claims Act against private contractors that provided support for U.S. government activities in the Middle East, including Iraq and Afghanistan. Of these fifty-one cases, the Department has intervened in and is litigating one case, has settled, at least in part, three other cases, and has declined to intervene in another fifteen cases. The Department continues to investigate the remaining matters. The Department is also investigating a number of non-*qui tam* matters involving the Middle East that have been referred to the Department by other governmental agencies.

As noted, the Department has resolved three *qui tam* actions, at least in part, relating to the war in Iraq and Afghanistan, which resulted in four separate settlements.

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Additionally, the Department has settled one non-*qui tam* matter under the False Claims Act involving the Middle East. These five settlements are briefly described below:

1. Houston-based EGL, Inc., operating as Eagle Global Logistics, a subcontractor for Kellogg Brown and Root, settled for $4 million on August 6, 2006. The settlement resolved allegations that EGL inflated invoices for shipments under government contracts for support of military operations in the Balkans, Afghanistan and Iraq. This settlement resolved in part a *qui tam* case that remains sealed.

2. In a second settlement arising out of the same sealed *qui tam* case discussed in the prior paragraph, EGL, Inc. paid the United States in June, 2007, an additional $300,000 to settle allegations that the company's local agent in Kuwait overcharged the military for rental charges on shipping containers to Iraq for the period from January through June, 2006.

3. Force Protection Industry, Inc., of Ladson, South Carolina, agreed on August 23, 2006, to pay the United States $1.8 million to settle fraud claims related to the manufacture and delivery of armored vehicles for use in Iraq. These allegations were the subject of a *qui tam* action captioned *United States ex rel. Chomyn v. Force Protection Industry, Inc.*, No. 2:05-1906 (D.S.C.).

4. Northrop Grumman settled a voluntary disclosure case on July 18, 2007, by paying $8 million in connection with deficient testing of night vision goggles and sniper scopes used throughout the military.

5. On December 18, 2007, the Department settled with Sioux Manufacturing Corp. for $1.9 million the allegations in United States ex rel. Kenner v. Spirit Lake Tribe, No. 2-06-CV-48 (D. N.D.). This qui tam case alleged that the defendant failed to follow specifications in making protective cloth material for military helmets.

Finally, as noted, the Department is currently litigating one case relating to the Middle East. On June 11, 2007, the United States intervened in the *qui tam* case captioned *United States ex rel. Dye v. ATK Thiokol, Inc.*, No. 1:06CV39 (D. Utah). The lawsuit alleges that ATK delivered defective illumination flares used in search and rescue, and combat operations critical to the U.S. military, including operations in Iraq and Afghanistan.

Leahy 38 As of May last year, the Justice Department reported to the Judiciary Committee that there was only one FBI agent assigned to Iraq and one assigned to Kuwait to investigate significant contracting fraud. Since May 2007, has the Justice Department assigned more full-time FBI agents or other federal investigators to work on contracting fraud cases in Iraq and Afghanistan? If not, why not?

ANSWER: The FBI currently has Special Agents (SAs) deployed in Iraq, Afghanistan, and Kuwait to provide full-time support to the International Contract Corruption

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Initiative, which addresses major fraud and corruption in the war and reconstruction efforts in Iraq and Afghanistan. These deployments are conducted in 120-day rotation cycles and SAs work jointly with the Defense Criminal Investigative Service, Army Criminal Investigation Command Major Procurement Fraud Unit, Special Inspector General for Iraq Reconstruction, and U.S. Agency for International Development, who also have agents deployed to address this crime problem. The FBI's overseas assignments in direct support of this multi-agency initiative are as follows: one SA in Kuwait; two SAs in Afghanistan; and one Legal Attaché and two SAs in Iraq (one of the two SAs in Iraq is scheduled to deploy in April 2008).

Leahy 40 According to press accounts, the FBI agreed in November to provide a list of all where bullet lead analysis was used to the Innocence Project in order to begin working to identify cases where there may be problems. Do you support this collaborative effort? Has anyone in the Justice Department taken any steps to support or oppose this agreement between the FBI and the Innocence Project?

ANSWER: In an FBI press release on November 17, 2007, the FBI announced it has undertaken an additional round of outreach, analysis, and review efforts concerning bullet lead analysis. This has included joint work with the Innocence Project, which has done legal research to identify criminal cases where bullet lead analysis has been introduced at trial.

The Department, including the FBI, takes this issue very seriously, and we are developing procedures to ensure that appropriate disclosures are made to the relevant parties. Thereafter, the parties involved can make an assessment of the effect of any potentially erroneous testimony.

Leahy 41 Will you commit to fully and vigorously enforce the OPEN Government Act, so that the presumption of openness which is at the heart of FOIA is restored for the American people?

ANSWER: Yes, the Department is fully committed to vigorously implementing the OPEN Government Act, which was signed into law by the President on December 31, 2007. The Department of Justice's Office of Information and Privacy (OIP) has been actively involved in providing government-wide guidance on the new FOIA amendments. On January 9, 2008, written guidance on the new FOIA amendments was posted on the Department of Justice's Website. See FOIA *Post*, "Congress Passes Amendments to the FOIA," (posted 1/9/08). Subsequently, on January 16, 2008, OIP held a conference attended by over 500 government FOIA personnel which focused on the requirements of the new law. See FOIA *Post*, "Upcoming Conference Providing Guidance on Newly Enacted Amendments to the FOIA," (posted 1/7/08). Additionally, OIP has incorporated into its FOIA training programs a new session which focuses exclusively on the FOIA amendments. The first such training session was held on February 27, 2008, and another was held on March 19, 2008. OIP's director has also

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already given two presentations on the FOIA amendments at conferences attended by members of the press and the FOIA requester community, as well as by government personnel. Those conferences were held on February 21, 2008, and March 4th. OIP will issue additional guidance and continue its training government wide to ensure that all federal agencies are in full compliance with the OPEN Government Act.

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QUESTIONS FROM SENATOR SPECTER

Specter 43 At your nomination hearing last October, I asked you about the so-called Thompson and McNulty memoranda and the Department of Justice's practice of requesting and obtaining corporate waivers of the attorney-client privilege. There has been considerable controversy over whether these waivers are in fact voluntary. In October, you stated, "I haven't reviewed the McNulty memorandum recently. I think it has to be examined very, very carefully." Have you since reviewed the McNulty Memo "very, very carefully?"

ANSWER: The Attorney General has reviewed the McNulty Memorandum carefully. He has also asked the Deputy Attorney General to analyze carefully the Department's policy regarding waiver and the McNulty memorandum.

Specter 44 Your written testimony states that you believe the McNulty Memo "strikes the appropriate balance."
Does this mean you oppose revising the McNulty Memo? Would you allow Mark Filip, if confirmed, a free hand in reassessing and revising the McNulty Memo?

ANSWER: The Department continues to analyze its practices and procedures in this area in an effort to ensure fairness and justice for both the victims of corporate fraud and corporate defendants. In particular, as noted in the answer to the previous question, the Attorney General has asked the Deputy Attorney General to analyze waiver and the McNulty Memorandum.

Specter 47 Does the McNulty Memo have anything in place to allow confidential reporting of the types of breaches of the memo's policy cited by Justice Veasey?

ANSWER: The McNulty Memorandum does not specifically address "confidential reporting" of breaches. If there were breaches of the McNulty Memorandum, the Department would certainly wish to be apprised of them. Indeed, the Department is committed to ensuring that all of its prosecutors and officials play by the rules. To that end, we have provided and will continue to provide training to prosecutors regarding the policies and procedures set forth in the McNulty Memorandum and to take any appropriate action against prosecutors who violate Department policy. Additionally, as described above, above, the Department continues to analyze its practices and procedures in this area in an effort to ensure fairness and justice for the victims of corporate fraud as well as corporate defendants.

Specter 49 How do you square this disparate treatment of the two sides of the privilege with Justice Rehnquist's opinion in Upjohn v. United States, 449 U.S. 383 (1981), in which the Court tied the very purpose of the privilege to the client's

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willingness to communicate with the lawyer? Id. at 389 ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client").

ANSWER: As noted in the response to Question 48, the McNulty Memo does not treat "lawyer-to-client" communications differently than "client-to-lawyer" communications.

Specter 50 The McNulty Memo still allows prosecutors to request attorney advice to the client, albeit after getting approval from the Deputy AG's office. The law already allows prosecutors to request this information where the defendant: (1) asserts and advice of counsel defense; or (2) used the privilege to perpetrate a crime or a fraud. Moreover the McNulty Memo already exempts requests for attorney advice in these types of cases from the consultation and approval process set forth in the Memo. Can you give me an example of a situation where DOJ needed attorney advice to a client outside of the crime-fraud exception or the advice of counsel context?

ANSWER: The Deputy Attorney General has not approved a single Category II waiver request since the McNulty Memo took effect. That experience is consistent with the McNulty Memo's directive that Category II information "should only be sought in rare circumstances."

Specter 58 In addition to the Weldon leak case being closed and notice given on that front, on January 4, 2008, the Washington Post reported that "the Justice Department has informed former senator Conrad Burns (R-Mont.) that it has closed its investigation of his dealings with disgraced lobbyist Jack Abramoff and will not bring criminal charges." These two reports beg the question of whether the Department has already modified its policy. Has the Department changed its policy regarding advising former targets and subjects of investigations that the investigation has closed?

ANSWER: Regarding notice to former Senator Conrad Burns, notice was given that was fully consistent with the U.S. Attorneys Manual (USAM) policy, considering the fact that the investigation had become public. The Department has not changed its existing policy regarding advising former targets and subjects of investigations that the individual is no longer considered to be a target of the investigation. The existing policy, as outlined in the United States Attorney's Manual 9-11.155, gives the U.S. Attorney the discretion to notify an individual who has been the target of a grand jury investigation that he or she is no longer considered a target by the U.S. Attorney's Office. The USAM lists the circumstances under which notification to a former target may or may not be appropriate.

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USAM 9-11.155 Notification to Targets when Target Status Ends

The United States Attorney has the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

Discontinuation of target status may be appropriate when:

The target previously has been notified by the government that he or she was a target of the investigation; and,

The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide such notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the notification is appropriate, the language of the notification may be tailored to the particular case. In a particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a "clean bill of health" or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution.

Specter 59 If not, have you considered changing this policy? At your confirmation hearing, I asked you if you agreed "that fair play would best be served by telling people when [a government investigation is] over, if it is over?" You responded: "If it's over, I agree that it's desirable for people to know that it's over." You agreed to "take a look" at the issue. Have you done so?

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ANSWER: The Department has undertaken a thorough review of its target notification policy, to include consideration by the Criminal Division and the United States Attorney community. The decision to give such notice continues to rest in the discretion of the U.S. Attorney who has been conducting the investigation, and who should take into account the circumstances set forth in the policy. As such, the target notification policy remains the same.

Specter 70 One of the major problems we find in combating gang activity is that the gangs often operate on several different levels. Gang members may themselves not be enrolled in school, but they often support affiliated groups in local high schools and even in the middle school environment. While the Route 222 corridor project and others include funding for prevention, what kinds of programs can the Justice Department engage in to help stop gang recruitment?

ANSWER: The Department of Justice is committed to working with youth to prevent "at risk" youth from joining a gang. The primary role of DOJ's Office of Justice Programs' (OJP) Office of Juvenile Justice and Delinquency Prevention (OJJDP) is to support states, local communities, and tribal jurisdictions in their efforts to develop and implement effective programs for juveniles. OJJDP is committed to supporting prevention activities in communities with identified gang problems, especially where there is a high risk of juveniles entering a gang, and intervening with youth who are already gang involved.

Examples of Department-supported efforts which have focused on prevention and intervention for youth in and around schools include:

- Comprehensive Anti-Gang Initiative (CAGI) - 10 sites;
- Project Safe Neighborhoods community efforts;
- Weed and Seed programs;
- Project Safe Neighborhood Comprehensive Anti-Gang Training;
- Gang Prevention Summits hosted by United States Attorney's Offices;
- Gang Resistance Education and Training Program (G.R.E.A.T.);
- National Gang Center; and
- National Youth Gang Center.

Additionally, as part of the 222 Corridor CAGI, the mayors of six 222 Corridor cities, Easton, Bethlehem, Allentown, Reading, York, and Lancaster, have each established a gang prevention task force, which include local government officials, law enforcement, community, and faith based organizations. Each of the six task forces have developed specific plans and initiated programs to prevent gang youth recruitment. Examples of such programs underway along the 222 Corridor include the following:

- Easton - Communities and Schools - Youth Awareness Initiative;

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- Bethlehem - Gang Prevention through Targeted Outreach of the Boys and Girls Clubs of Bethlehem, Southside Ministries Youth Program, and The Young Playwrights' Lab;
- Allentown - Gang Prevention Classes;
- Reading – Gang Resistance Education And Training (G.R.E.A.T.) has been presented to more than 500 5th grade school children in the Reading school district by the Reading Police Department;
- Lancaster - Gang Resistance Intervention Education and Prevention (GRIPE) training is being provided to 86 elementary age school children and 12 adjudicated youth by members of the Educational Sub-committee of the Mayors Task force specifically trained in GRIPE by the 222 CAGI and the East Coast Gang Investigators Association.

OJJDP has developed a Comprehensive Gang Model which promotes the development of pro-social programs in communities that have identified gang problems. Specifically, the Comprehensive Gang Model is a guide to assist policymakers, practitioners, and community leaders in assessing and understanding their youth gang problem. As you know, gang problems differ among and within communities. This Model helps communities conduct a comprehensive assessment of the nature and scope of their gang problem, its origins, potential causes, and contributing factors. A comprehensive, data-driven assessment of the gang problem will:

- Identify the most serious and prevalent gang-related problems;
- Determine factors contributing to gang problems;
- Identify target group(s) for intervention, suppression, and prevention efforts;
- Shape community mobilization efforts and identify community members who should be involved;
- Identify organizational or systems issues that must be addressed in order to have a long-term effect on the problem; and
- Identify current efforts to address gangs and gang-involved youth.

The Model calls for five core strategies to be delivered through an integrated approach by a team of community agencies and organizations. The five strategies are: (1) community mobilization, (2) social intervention, (3) opportunities, (4) suppression, and (5) organizational change. These strategies are seen as effective ways of combating the negative influence or "pull" of gangs.

An additional resource the Department of Justice can offer to help stop gang recruitment is the Gang Resistance Education And Training (G.R.E.A.T.) Program. This program is administered by OJP's Bureau of Justice Assistance (BJA) and is a school-based, law enforcement officer-instructed classroom curriculum. With prevention as its primary objective, the program is intended as an immunization against delinquency, youth violence, and gang membership.

The goal of the G.R.E.A.T. Program is to help youth develop positive life skills that will help them avoid gang involvement and violent behavior. G.R.E.A.T. uses a

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community-wide approach to combat the risk factors associated with youth involvement in gang-related behaviors. The curricula, developed through the collaborative efforts of experienced law enforcement officers and specialists in criminology, sociology, psychology, education, health, and curriculum design, are designed to reinforce each other. The three different curricula are intended for different audiences and are most effective when youth are exposed to more than one of the curricula. The lessons included in each curriculum are interactive and designed to allow students to develop positive habits and behaviors that will remain with them for the remainder of their developing years.

Many law enforcement agencies have implemented the program over the 15 years since the G.R.E.A.T. Program went nationwide. In 2007, the program was delivered in 400 communities across the United States.

G.R.E.A.T. has developed partnerships with nationally recognized organizations, such as the Boys & Girls Clubs of America and the National Association of Police Athletic Leagues. These partnerships encourage positive relationships among the community, parents, schools, and law enforcement officials. The Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) and the U.S. Marshals Service are also involved in the program, partnering with local law enforcement to expand and teach the program.

Five regional training centers, including one in Philadelphia, provide training to sworn law enforcement professionals to teach the G.R.E.A.T. curriculum in elementary and middle schools across the country. The regional training centers also do outreach in each region in order to introduce the program into more communities.

Two formal national evaluations of the G.R.E.A.T. Program, a cross-sectional evaluation and a five-year longitudinal evaluation, were conducted in the 1990s by researchers from the University of Nebraska at Omaha. The evaluations found that the program demonstrated several positive effects. Four years after participating in the program, when compared to the control group, G.R.E.A.T. students still reported:

- Lower levels of victimization;
- More negative views about gangs;
- More favorable attitudes about law enforcement;
- Reductions in risk-seeking behaviors; and
- Increased associations with peers involved in pro-social activities.

A summary of the studies was published in 2004 by OJP's National Institute of Justice (NIJ) and is available online at http://www.ncjrs.gov/pdffiles1/nij/198604.pdf.

The evaluation process prompted the G.R.E.A.T. National Policy Board to order a thorough program review by a national board of experts. This review led to significant, research-based changes in the content and implementation of the curriculum, providing for greater involvement of the regular classroom teacher and more focus on active

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learning than lecturing. The additions of an elementary school component and family training program have also enhanced the program's impact.

NIJ recently commissioned a new longitudinal study of G.R.E.A.T. with funding from BJA, which formally began in 2006. This study will provide a more accurate and current picture of the impact of the improved curriculum and additional program components.

Specter 71 Do you believe federal authorities will have to take a more active role in what has traditionally been considered the domain of the states—the juvenile justice system—in order to identify gang members at a younger age and to more aggressively combat the recruitment of school-age children?

ANSWER: There is a greater need to implement cooperative strategies and information sharing that link schools, juvenile justice officials, and law enforcement officers into a seamless information grid. Such cooperative strategies serve to hold juvenile offenders accountable for wrong-doing, but also provide them access to a broad range of beneficial private, non-profit, and public sector opportunities. State and local juvenile justice officials agree that addressing juvenile crime issues on a local level is more efficient. The states may be better equipped to prevent gang recruitment of youth, and to intervene and rehabilitate those who have started down the path of gang violence. State and local juvenile justice officials are determined to invest in prevention programs as a complement to enforcement strategies.

The Department believes that addressing juvenile crime will remain primarily within the purview of the various states and their juvenile justice systems. The federal government, however, can assist the states in several ways. One such way is for the Department's Office of Justice Programs, through its various components, to disseminate "best practices" to the local officials for identifying youth vulnerable to gang recruitment. The Department also encourages any sharing of information between schools, police, juvenile corrections and youth service organizations regarding specific youth who may be at-risk of gang recruitment.

Specter 72 In urban areas, gang activity often spikes in and around schools around 3 PM—the time that children are dismissed from the classroom. What kinds of solutions would you offer to combat this problem?

ANSWER: In the Comprehensive Anti-Gang Initiative sites and in other cities using Project Safe Neighborhoods and Weed and Seed funds, public school systems have opened their classrooms to relevant after-school programs. Such programs have the capacity to serve a large number of students from 3pm-6pm and provide invaluable mentoring, work experience, academic tutoring, and recreation. Collaboration between the school districts, faith based organizations, non profit organizations, city government,

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social services, and police departments result in after-school programs which give youth positive alternatives to the gang lifestyle.

The Department is also promoting the creation of safe corridors for children to walk to and from schools. Every day, many students are forced to walk through areas controlled or impacted by gangs. Additional federal funding for busing and other means of transportation could substantially diminish the impact that gangs have on children before and after school. These safe corridors also make it more difficult for gangs to recruit children in and around schools.

The Department also encourages regular intelligence sharing meetings with various school and community partners. These meetings include campus resource officers, counselors/teachers, local police department gang officers, school system gang officers, community-based gang interventionists, juvenile probation, re-entry court officials, and social service agencies. Pro-active strategies based on recent information are developed to address any gang-related situations which may occur on the campuses or throughout the community.

Additionally, OJJDP's Strategic Planning Tool assists communities in assessing and addressing gang problems through three interrelated components: a community resource inventory section that allows users to identify and record information about community organizations, programs, services, and activities that could be incorporated into a collaborative, comprehensive approach to gangs; a planning and implementation section that provides users with access to a database of proven and effective programs, strategies, and activities; and a risk factors section that describes research-based risk factors that are correlated to gang behavior and organized by age.

Once a community has identified who the individuals are who are engaging in the gang activity and where they are coming from (and/or going after school) then the community can collaboratively implement a plan that will provide resources or programmatic alternatives to those youth; while at the same time increasing the law enforcement response to gang related incidents during the targeted period of time.

After school programs, such as those found in Boys and Girls Clubs and community recreation centers offer rewarding, challenging, and age-appropriate activities in a safe, structured, and positive environment. They may reduce delinquency by way of a socializing effect through which youth learn positive virtues such as discipline or simply reduce the opportunity for youth to engage in delinquency.

Specter 73 What are the Department and its components doing to support mentoring initiatives?

ANSWER: The Department and its components are identifying ways to reach out to young people before they become involved in violence, as well as addressing the underlying problems that lead too many young people to crime. The Department's Office

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of Justice Programs' Office of Juvenile Justice and Delinquency Prevention (OJJDP) has a long history of supporting mentoring programs. OJJDP has partnered with national organizations such as Big Brothers Big Sisters of America, Boys and Girls Clubs of America and the MENTOR/National Mentoring Partnership.

In Fiscal Year 2006, OJJDP provided $1.6 million to four mentoring partnerships under the Mentoring Initiative for System Involved Youth (MISIY). The main objective of the program is to identify effective mentoring programs and strategies and determine how to enhance and expand these approaches for youth involved in the juvenile justice system, reentry, and foster care. In Fiscal Year 2007, grant awards from Support for Mentoring Initiatives for System Involved Youth were made to support the implementation of initiatives that assist in developing and enhancing the capacity of community programs to provide mentoring services to at-risk youth.

In addition, OJJDP has funded youth-serving organizations, such as the National Network of Youth Ministries, Youth Friends, Virginia Mentoring Partnership, People for People, the Pittsburgh Leadership Foundation, and the Messiah College, among others, to provide mentoring to at-risk youth.

OJP's Community Capacity Development Office (CCDO) assists communities around America as they seek to prevent crime, increase community safety, and revitalize neighborhoods. CCDO works with local communities to develop solutions that deter crime, promote economic growth, and enhance quality of life. The Office of Weed and Seed is CCDO's premier community development initiative. Communities work with their U. S. Attorneys to develop a Weed and Seed strategy that aims to prevent, control, and reduce violent crime, drug abuse, and gang activity in targeted high-crime neighborhoods across the country. Many Weed and Seed communities include mentoring for at-risk youth as a component of their strategies.

An example of collaboration is in the 222 Corridor, where the prevention and re-entry components are working together to develop a mentoring program which will recruit and train mentors for such at-risk youth and reentering ex-offenders. Recently, a mentoring conference was attended by more than 200 people at Franklin and Marshall College in Lancaster. From this conference, a Mentoring Partnership is being formed by the 222 Regional Steering committee to develop more efficient and standard criteria for recruiting, training, and sustaining mentors across the region. This effort will serve to maximize mentoring grants and reduce duplication of effort and funds.

Specter 74 The fight against gang activity cannot be waged strictly in the courts. Partnerships between the schools (where gang members are often recruited), Juvenile Probation offices (where actual and aspiring gang members can be identified), and local police departments (which often have school resource officers who can identify potential "problem" individuals early on) are an important part of the fight against gang activity. What kinds of things can projects like the Route 222 corridor initiative do to encourage these alliances?

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ANSWER: The Department's Office of Justice Programs (OJP) provides innovative leadership to federal, state, local, and tribal justice systems, by disseminating state-of-the art knowledge and practices across America, and providing grants for the implementation of crime fighting strategies. Because most of the responsibility for crime control and prevention falls to law enforcement officers in states, cities, and neighborhoods, the federal government can be effective in these areas only to the extent that it can enter into partnerships with these officers. Therefore, the Department is committed to working in partnership with the justice community to identify the most pressing crime-related challenges confronting the justice system and to provide information, training, coordination, and innovative strategies and approaches for addressing these challenges.

Alliances between schools, juvenile probation offices, and local law enforcement agencies are strongly encouraged by the Department and initiatives such as the Comprehensive Anti-Gang Initiative (CAGI) provide a framework that includes collaboration and coordination between federal, state and local law enforcement, corrections, key public stakeholders, and the community. The CAGI supports law enforcement efforts to combat violent gangs, while also promoting prevention efforts that discourage gang involvement. CAGI also has a reentry component.

Another initiative underway that encourages collaboration on the anti-gang front is the Project Safe Neighborhoods (PSN) Anti-Gang Training. On January 29- 31, 2008, the Department hosted the first of 12 regional trainings throughout the nation, in Chapel Hill, North Carolina, for more than 550 attendees. The regional trainings will focus on anti-gang training for law enforcement, prosecutors, prevention and re-entry representatives. The goal of this new anti-gang training program is to improve the level of knowledge, communication, and collaboration involved in addressing the criminal gang issue impacting communities throughout the nation. Courses are comprehensive and focus on gang-related prevention, enforcement, prison re-entry programs, and an executive session which is geared toward law enforcement executives.

To further our efforts in combating gang activity, in June 2008, OJJDP will be hosting a Youth Gang Symposium in Atlanta, GA. The theme is "Partnering to Prevent Gang Violence: From Faith-Based and Community Organizations to Law Enforcement". The conference will feature focused workshops to enhance efforts by law enforcement, school personnel, faith-based and community organizations, policymakers, youth serving agencies, and others who are working together to combat youth gang issues.

In Fiscal Year (FY) 2007, OJP's Bureau of Justice Assistance (BJA), through the FY 2007 Edward Byrne Discretionary Grants Program, provided funding to the National Crime Prevention Council (NCPC) to launch a new program that will provide community mobilization and engagement support to the City of Philadelphia, as part of the Route 222 Corridor initiative, and a handful of other cities in 2008. NCPC will be working in each location to enhance public awareness of crime prevention and personal safety practices and to identify potential areas of community concern. NCPC will engage leaders in law

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enforcement, city government, community, and private business in prevention-focused action across the community.

One of OJP's most important functions is to support the work of practitioners in state, local and tribal justice systems through training and technical assistance (T&TA) programs. T&TA provides direct assistance to develop and implement comprehensive, system-wide strategies for public safety and improving criminal justice systems.

Specter 75 What federal programs are available to foster such alliances? If so, has OJP notified the law enforcement and community contacts within the Route 222 corridor of these programs?

ANSWER: The Department fosters law enforcement and community involvement through: 1) Weed and Seed programs, 2) Project Safe Neighborhoods, and 3) the Comprehensive Anti-Gang Initiative (CAGI). The CAGI sites employ all three initiatives to deal with gang violence. These programs target high crime neighborhoods and facilitate seamless communication among law enforcement, community leaders, and social workers who are familiar with the needs of the community.

The Department strives to disseminate resources and information to the field and to encourage alliances. To reinforce the Comprehensive Anti-Gang Initiative (CAGI) framework, a "Six Cities Kick-Off Meeting" was held on November 8-9, 2006. In attendance at this meeting were representatives from Los Angeles, CA; Tampa, FL; the Eastern District of Pennsylvania's 222 Corridor; Cleveland, OH; Dallas/Ft. Worth, TX; and Milwaukee, WI. Additionally, in August 2007, a "Four New Sites Kick off Conference" was held for the sites in Indianapolis, IN; Raleigh/Durham, NC; Rochester, NY; and Oklahoma City, OK. Both conferences consisted of a series of workshops on the topic areas of: gang enforcement, prevention and reentry. The workshops addressed issues involved in the implementation and operation of their programs. A direct result of the training was an increased level of cooperation and collaboration between all of the CAGI sites. CAGI sites are also supported by a team of resident experts in the areas of enforcement, prevention and reentry, and have had on-site visits by Department personnel to address both training and operational issues. Additionally, during the PSN National Conference, held on September 17-19, 2007, in Atlanta, Georgia, all ten of the CAGI sites received specialized ½ day training, while also attending various Project Safe Neighborhoods (PSN) workshops throughout the rest of the conference.

In October 2007, the OJP's Bureau of Justice Assistance (BJA) awarded $75 million, through the Targeting Violent Crime Initiative, to 106 local law enforcement agencies to support multi-jurisdictional violent crime task forces. The goal of this initiative is to assist jurisdictions in responding to violent crime by expanding the use of intelligence-led policing among state, local, and tribal agencies as they collect and analyze information to identify threats, develop tactics and partnerships to respond to violent crime, and then measure the effectiveness of their responses. A major objective

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of this initiative is to establish data-driven, multi-jurisdictional responses to violent crime.

Another initiative which reinforces partnerships is the Law Enforcement and Youth Initiative. This initiative builds collaboration among law enforcement and youth-serving organizations such as schools and Boys and Girls Clubs. In October 2007, over 200 community teams – consisting of a law enforcement official, a community leader, and a Boys and Girls Club executive – were given the opportunity to choose among 20 different national programs. The Department then provided training and technical assistance on their chosen program and provided each team, through the Boys and Girls Club, with seed money for implementation of their chosen program. With their seed funds, the local clubs will bring law enforcement and youth serving organizations together through community-based programs.

Specter 76 As part of their effort to curb gang activities and to identify gang members coming on to campus, schools have tried to hire additional security personnel and install cameras on their premises. Funds are short in the school system, however. Do you think it would be a good idea for projects such as the Route 222 corridor initiative to utilize some of their funds to try to assist the schools in this identification process, or would the funds be better spent on traditional law enforcement prosecution activities?

ANSWER: The decision to utilize funds from initiatives such as the Route 222 Corridor initiative to assist schools in the identification process of gang members should be a local one. Closer collaboration between schools and law enforcement would assist in this effort. That is an area where the Gang Resistance Education And Training (G.R.E.A.T.) Program is useful. The relationships between law enforcement teaching the program and students are critical to keeping the lines of communication open.

Many communities have found that trained, sworn law enforcement officials assigned to schools make a positive difference in establishing and maintaining safe environments that are conducive to learning. Both schools and law enforcement agencies benefit from these partnerships. Schools benefit from on-site law enforcement services, and law enforcement agencies benefit by having the opportunity to engage in a joint problem-solving process with schools to address school and community crime and violence.

A school/law enforcement partnership is a process rather than an event. Partnerships do not just happen when a law enforcement official is assigned to a school, but are built on a foundation of shared goals, ongoing communication, and positive relationships. When schools and law enforcement agencies work together—and in concert with other community-based organizations, parents, and students—as they do in the G.R.E.A.T. Program, a number of positive outcomes can be expected:

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- Schools, law enforcement agencies, and community groups are better able to work together in developing innovative, system-wide, long-term approaches to reducing and preventing different kinds of crime and disorder in and around their schools;
- Schools and law enforcement agencies can have measurable impacts on targeted crime and disorder;
- Duplication of efforts is reduced;
- Students, school personnel, parents, and community members have less fear of crime and violence; and
- Schools and communities show an improved quality of life.

Specter 77 Traditionally the federal government has had some success obtaining forfeiture orders on the assets of drug dealers where it can show that those assets are either utilized in or the fruits of the defendant's involvement in the distribution of illegal drugs. Is the Justice Department pursuing aggressive forfeiture actions against gang assets pursuant to the Route 222 project or other anti-gang initiatives?

ANSWER: Yes. Each United States Attorney's Office has at least one Assistant United States Attorney (AUSA) who pursues Asset Forfeiture cases, both criminal and civil. Many offices of have Forfeiture Units staffed with AUSAs, paralegals, and support personnel identifying forfeitable assets and bringing these cases to court. Asset forfeiture plays in important role in the fight against gang crime. Gang-related forfeitures typically include firearms, cash, and vehicles.

Specter 78 Please provide data of the forfeiture actions initiated in the Route 222 corridor during the Route 222 project's tenure.

ANSWER: The following amounts are derived from the two United States Attorney's Offices in which their geographical area encompasses a portion of the 222 Corridor. The Comprehensive Anti-Gang Initiative began in these districts in 2007. These gang-related asset forfeitures are reported from each of the two districts from fiscal years 2007-2008, combined:

District	Assets Forfeited	Assets Pending Forfeiture
PA-E	$1,678,680.	$14,187,958.
PA-M	$437,943.	$8,801,474.

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QUESTIONS FROM SENATOR KENNEDY

Kennedy 130 This Administration's record on voting rights has been unacceptable. The Administration has repeatedly failed to protect voting rights, and some of its activities have made it harder for citizens to gain access to the ballot. The Department of Justice's Voting Access and Integrity initiative, adopted in the early years of the Bush Administration, shifted the Department's priorities and resources away from efforts to increase access to voting, and toward the prevention of voter fraud – despite the lack of evidence that voter fraud is a real problem. From 2002 to 2007, despite the Administration's strong focus on voter fraud, there have been only 86 convictions nationwide. In 2004, the Department filed amicus briefs in the key battleground states of Florida, Michigan, and Ohio in 2004, seeking to prevent the counting of provisional ballots in the Presidential election. In 2006, the Department fired eight U.S. Attorneys, under circumstances suggesting that several of them had been dismissed for failing to prosecute Democrats on voter fraud charges that they felt lacked merit. At the same time, the Division has failed to vigorously enforce laws protecting the right to vote. The Bush Civil Rights Division has developed and filed only two cases to protect African Americans against racial discrimination in voting since it took office. It also has failed to file cases to enforce provisions of the National Voter Registration Act that increase voters' access to the ballot. Instead, it has tried to use the Act to force states to purge voters from registration lists. The Department brought one such case in Missouri, but it was thrown out because there was no evidence that any inaccuracy in Missouri's registration lists would affect the outcome of an election. It is my hope that this pattern will not be repeated in this election year. Please describe how you plan to you ensure that the Voting Section fulfills its duty to enforce voting rights in a fair and nonpartisan manner.

ANSWER: The Department is committed to vigorously enforcing each of the voting statutes within its jurisdiction in a fair and nonpartisan manner. This commitment is clearly demonstrated by the Voting Section's recent record of voting rights enforcement.

Section 2 of the Voting Rights Act prohibits intentional, purposeful racial discrimination in voting as well as conduct with a racially discriminatory effect. Although most commonly used to address issues of minority vote dilution, Section 2 also has been the basis for other types of legal relief involving voter registration and election-day practices, including: the use of dual (state and municipal) voter registration systems, the refusal to recruit or hire minority poll workers, the intentional targeting of voters for challenges based on their race or ethnicity, misconduct by poll officials favoring candidates of a particular race, changes in candidate residency requirements intended to disqualify minority candidates, and actions and failures to act resulting in the denial of equal access to the political process for language minority voters, in the form of hostile poll workers and refusal to permit bilingual assistance.

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In March 2008, the Voting Section filed and resolved a lawsuit under Section 2 against the Georgetown County, South Carolina, Board of Education on the grounds that the at-large method of electing school board members unlawfully diluted the voting strength of black voters in Georgetown County. No black candidates have won a school board election during the last three election cycles. The current school board is all white, although black citizens comprise approximately 38% of the population of Georgetown County. The consent decree creates seven single-member districts and two at large seats on the nine-member school board, and in three of the new single-member districts black citizens will constitute a majority of the age-eligible population. This settlement ensures that minority voters in Georgetown County will have the opportunity to elect school board members of their choice.

In 2006, the Voting Section filed and resolved a lawsuit under Section 2 against Long County, Georgia, for improper challenges to Hispanic-American voters – including at least three United States citizens on active duty with the United States Army – based entirely on their perceived race and ethnicity. The Section also filed a Section 2 lawsuit in Ohio in 2006 that challenged the mixed at-large/ward method of electing the city council in Euclid, Ohio, on the basis that the method unlawfully diluted the voting strength of African-American voters. Although African Americans comprise nearly 30 percent of the city's electorate, and there have been eight recent African-American candidates for the Euclid City Council, not a single African-American candidate has ever been elected to the nine-member city council or to any other city office. In August 2007, the court ruled that the city's method of electing its city council violated the Voting Rights Act and stayed Euclid's council elections until a new method of election is approved by the court.

Also among the successes under Section 2 is the Voting Section's lawsuit against Osceola County, Florida, where we brought a challenge to the county's at-large election system. In October 2006, we prevailed at trial. The court held that the at-large election system violated the rights of Hispanic voters under Section 2 and ordered the county to abandon it. In December 2006, the court adopted the remedial election system proposed by the United States and ordered a special election under that election plan that took place in April 2007.

The United States filed a complaint on December 15, 2006, alleging that the at-large system of electing the governing Board of Trustees in Port Chester, New York, diluted the voting strength of Port Chester's Hispanic citizens, in violation of Section 2 of the Voting Rights Act of 1965. On March 2, 2007, after an evidentiary hearing, the court enjoined the March 20 elections, holding that the United States was likely to succeed on its claim. On January 17, 2008, the court ruled that the at-large system of election used by Port Chester to elect its trustees violates the Voting Rights Act because it denies Hispanics an equal opportunity to participate in the political process. According to the evidence adduced at trial, and as cited in the court's opinion, the 2000 census shows that almost half of Port Chester's residents, and 22 percent of Port Chester's citizens of voting age, were Hispanic. By July 2006, the number of Hispanic citizens of voting age had increased to about 28 percent. Despite these figures, no Hispanic has ever been elected to

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Port Chester's municipal legislature, the six-member Board of Trustees. Indeed, no Hispanic has ever been elected to any public office in Port Chester, despite the fact that Hispanic candidates have run for office six times – twice for the Board of Trustees and four times for the Port Chester Board of Education, which manages a school system that is overwhelmingly Hispanic.

Also in 2007, in Fremont County, Wyoming, the Division successfully defended the constitutionality of Section 2 of the Voting Rights Act, for the fourth time in this Administration. In addition, the Division filed and resolved a claim under Section 2 involving discrimination against Hispanic voters at the polls in Philadelphia and obtained additional relief in an earlier Section 2 suit on behalf of Native American voters in Cibola County, New Mexico. The actions against Philadelphia and Cibola County are noteworthy because both involve claims not only under the Voting Rights Act but also under HAVA and the NVRA. In Cibola County, which initially involved claims under Sections 2 and 203, the Division brought additional claims after the County failed to process voter registration applications of Laguna Pueblo and other Native American voters, removed Native American voters from the rolls without the notice required by the NVRA, and failed to provide provisional ballots to Native American voters in violation of HAVA. In Philadelphia, the Division added to our original Section 203 and 208 claims additional counts under Sections 2 and 4(e) of the Act to protect Hispanic voters, a count under the NVRA pursuant to which the City has agreed to remove from the rolls the names of numerous ineligible voters, including those who are deceased or have moved, and two counts under HAVA – to assure that accessible machines are available to voters with disabilities and that required signs at the polls also are posted in Spanish.

In 2007, the Section litigated a case in Mississippi under Sections 2 and 11(b) of the Voting Rights Act. On June 29, 2007, U.S. Senior District Judge Tom S. Lee found the defendants in *United States v. Ike Brown et al.* (S.D. Miss.) liable for violating the Voting Rights Act by discriminating against white voters and white candidates. The Department will continue to closely investigate claims of voter discrimination and vigorously pursue actions on behalf of all Americans wherever violations of federal law are found.

In recent years, the Department has broken records with regard to enforcement of Section 208 of the Voting Rights Act. Section 208 assures all voters who need assistance in marking their ballots the right to choose a person they trust to provide that assistance. Voters may choose any person other than an agent of their employer or union to assist them in the voting booth. During the past six years, we have brought nine of the eleven such claims brought by the Department since Section 208 was enacted twenty-five years ago, including the first case ever under the Voting Rights Act to protect the rights of Haitian Americans.

Our commitment to enforcing the language minority requirements of the Voting Rights Act, reauthorized by Congress in 2006, remains strong, with nine lawsuits filed in fiscal year 2007. In September 2007, we settled the first lawsuit filed under Section 203 on behalf of Korean Americans in the City of Walnut, California. During the past 7

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years, the Civil Rights Division has brought more cases under the minority language provisions than in all other years combined since 1965. Specifically, we have successfully litigated over 60 percent of all the Department's language minority cases in the history of the Voting Rights Act. These cases include the first Voting Rights Act cases in history on behalf of Filipino, Korean, and Vietnamese Americans.

Our cases on behalf of language minority voters have made a remarkable difference in the accessibility of the election process to those voters. Due in part to our lawsuit, Boston now employs five times more bilingual poll workers than before. As a result of our lawsuit, San Diego added over 1,000 bilingual poll workers, and Hispanic voter registration increased by over 20 percent between our settlement in July 2004 and the November 2004 general election. There was a similar increase among Filipino voters, and Vietnamese voter registration rose 37 percent. Our lawsuits also spur voluntary compliance: after the San Diego lawsuit, Los Angeles County added over 2,200 bilingual poll workers, an increase of over 62 percent. In many cases, violations of Section 203 are accompanied by such overt discrimination by poll workers that Section 2 claims could have been brought as well. However, we have been able to obtain complete and comprehensive relief through our litigation and remedies under Section 203 without the added expense and delay of a Section 2 claim.

The Voting Section will also continue to process Section 5 submissions in a timely, fair and evenhanded manner. In 2006, the Voting Section processed the largest number of Section 5 submissions in its history. The Department has interposed six objections to submissions pursuant to Section 5 since January 2006, in Georgia, Texas, Alabama, North Carolina, South Dakota, and Michigan, and in 2006 filed a Section 5 enforcement action. Additionally, the Department is vigorously defending the constitutionality of Section 5 of the Voting Rights Act in an action brought by a Texas jurisdiction in 2006 and filed an amicus brief in a Mississippi Section 5 case in 2007. The Department also consented to four actions since 2006 brought by jurisdictions that satisfied the statutory requirements for obtaining a release, or "bailout," from Section 5 coverage.

The Voting Section has continued to work diligently to protect the voting rights of our nation's military and overseas citizens. The Department has enforcement responsibility for 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. Just since January 2008, the Department has taken legal action in two States to resolve UOCAVA violations for the February 5 federal primary elections. In Illinois, we participated as amicus curiae in a case to ensure the State adequately ensured the voting opportunities for UOCAVA voters under their truncated 2008 election calendar, and on January 30, 2008, the court approved a consent decree with Tennessee to resolve our complaint filed over the late mailing of overseas ballots in that state. 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. We also

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obtained permanent relief in the form of legislation in a suit originally filed against Pennsylvania in 2004. The Department 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.

A major component of the Department's work to protect voting rights is the Voting Section's election monitoring program, which is among the most effective means of ensuring that federal voting rights are protected and respected on Election Day. The Department deploys hundreds of personnel to monitor elections across the country. In 2006, a record number of Department monitors and federal observers from the Office of Personnel Management were deployed 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 during the November 7, 2006, election. In calendar year 2006, we sent over 1,500 federal personnel to monitor elections, doubling the number sent in 2000, a presidential election year.

During calendar year 2004, a record 1,463 federal observers and 533 Department personnel were sent to monitor 163 elections in 106 jurisdictions in 29 states. This compares to the 640 federal observers and 110 Department personnel deployed during the entire 2000 presidential calendar year.

For the 2008 elections, the Department will implement a comprehensive Election Day program to help ensure ballot access. As in previous years, the Department will coordinate the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

As in prior years, in 2008 the Department will monitor states' compliance with the requirements of the Voting Rights Act, the Help America Vote Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the National Voter Registration Act, instituting enforcement actions as necessary. In that regard, we will closely monitor compliance with our numerous court orders, consent decrees, and other agreements, many of which will be in effect through the 2008 election cycle. The Department's efforts to ensure voter access in accordance with federal law will include training a responsible official, the District Election Official (DEO), in every U.S. Attorney's Office across the country on ballot access laws to stand ready to protect the voting rights of all Americans.

Such extensive efforts require substantial planning and resources. Our decisions to deploy observers and monitors are made carefully and purposefully so that our resources are used where they are most needed. To that end, Department officials will meet with representatives of a number of civil rights organizations prior to the 2008 general election, including organizations that advocate on behalf of racial and language minorities, as well as groups that focus on disability rights. Department officials also will meet with representatives of State and local election officials before the 2008 general

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election. These meetings will provide a forum for discussion of state and local officials' concerns.

On Election Day, Department personnel here in Washington will stand ready. We will have numerous phone lines ready to handle calls from citizens with election complaints, as well as an internet-based mechanism for reporting problems. We will have personnel at the call center who are fluent in Spanish and the Division's language interpretation service to provide translators in other languages.

Kennedy 131 Will you use the tools at your command, such as the National Voter Registration Act and HAVA to promote access to the ballot? Please explain.

ANSWER: The Department will enforce all of the federal voting rights laws at its disposal to promote and protect access to the ballot. The Department has worked closely with states to ensure compliance with those federal laws that regulate the voter registration process, such as the NVRA and HAVA. The Department will continue to work to monitor state efforts to comply with these statutes, and we will bring enforcement actions where necessary to promote access to the ballot.

The NVRA sets forth certain federal standards for conducting voter registration programs by mail, for providing voter registration opportunities at state public assistance offices, and for adding and removing voters from the voter rolls, including notice of decisions on voter registration applications and notice of removals for voters who have moved. The NVRA requires states to take steps to ensure that voter registration rolls are accurate, including steps such as mailings or canvasses of voters to see whether they have moved or died.

The Department's enforcement actions have focused and will continue to focus on ensuring that election officials properly apply all of these provisions of the NVRA, including the provisions for ensuring registration opportunities, as well as properly registering and removing persons from the rolls.

Since 2001, the Voting Section has filed 10 suits alleging violations of the National Voter Registration Act. Two of the cases were to enforce NVRA provisions requiring state public assistance or disability agencies to improve voter registration access, and five cases dealt with the improper removal of voters from the poll lists without the notice required by the NVRA and/or the failure to add voters who had properly applied to register to vote. Since 2006, we have filed lawsuits containing NVRA claims in Indiana, Maine, New Jersey, Philadelphia, and Cibola County, New Mexico. Every one of these suits was resolved by agreed orders that protect the interests and rights of voters.

Aside from lawsuits, we actively investigate the practices of jurisdictions to determine if they are complying with the NVRA. In the past few months, we sent letters to 18 states inquiring about their practices and procedures regarding the provision of

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voter registration opportunities at state offices that provide public assistance, disability, and other services. In the past year, we sent letters to a dozen states inquiring about their list maintenance practices when we learned that there appeared to be significant imbalances between their numbers of registered voters and their citizen populations.

The Department works hard to help States satisfy HAVA's requirements as well, through speeches and mailings to election officials, responses to requests for our views on various issues, and maintaining a detailed website on HAVA issues as well as cooperative discussions with States aimed at achieving voluntary compliance. With January 1, 2006, came the first year of full, nationwide implementation of the database and accessible voting machine requirements of HAVA. HAVA requires that each State and territory have a statewide computerized voter registration database in place for federal elections, and that the voting systems used in federal elections, among other requirements, provide accessible voting for persons with disabilities in each polling place in the nation.

Where cooperative efforts prove unsuccessful, the Department enforces HAVA through litigation. Since January 2006, the Department has filed lawsuits against the States of New York, Alabama, Maine, and New Jersey. In New York and Maine, the States had failed to make significant progress on both the accessible voting equipment and the statewide databases. In Alabama and New Jersey, the States had not yet implemented HAVA-compliant statewide databases for voter registration. The Department ultimately obtained a favorable judgment and remedial order in Alabama, a preliminary injunction and the entry of a remedial order in New York, and favorable consent decrees in Maine and New Jersey.

The Department recently won a motion for further relief against New York for failure to achieve full compliance with HAVA's voting system requirements, and the court there has entered a supplemental remedial order to cure the continuing violations. In addition, we filed HAVA claims against Galveston County, Texas, for failing to provide provisional ballots to individuals eligible to vote, post required voting information at polling places, and provide adequate instructions for mail-in registrants and first time voters. We also filed HAVA claims against an Arizona locality for its failure to follow the voter information posting requirements of the Act, and our recent lawsuits in Cibola County, New Mexico, and Philadelphia, Pennsylvania, discussed above, also included HAVA claims to protect Native American and voters with disabilities, respectively.

The Department also has defended three challenges to HAVA in a private suit involving the HAVA accessible machine requirement. A separate Pennsylvania State court judgment barring the use of accessible machines was overturned after the Department gave formal notice of its intent to file a federal lawsuit.

HAVA requires that states offer persons who do not appear on voter registration lists on election day for federal elections, and who claim to be registered and eligible, the opportunity to vote by provisional ballot. This provisional process is aimed at ensuring

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that persons who may be mistakenly omitted from the rolls through bureaucratic error can vote and have that vote counted. The eligibility of such persons to vote can be verified under state law after the election when there is more time to search registration records than exists on Election Day. Whether the vote counts will depend upon whether state and local officials subsequently determine that the voter was, in fact, eligible to vote. The Department will continue to work with states to ensure compliance with HAVA's provisional ballot requirements.

Kennedy 134 On January 24, 2008, the Committee received your responses to written questions submitted to former Attorney General Alberto Gonzales. The responses to questions 149 and 153 included an attachment listing cases filed by the Civil Rights Division's Voting and Employment Litigation Sections. Please indicate the time frame covered by the list of voting cases submitted in response to answer 149, and identify any additional cases filed by the Voting Section since this attachment was submitted.

ANSWER: The time frame covered by the list of voting cases submitted in response to question 149 previously submitted to Attorney General Alberto Gonzales is October 1, 1976 – September 30, 2007.

As of April, 2008, the Voting Section has participated in the following cases:

Plaintiff – Section 2 Case

U.S. v. Georgetown County (S.C.) School District	D.S.C.	3/14/08

Plaintiff – HAVA Case

U.S. v. Bolivar County, Mississippi	N.D. Miss.	2/15/08

Plaintiff – UOCAVA Case

U.S. v. State of Tennessee	M.D. Tenn.	1/28/08

Amicus Curiae – UOCAVA Case

DuPage County Bd. Of Election Comm'rs v. Illinois State Bd. Of Electors	N.D. Ill.	1/16/08

Kennedy 135 The list of Employment Litigation Section cases indicates that it dates from 1993. Please explain why this date was chosen, and identify whether any additional Title VII cases have been filed since this list was submitted.

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ANSWER: Written question 152 submitted to former Attorney General Alberto Gonzales requested information on Employment Litigation Section (ELS) cases from both the previous and current Administration. Thus, information was provided back to 1993.

ELS has filed the following additional lawsuits since that list was submitted:

Tracey Marshall v. Hillsborough County Clerk
On October 12, 2007, we filed a compliant alleging that the Hillsborough County Clerk violated the Uniformed Services Employment and Reemployment Rights Act of 1994 by failing to return Ms. Tracey Marshall to her pre-service position as supervisor of the Court Clerk II Section upon the conclusion of her 2005 military deployment. The complaint also alleged that the Clerk's Office violated USERRA by retaliating against Ms. Marshall for filing a USERRA claim with the Department of Labor. The complaint seeks back wages, interest, and remedial measures.

Anthony Jackson v. Union County College
On December 14, 2007, we filed a complaint on behalf of Anthony Jackson against Union County College alleging violations of the Uniformed Services Employment and Reemployment Rights Act of 1994. The complaint alleges that Union County College discriminated against Mr. Jackson because of his military service, including discharging Mr. Jackson without cause. The complaint seeks back wages, interest, and other remedial measures.

United States v. Policia de Puerto Rico
On March 3, 2008, we filed a complaint under Section 706 of Title VII of the Civil Rights Act of 1964, as amended, against the Puerto Rico Police Department alleging that the Police Department engaged in gender discrimination against Ms. Jeanette Caraballo by subjecting her to a hostile work environment, including sexually discriminatory comments and insults, and assignments to clerical duties not required of male officers. The complaint further alleged that the Police Department discriminated against Mr. Manuel Bonilla by retaliating against him because he opposed what he reasonably believed to be sex discrimination against Caraballo and other female co-workers. This case is currently being litigated.

Jerimiah Macintire v. Pan-O-Gold Baking Company (d.b.a. Village Hearth Bakery) and Select Personnel Services, Inc. (d.b.a. Remedy Intelligent Staffing)
On March 14, the United States District Court for the Western District of Wisconsin approved and entered the Settlement Agreement executed by all parties and tendered with the Complaint we filed on behalf of Jerimiah Macintire in the case *Jerimiah Macintire v. Pan-O-Gold Baking Company (d.b.a. Village Hearth Bakery) and Select Personnel Services, Inc. (d.b.a. Remedy Intelligent Staffing)*; Civil Action No. 08–cv–134 (WD WI). The Complaint, which was filed on March 11, alleged that Pan-O-Gold Baking Company (d.b.a. Village Hearth Bakery) and Select Personnel Services, Inc. (d.b.a. Remedy Intelligent Staffing) violated the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Specifically, the Complaint alleged that the defendants

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violated Section 4312 and 4313 of USERRA by failing to reinstate Macintire to his pre-service position following the completion of his Reserves duty and violated Section 4311 of USERRA by taking into account his military status in deciding whether to discontinue his employment with Pan-O-Gold Baking Company.

Kennedy 137 I am concerned about the politicization of the process for appointing immigration judges. Testimony before this Committee clearly demonstrates that the Office of the Attorney General was actively involved in the selection of immigration judges between 2004 and 2006. The former Attorney General placed the selection and hiring of immigration judges in the hands of Monica Goodling, who frequently bypassed regular channels in order to accommodate friends of the Administration. Some of these appointments were made without benefit of any civil service notification or job posting. Immigration judges are civil servants charged with the important responsibility of determining whether an individual should be deported, or allowed to remain in this country on the basis of a claim for asylum or other legal claims. Despite the life or death consequences, the former Attorney General allowed this process to be corrupted by political cronyism. What assurance can you give this Committee that you will thoroughly review all immigration judge appointments made between 2004 and 2006? In your review, you should consider whether and to what extent impermissible political considerations were taken into account during the hiring process, the number of positions filled without benefit of posted job announcements or without interviews, and the expertise in immigration law of those hired. If you find deficiencies in these areas, can you commit to correcting the problems?

ANSWER: There is no place for political considerations in the hiring of our career employees or in the administration of justice. This matter has been referred to the Office of Professional Responsibility and the Office of the Inspector General, and that investigation is ongoing. In the meantime, the Department has taken the following steps to ensure that any previous mistakes are not repeated. In January 2007, the Department's leadership offices, in consultation with the Executive Office for Immigration Review (EOIR) and other relevant components, developed a new process for screening and evaluating immigration judge (IJ) applicants, which was implemented in early April 2007.

The new process has been formalized to make it more routine and consistent, and has placed the initial vetting, evaluation, and interviewing function within EOIR. EOIR has enhanced supervisory review of newly appointed IJs. All new IJs serve an initial trial period, during which time their performance and conduct on the bench are assessed. This review, which includes feedback from both the private bar and government attorneys who practice before that IJ, determines whether the new judge possesses the proper temperament and aptitude necessary to be retained as an IJ.

Additional reforms have been implemented to improve the immigration courts overall and ensure that IJs provide a fair process through which aliens have an

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opportunity to present their claims. Proposed codes of judicial conduct have been published, new judicial training programs have been developed, a new position has been created to oversee all judicial misconduct allegations, and we have also instituted a written immigration law exam requirement for all newly appointed IJs. The Department remains committed to these reforms and will continue to demand that all IJs maintain the highest levels of integrity and professionalism.

Kennedy 138 Finally, in 2006 Attorney General Gonzalez announced a review of the operations of the Immigration Judges and the Board of Immigration Appeals, which included 22 directives to expand and professionalize the immigration court system. What is the status of that review? How many of those directives have been completed? In particular, how many Immigration Judges and Members of the Board of Immigration Appeals have been hired to help deal with the overwhelming numbers of cases in the Immigration Court system?

ANSWER: The Department has made substantial progress on implementing these initiatives. To date, the majority have been completed, including: (1) requiring all newly appointed immigration judges (IJs) and members of the Board of Immigration Appeals (Board) to pass a written exam prior to adjudicating cases; (2) improving training for new appointees and developing a continuing education program for veteran IJs and members of the Board; (3) creating a system to evaluate the performance of newly appointed IJs and members of the Board; (4) developing a training program to strengthen the ability of Board staff attorneys to perform their screening and drafting duties; (5) creating a more systematic way for members of the Board and Office of Immigration Litigation attorneys to report conduct, professionalism, or quality concerns; (6) reviewing and analyzing concerns raised regarding disparities in asylum grant rates; (7) creating the position of Assistant Chief Immigration Judge (ACIJ) for Conduct and Professionalism to monitor and review all allegations of misconduct against IJs; (8) improving transcription services; (9) developing a process for referring complaints about immigration fraud and abuse; (10) assigning ACIJs to six regional offices; (11) revising the IJ Bench Book; (12) publishing a comprehensive immigration court practice manual; (13) pursuing appropriate budget increases; and (14) forming a committee to oversee the expansion and improvement of the Executive Office for Immigration Review's (EOIR) Pro Bono programs.

Other initiatives are well under way or are near completion, but require additional steps to complete them. These include: (1) implementing a performance appraisal system for IJs and members of the Board; (2) clarifying the conduct standards that IJs and members of the Board must abide by; (3) making final improvements to the streamlining reforms; (4) increasing the size of the Board; (5) implementing sanction authority for IJs and expanding the bases upon which discipline may be imposed on attorneys and representatives who appear before immigration courts or the Board; (6) implementing and installing a new digital audio recording system; (7) enhancing interpreter services; and (8) enhancing the sanction authority of the Board.

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IJ hiring has taken place and continues; 12 new IJs entered on duty in March 2008 and 1 in May 2008, with hiring continuing for an additional 25 judges. With respect to the Board, the Department recently published a final rule increasing the size of the Board to 15 permanent members. The rule also expanded the pool of persons eligible to serve as temporary board members. The Board has continued the use of temporary board members to assist in handling its increased workload. On May 30, the Attorney General announced the appointment of five permanent members to the Board. Announcements for permanent Board member positions have been posted and the hiring process is ongoing.

Kennedy 139 Under the Homeland Security Act of 2002, immigration enforcement and benefit functions were transferred from the Department of Justice to the Department of Homeland Security. Only the Executive Office for Immigration Review, which houses the immigration courts and the Board of Immigration Appeals, remains under the jurisdiction of the Attorney General. Immigration judges determine whether an individual is eligible for relief from removal. In particular, immigration judges must assess eligibility for asylum, withholding of removal, or protection from torture — all issues that require significant expertise in political and cultural matters. During your years on the federal bench, you routinely accorded great deference in evaluating the determinations of the Board of Immigration Appeals and decisions by immigration judges. There is significant evidence, however, that many immigration judges do not receive sufficient training on complex issues such as country conditions and human rights. I have heard numerous reports that immigration judges often fail to consider cultural differences, or fail to understand the political realities in particular countries. A study published last year by three law professors found that asylum grants by immigration judges are inconsistent and vary widely across the country. As a former judge, you're well aware that the integrity of the judicial process is called into question when such disparities exist. Regulations went into effect last October requiring the Executive Office for immigration Review to ensure that appropriate training is provided and that professional conduct is appropriately monitored. What training should immigration judges receive, particularly with respect to asylum and human rights? How will you use your authority as Attorney General, including your power to review immigration decisions, to ensure that integrity is restored to the immigration courts? Will you monitor the implementation of new regulations regarding management of the courts? Will you conduct further evaluations to determine whether these reforms have gone far enough to restore integrity?

ANSWER: Both the Department and the Executive Office for Immigration Review (EOIR) take the integrity of the immigration courts very seriously, and have taken concrete steps toward improving training and oversight of immigration judges (IJs).

With respect to new IJs, EOIR has expanded new judge training to provide each judge with five weeks of training prior to taking the bench, including the opportunity to

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work with mentor judges both in their home court and in a training court. The classroom curriculum includes training on asylum and other forms of humanitarian protection.

For all judges, EOIR provides training through conferences, specialized on-line resources, and legal publications. In August 2007, EOIR held a week long training conference for IJs and the Board of Immigration Appeals (Board). This past year, EOIR launched new and dramatically improved on-line resources for IJs, Board members, and legal staff. The newly overhauled Immigration Judge Benchbook contains a growing library of reference materials on asylum and other immigration law topics. In January 2007, EOIR launched a monthly newsletter for IJs, Board members, and all EOIR legal staff, containing topical articles on substantive legal issues and analyses. EOIR also distributes topical reference materials from external sources on an ongoing basis, such as circuit court summaries from the Office of Immigration Litigation, and the EOIR Virtual Law Library is regularly updated and expanding. Finally, EOIR has recently developed a more structured peer mentoring program, where IJs who are experts on immigration law topics, including asylum, make themselves available to advise colleagues on particular areas of law and procedure.

Public confidence in the immigration courts depends in large part on the professionalism of the immigration judges. In coordination with the Department, EOIR has instituted reforms to address concerns about judge professionalism, including the creation of a senior level position dedicated to IJ conduct and professionalism, the development of a code of judicial conduct for IJs, and an ongoing emphasis on increased professionalism throughout the ranks of EOIR. The Department is very much committed to enhancing public confidence in the immigration courts and, through oversight and coordination with EOIR, taking the steps necessary to achieve that end.

Kennedy 140 In 2002, Attorney General Ashcroft issued regulations ordering the Board of Immigration Appeals to reduce its backlog of asylum and deportation cases. This so-called "streamlining" regulation reduced the size of the Board from 23 members to 11, and eliminated review by three members of the Board in many cases. Instead, the regulation permits a single member to issue a decision in many cases, without any requirement for a reasoned explanation of the decision. This "streamlining process" has been heavily criticized by both the immigration bar and the federal courts.in the past two years, however, we understand that the number of appeals affirmed without opinion has dropped from 36 percent to under 10 percent and the number of federal court filings from Board rulings has decreased 23 percent. In addition, the number of published precedent decisions increased significantly, providing important guidance to parties in proceedings as well as the federal courts on the Board's interpretation of immigration law. In a directive issued by Attorney General Gonzalez, the size of the Board was to be increased slightly from 11 members back up to 15, which will help ensure that case backlogs do not become a problem again at the BIA. What steps have you taken to see that these positive trends continue, and that the Board fully restores fairness and due process to its decision making? What steps have been taken to expand the Board to

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15 members? Can we have a commitment from you that you will support additional increases in the Board's membership if the caseload merits it?

ANSWER: For the past two years, the Board of Immigration Appeals (Board) has taken significant steps to adjust its practices in response to the Attorney General's directives. As noted, the Board has reduced the rate of single member affirmances without opinion, from a high of 36 percent in 2003 to 9 percent currently, and is issuing decisions that contain more detail and analysis than before. There are signs that this approach has improved the climate for Board decisions in federal court. In addition, the Board has worked hard at fulfilling its mission to give guidance to the immigration judges and the parties in proceedings. In 2007 the Board significantly increased the number of published decisions to 45 precedent decisions. The Board has also successfully eliminated the backlog of cases awaiting transcription that had existed for some time.

In response to the 2006 directives, the Department published an interim rule expanding the Board to 15 permanent members. On May 30, 2008, the Department announced the appointment of five new permanent Board members. The interim rule also expanded the pool of persons eligible to serve as temporary board members to include not only IJs but also EOIR attorneys with at least 10 years of experience in the field of immigration law. This has in part, enabled the Board to handle its increased workload. The Board will continue to monitor and project future caseloads, and adjust resources accordingly, including the number of temporary board members. The Department is committed to providing the necessary resources to meet caseload needs at the Board.

On June 18, 2008, further implementing the 2006 directives, the Department issued a proposed rule that would amend the Board's administrative review procedures to give it more flexibility in handling its case load.

Kennedy 141 There have been a number of recent proposals to require state and local police to enforce the immigration laws or lose their federal funding. Strong objections were raised by state and local officials, mayors, police chiefs, and sheriffs around the country, who believe such a requirement will seriously jeopardize their efforts to fight crime and protect us from future terrorist attacks. It could obviously have a disastrous effect on community policing, in which local police cultivate bonds of trust with the public, including immigrants of all statuses, to root out crime and bring offenders to justice. It will also divert precious resources from the police's primary mission of protecting our communities. Security experts have repeatedly stated that good intelligence is the key to national security. Helpful information comes from all sources, including immigrants. Permitting state and local police to enforce immigration law will also heighten the risk of discrimination and racial profiling. These law enforcement officers don't have training in the complex and technical area of immigration law, and they'll have no basis to determine immigration status. They'll be likely to target individuals who look or sound foreign for questioning, detention, or arrest. Isn't this is a function that the federal

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government should retain exclusive jurisdiction over? What role, if any, do you think state and local law enforcement agencies should have in enforcing federal immigration laws? Do you believe such a policy would affect the successes achieved by community policing? How do you think this policy would affect our ability to obtain good intelligence? Won't immigrants be afraid to approach local law enforcement officials for fear of being deported, thereby denying important information and jeopardizing the security of our nation?

ANSWER: The federal government has the primary role in immigration matters. State and local officials are important partners in immigration matters (just as they are in other matters). Moreover, state and local governments have jurisdiction and interests over persons (including aliens) within their states and localities. Immigration issues are best resolved when the federal government and state and local governments work together in a cooperative way.

When Congress enacted Section 287(g) of the Immigration and Nationality Act it provided a mechanism whereby the Attorney General (now the Secretary of Homeland Security) could enter into formal agreements with state and local governments and provide critical training to state and local officials regarding immigration matters. Section 287(g) is not, however, mandatory and no state or local government is required to enter into such agreements. *See* INA § 287(g)(9). The Department of Justice has been supportive of the Department of Homeland Security's efforts to enter into INA § 287(g) agreements with state and local governments. The Department is unaware of any situations where the existence of an INA § 287(g) agreement has undermined a state or local law enforcement officials ability in other contexts.

Kennedy 142 Over 1,400 immigration bills were introduced in state legislatures last year, more than double the number filed the year before. Approximately 130 local governments have introduced or passed ordinances dealing with immigration. However, under Supreme Court precedent, the federal government has exclusive authority to regulate immigration. What is your perspective on efforts by state and local governments to enact their own immigration laws? Will the Department of Justice vigorously challenge such efforts under your leadership?

ANSWER: The Department of Justice generally does not take a position on bills pending in state legislatures. Like any other issue, the Department will decide on a case by case basis whether to intervene in or initiate litigation relating to state or local law. Any decision regarding litigation would be made in close consultation with the Department of Homeland Security.

Kennedy 145 What are U.S. Attorneys doing to ensure that the courts are aware of any truly dangerous offenders?

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ANSWER: When courts have allowed them the opportunity, Assistant U.S. Attorneys assigned to review sentencing reduction motions, in many instances, have reviewed the motions, retrieved factual background information underlying the offenders' convictions, contacted the Bureau of Prisons to obtain information concerning the prisoners' post-sentencing behavior, and considered the propriety of Probation Office sentencing recommendations. In cases where an offender's post-sentencing conduct involves criminal behavior or where the circumstances underlying the offender's original conviction are particularly egregious, Assistant U.S. Attorneys have the discretion to alert the court to those circumstances and oppose a sentencing reduction.

Some courts, however, have granted sentencing reduction motions *sua sponte* since the March 3, 2008, retroactivity effective date without allowing the government an opportunity to review the offender's motion, the facts underlying his case, or his post-sentencing conduct, and reply to the motion accordingly. The government's ability to alert the courts to every dangerous offender has been further hindered by the sheer volume of sentencing reduction motions filed in districts where hundreds or thousands of offenders are estimated to be eligible for a reduction.

Kennedy 149 How much training is the FBI currently providing to state and local law enforcement authorities to improve identification, reporting, and response to hate crimes?

ANSWER: The FBI's Uniform Crime Report (UCR) program provides training materials in print, online, and, when funding permits, on site for the agencies that request it. During the last three fiscal years, the FBI's UCR program has provided almost 6,000 printed hate crime training manuals to law enforcement. In addition, the UCR program has conducted on-site training for 63 agencies regarding issues specific to hate crimes, and Web-based hate crime training is available to law enforcement through Law Enforcement Online (LEO). The UCR program also provides training regarding hate crime reporting when it trains law enforcement personnel regarding Summary reporting and the National Incident-Based Reporting System. UCR program contributors and stakeholders are informed of hate crime reporting procedures and training opportunities through the UCR *State Program Bulletin* and *UCR Newsletter*, among other means.

Kennedy 150 What steps are you taking to ensure that the Department makes prosecution of hate crimes a top priority?

ANSWER: Please see the above response to Question 148. Violent crime, including violent crime motivated by prejudice or animus against a particular class or group of citizens, should never be tolerated. Therefore, aggressively prosecuting hate crimes remains a priority of the Department.

Generally speaking, with respect to hate crimes and other criminal civil rights matters, the Department initially determines whether the local law enforcement

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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 hate crime cases in recent years. Examples of recent hate crimes prosecutions include:

- *United States v. Eye and Sandstrom* (W.D. Mo.): On March 8, 2008, the defendants were convicted of fatally shooting an African-American man as he was walking to work in downtown Kansas City. Both defendants were sentenced to life in prison without parole.

- *United States v. Milbourn* (S.D. Ind.): On March 11, 2008, the defendant was convicted of conspiring to interfere, and interfering, with housing rights on March 12, 2006, by burning an eight-foot-tall cross in the yard of a home because the resident has three bi-racial children.

- *United States v. Syring* (D.D.C.): The defendant entered a guilty plea to violating a federally protected right for sending threatening e-mail and voicemail messages to the Director of the Arab American Institute as well as staff members between July 17 and 19, 2006. Sentencing is anticipated in summer 2008.

- *United States v. Laskey, et al.* (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, et al.* (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.

- *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. Saldana, et al.* (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

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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.

- *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, et al.* (D. Utah): From December 2005 through January 2006, in Salt Lake City, three white supremacists pled guilty to assaulting an African-American man riding his bicycle to work because of his race and because they wanted to control the public streets for the exclusive use of white persons.

- *United States v. Fredericy and Kuzlik* (N.D. Ohio): In October and November 2006, defendants Joseph Kuzlik and David Fredericy pled guilty to conspiracy, interference with housing rights, and making false statements to federal investigators. In February 2005, these defendants poured mercury on the front porch and driveway of a bi-racial family in an attempt to force them out of their Ohio home.

- *United States v. Hobbs, et al.* (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

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the fourth defendant pleaded guilty to obstruction of justice for his role in the offense.

- *United States v. Hildenbrand, et al.* (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.

As described above, 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 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. The victims in this case were kidnapped by a group of White Knights of the Ku Klux Klan that included the defendant. Dee and Moore were beaten by their captors, then transported and finally forcibly drowned by being thrown into the Old Mississippi River, tied to heavy objects alleged to have included an engine block, iron weights, and railroad ties. Last June, Seale was convicted on all counts, and in August, he was sentenced to life in prison.

- 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 Dr. Martin Luther King, Jr., to the area, was lured into a national forest and shot multiple times. That conviction was affirmed in April 2004.

Kennedy 151 As states continue to enact hate crime statutes, the clear trend has been to include gender-based crimes in these laws. In 1990, only seven of the statutes in the thirty-one states with hate crime laws included gender. Today, including the District of Columbia, twenty-eight of the forty-five states with penalty-enhancement hate crimes statutes include gender-based crimes. Eight states now include gender in their hate crime data collection mandate, and gender-based crimes are subject to

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federal sentencing enhancements under 28 U.S.C. § 994.Do you believe that the FBI's Hate Crime Incident Report should include a box in the Bias Motivation section for gender-based hate crimes?

ANSWER: The categories of bias reported in the UCR are based on the Hate Crime Statistics Act of 1990, as amended, and the minimal standards for race and ethnicity designations established by the Office of Management and Budget (OMB). While the FBI does not anticipate revising the bias motivation categories absent revision of these authorities, there is no legal impediment to seeking additional voluntary reporting from law enforcement. If the FBI were to contemplate this, they would seek consideration of the proposal by the Criminal Justice Information Services (CJIS) Advisory Policy Board (APB).

Kennedy 153 In meetings with government officials and community-based organizations, FBI representatives have indicated that an interagency hate crime working group was created to revise and update FBI resources under the Act. What is the current status of this hate crime working group?

ANSWER: The Attorney General (AG) convened a Hate Crime Working Group at DOJ in May 1997. The Working Group was initially chaired by David W. Ogden, Counselor to the AG, and met approximately weekly. Members of the Working Group included interested components throughout DOJ and the FBI. Although currently inactive, the Working Group examined five principal areas related to hate crime: legislative initiatives, data collection, community outreach, prosecution and enforcement, and coordination. The Working Group developed a number of specific recommendations, including the formation of local hate crime working groups in federal judicial districts under the leadership of or with the participation of each U.S. Attorney's Office. The local working groups were envisioned as including local community leaders and educators, as well as federal, state, and local law enforcement officials, and were to be the primary mechanism for evaluating and addressing the hate crime problem in the local community.

Kennedy 154 Professor Jack McDevitt, Director of The Center for Criminal Justice Policy Research at Northeastern University in Boston, has emphasized the need for an expanded narrative in reporting hate crimes. In his September 2002 report, "Improving the Quality and Accuracy of Bias Crime Statistics Nationally", funded by the Justice Department's Bureau of Justice Statistics, Professor McDevitt suggested that more detailed reporting can reduce the occurrence of "information disconnect" between the investigating officer and Uniform Crimes Report reporting officials. What is the status of plans to revise and update the FBI's Hate Crime Incident Report forms to provide space to encourage additional narrative about the bias motivation?

ANSWER: The UCR program is evaluating the current Hate Crime reporting program and exploring opportunities for program enhancement, including the possible inclusion of

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narrative comments or structured narrative fields. This evaluation includes researching user initiatives; evaluating the data collection process; examining and possibly revising data collection forms and guidelines; exploring publication content, formats, and methods; and reviewing the audit process to ensure data quality. We will also consider how to ensure that subjective, unstructured narrations constitute valuable information and how to limit the burden imposed on those relied on to draft narratives so they depict incidents accurately and succinctly. Once the FBI has evaluated this issue, recommendations will be provided to the FBI's CJIS APB for review and recommendation to the FBI Director.

Kennedy 156 Will you support legislation in Congress that would require firearms manufactured and sold in the U.S. after 2010 to be equipped with microstamping technology?

ANSWER: We believe the additional study described above needs to be completed before commenting on or supporting the legislation regarding this technology.

Kennedy 158 Do you intend to conduct your own investigation of Mr. Adams and the Office of the Pardon Attorney?

ANSWER: The Inspector General has conducted an investigation and made findings. While we cannot discuss the specifics of any case involving discipline, we can say that where the Inspector General finds misconduct, the Department's protocol for imposing discipline tracks the process established by merit systems regulations. The protocol requires issuance of proposed discipline. The employee can either accept the discipline, or respond to the proposal. A higher level manager than will issue a decision on the proposal. If the imposed discipline involves a suspension of more than fourteen days or removal, then the employee can request a trial de novo by a Merit Systems Protection Board (MSPB) judge. The MSPB judge has the option to affirm the punishment, reduce the punishment, or exonerate the individual.

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QUESTIONS FROM SENATOR BIDEN

Biden 160 Because of its critical importance to our criminal justice system, I have long advocated for increased federal assistance to local forensic laboratories and law enforcement. Just a few years ago Congress passed the Justice for All Act. That far-reaching legislation included the Debbie Smith DNA Backlog Grant Program that authorized $700 million in federal funding to states and police agencies to help eliminate the backlog of untested DNA rape kits – kits that were tragically sitting on shelves in police warehouses and crime labs. This legislation also included the Paul Coverdale grants program that authorized funding to assist state crime labs. Regrettably, backlogs persist; the FBI recently estimated that 180,000 federal convicted offender samples are waiting for DNA processing. The most recent, comprehensive study by the National Institute of Justice found 542,700 cases with evidence waiting for DNA testing. Many provisions of the Justice for All Act expire next year. To comprehensively reauthorize these programs, it is critical that Congress have accurate and up to date information on the collection, testing and use of forensic evidence at the Federal, state, and local level. The last comprehensive DNA backlog survey was produced over four years ago in 2003. A more recent compendium of forensic information is needed. We must move full speed ahead to harness this technology to the benefit of our criminal justice system. In light of the need for the latest information on forensic analysis, I would like answers to the following questions: Please provide the latest estimate of the backlog at Federal, state and local forensic labs of samples of convicted offenders waiting for DNA testing?

ANSWER: In October of 2007, thirty-three States responded to a survey that was distributed to State Combined DNA Index System (CODIS) Laboratories. The results of these responses show a current backlog of 33,533 convicted offender samples awaiting testing with the addition of an estimated 259,896 anticipated total sample submissions through September 30, 2008. Responsive States also collecting arrestee samples reported 1,026 arrestee samples in the current backlog and the anticipated receipt of 5,003 arrestee samples through September 30, 2008. The FY 2008 Convicted Offender and/or Arrestee DNA Backlog Reduction Program announcement will close on April 4, 2008, and the number of backlog convicted offender and/or arrestee samples for which federal assistance will be awarded in 2008 will be known shortly after the receipt of all requests.

Having said that, the backlog of convicted offender samples is not readily quantifiable due to the fact that newly collected samples are received into State CODIS Laboratories for analysis every day, thereby adding to existing backlogs. In addition, legislative changes in collection statutes impact the number of samples collected each year. Recent trends in such legislative changes, ranging from the increase of qualifying offenses for DNA sample collection to the collection of DNA samples from arrestees for qualifying offenses, have resulted in a significant increase in national backlogs of samples awaiting DNA analysis and subsequent entry into CODIS. As a result of this

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trend, in 2007 NIJ began providing financial assistance to states with backlogs of arrestee samples.

Each year, NIJ performs a voluntary survey of State CODIS database units requesting that they provide a value for the current existing backlog of convicted offender and arrestee samples, as well as an estimate of the number of samples that will be received through September 30 of the following year.

The results of the October 2006 survey revealed a total of 708,706 convicted offender samples (combined existing backlog and anticipated collection samples from States who responded to the survey). NIJ received requests for assistance in testing 441,019 of these samples and funded 100 percent of the requests received for federal assistance. It is inferred that State resources were available to test the remainder of the samples, or that states were working the anticipated sample receipts in a timely fashion.

As of March 31, 2008, the backlog of convicted offender samples at the FBI Laboratory is 231,488. This total is distributed across progressive and separate processing steps as follows: 1,319 specimens to be inventoried; 4,938 specimens to be scanned into electronic records; 144,611 specimens to be analyzed; and 80,620 specimens awaiting data review.

Biden 161 What is the current turn-around time between collection of samples and DNA testing, and how many samples are processed through federal funds annually?

ANSWER: One hundred and six DNA laboratories, utilizing funds awarded in 2006 under the Forensic DNA Capacity Enhancement Program, reported a reduction of 5.7 days in the average number of days between submission of a DNA sample to the laboratory and delivery of the test results to the requesting agency. Nationwide, laboratories reported an average increase of 16.9 more samples analyzed by each analyst per month than at the beginning of the grant period. The number of samples processed through federal funds annually is not available.

Based upon the preliminary review of progress reports from forty-nine DNA laboratories utilizing funds awarded in 2007 under the Forensic DNA Backlog Reduction Program, the current turnaround time ranged from 16 days to 395 days. Reductions in turnaround time between October 2007 to December 2007 range from 0 to 180 days; however, in some instances the turnaround time actually increased (a range of 1.5 to 100 days).

Biden 162 Is there, either at the National Institute of Justice or the Bureau of Justice Statistics, an estimate for the backlog of crime scene samples waiting for DNA testing? How many crime scene samples undergo DNA processing through federal funds annually?

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ANSWER: There is no published estimate of the current size of the DNA backlog. The NIJ-funded *National Forensic DNA Study Report* (2003) by the Division of Governmental Studies and Services Washington State University and Smith Alling Lane estimated that the total crime cases with possible biological evidence either still in the possession of local law enforcement, or backlogged at forensic laboratories is 542,700 (264,000 of these were property crimes, with the remainder homicide and rape cases). This report is available at http://www.ncjrs.gov/pdffiles1/nij/grants/203970.pdf

According to the *Census of Publicly Forensic Crime Laboratories, 2002*, from the Bureau of Justice Statistics, the nation's public forensic crime labs ended 2002 with more than 500,000 backlogged requests for forensic services. Of these, 48,811 were for DNA analysis. The BJS study included 33 federal, 203 state or regional, 65 county and 50 municipal forensic crime laboratories. This report is available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf.

From FY 2003 through FY 2007, NIJ has provided assistance to 103,824 forensic DNA cases. Also, NIJ has two studies underway that will examine forensic backlogs, including, but not limited to DNA cases. Both studies are scheduled for completion by the end of 2008.

One study includes a survey of law enforcement agencies to determine their existing backlogs of criminal cases and forensic evidence. This project will also identify challenges that contribute to the backlog.

The second study will identify crime laboratory policies and practices that influence the size and nature of backlogs in various forensic disciplines, including DNA. This study will provide a detailed view of emerging areas in forensic DNA, and how these areas may impact demand for DNA analysis.

Biden 163 What percentage of biological crime scene evidence, the long-term storage of which is sometimes essential to post-conviction exonerations, is properly stored in agency evidence repositories? What efforts, if any, are being made at the federal level to help State and local law enforcement and crime laboratories properly store DNA evidence?

ANSWER: At this time there is no known data on the actual percentage of biological crime scene evidence which is properly stored in agency evidence repositories. A number of grant programs under the President's DNA Initiative including the Convicted Offender DNA Backlog Reduction and DNA capacity enhancement programs allow for the expenditure of funds for facilities/renovations that laboratories could use to upgrade or increase the storage areas for DNA evidence. The Paul Coverdell Forensic Science Improvement Program also allows for funds to be used for similar purposes.

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Biden 164 In addition to DNA, there are also substantial backlogs in other forensic analysis. Please provide an analyses of the backlogs for other forensic sciences, and a breakdown of the federal resources dedicated to DNA and to other forensic sciences.

ANSWER: According to a study conducted by the Bureau of Justice Statistics (BJS), the nation's public forensic crime laboratories ended 2002 with more than 500,000 backlogged requests for forensic services (see table below, which was adapted from Table 11 of the BJS report), compared to 290,000 requests that were backlogged at the beginning of the year. The laboratories received more than 2.7 million new requests during 2002. The BJS study of the nation's 351 federal, state and local forensic crime laboratories, conducted in 2003 and 2004, is the first such census of publicly funded forensic crime laboratories and included 33 federal, 203 state or regional, 65 county and 50 municipal laboratories with about 9,400 full-time employees. This report, entitled "Census of Publicly Forensic Crime Laboratories, 2002, is available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf.

BJS is currently completing a similar study with more recent data. The results of this study are expected to be released later in 2008.

In FY 2008, Federal resources appropriated (pre-rescission) to DNA-related and other forensic programs and activities exceed $150,000,000. The FY 2008 appropriation for Paul Coverdell Forensic Sciences Improvement Grants Program is $18,800,000.

Biden 165 The National Institute of Justice recently held a forum on forensic sciences here in Washington, D.C. Please provide details on this forum – what were the purposes, the participants, the conclusions and policy recommendations?

ANSWER: OJP believes that improvements to forensic science capabilities in State and local law enforcement should be a priority at all levels of government. In connection with a Congressional recommendation, and in keeping with the applicable statutory authorities, the National Academy of Sciences (NAS) is undertaking a fundamental review of forensic science in the United States with a grant from NIJ. The NAS is expected to issue its report in the spring of 2008. OJP believes that this report will address the important issues identified by Congress in forensic science improvement, including backlog reduction, professional and laboratory standards, governance of forensic disciplines, training and certification, validation of forensic disciplines, and related matters.

Recognizing the important work being conducted by the NAS, NIJ hosted a "Forensics Policy Summit," December 17-18, 2007, in Washington, D.C., to bring together those individuals who might be impacted by the work of the NAS, and provide a forum for the deliberation of policy matters which might affect the implementation of the NAS recommendations. NAS was present at the Summit and gave a presentation on the progress of their study. Participants will use the recommendations from the final NAS

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report, among other findings, to eventually develop a strategic plan on forensic science, constructed by forensic science practitioners and constituents. The plan will not only define the current state of issues affecting our nation's ability to maximize the value of forensic evidence, but will also address policy matters and outline a road map for the future of forensic science from crime scene to court room and beyond.

Participants were selected based on their experience in the criminal justice and forensic science communities, while ensuring the inclusion of the widest variety of stakeholders possible. Forensic laboratory directors, academicians, prosecutors, defense attorneys, judges, law enforcement, medical examiners, forensic nurses, victims and victim advocates were in attendance.

Biden 168 Please describe, in detail, the Violent Crime Reduction Partnership program set forth in the President's fiscal year 2009 budget proposal.

ANSWER: The $200 million Violent Crime Reduction Partnership Initiative (VCRP) sought by the President's budget is part of the Department's ongoing efforts to identify effective strategies for assisting our partners prevent and control crime. VCRP is based on the Department's experience administering the Byrne/JAG grant program. The JAG formula program can be used for almost any criminal justice purpose, which makes it is difficult to evaluate the positive impact of the program. One use to which JAG funds have been put that can be measured is multijurisdictional task forces; for example, in FY2007 states put a total of $103 million in JAG funds toward this activity. Building on this proven success, VCRP funding would 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. These partnerships are designed to disrupt criminal gang, firearm and drug activities, particularly those with a multi-jurisdictional dimension.

Under the VCRP, applicants would be state, local, or tribal law enforcement agency with a plan to establish or expand an intelligence-led, data-driven, multi-jurisdictional response to violent crime and gangs. Among other things, applicants would need to show an ongoing partnership with at least one federal law enforcement agency. Priority consideration would be given to applicants who: 1) document an increase in violent crime rates; 2) document a history or commitment to form a multi-jurisdictional, multi-disciplinary violent crime response; 3) demonstrate a data-driven analysis capacity or a willingness to adopt intelligence-led policing for planning and implementing violent crime initiatives; and 4) use a minimum of 10 percent of grant funds for justice information sharing related to the proposed violent crime problem. In short, VCRP combines the best of proven law enforcement strategies, but allows each community to tailor its solution to their specific crime challenge.

Last year, with discretionary funds provided by Congress, the Department demonstrated this approach with a competitive solicitation seeking applications to fund task force activities with focused strategies, including intelligence led policing, to address

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the specific crime problem represented by a given community or region. In the end, BJA awarded over $75 million to 106 sites in 37 states through this program last fall. This initiative is tracked at: www.ojp.usdoj.gov/BJA/grant/tvc.html. With the resources sought by the President's larger request of $200 million, we can expand this success and better assist communities that continue to struggle with violent crime.

Biden 169 Please describe, in detail, the Byrne Public Safety and Protection program set forth in the President's fiscal year 2009 budget proposal.

ANSWER: This proposal would consolidate OJP's state and local law enforcement assistance programs into a single, flexible, competitive grant program that would help state, local, and tribal governments, and non-profit entities, develop programs appropriate to the particular needs of their jurisdictions. Through a competitive grant process, OJP would assist state, local, tribal, and community efforts to address concerns in a number of high-priority areas, such as: (1) law enforcement programs (including those improving the capacity of law enforcement and justice system personnel to make use of forensic evidence and reducing DNA evidence analysis backlogs, and those addressing domestic trafficking in persons); (2) prosecution and court programs (including those improving services to victims of crime, to facilitate their participation in the legal process); (3) education and training programs (including those for state and local prosecutors and trial judges, designed to improve the quality of criminal cases involving capital offenses); (4) corrections and community corrections programs (including those improving and expanding prisoner re-entry initiatives); (5) drug treatment, monitoring, interdiction, and eradication programs (including those addressing the criminal justice issues surrounding substance abuse through drug courts, residential treatment for prison and jail inmates, prescription drug monitoring, methamphetamine lab cleanup, and cannabis eradication efforts); (6) planning, evaluation, and technology improvement programs (including those promoting and enhancing law enforcement information sharing efforts through improved and more-accurate criminal history records); and (7) reducing violent crime at the local level through the Project Safe Neighborhoods initiative. The grants, training programs, and technical assistance activities provided under this program will assist law enforcement agencies, courts, and other components of the criminal justice system with resources that help them prevent and address violent crime, protect the public, and ensure that offenders are held accountable for their actions.

Biden 170 The Department has reprogrammed at least 1,000 FBI agents—some reports say as many as 2,400 agents—from fight crime to combating terrorism. The President's budget proposes to add 280 new counterterrorism agents. Combating terrorism is important, but we can't make this an "either/or." Americans need the FBI to both fight crime and combat terrorism. Yet reports indicate that the FBI brought 34 percent fewer criminal cases in 2005 than in 2000, with sharp drops in white collar prosecutions and civil rights cases, and resources transferred away from FBI violent crime programs. Nonetheless, the Administration has not supported my bill to hire 1,000 additional FBI agents dedicated to fighting crime.

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Director Mueller has said in response to questions from me that the additional agents would help the FBI fight crime. Do you agree with the FBI Director that replacing agents reprogrammed to fight terrorism will help DOJ perform its crime fighting mission? Will you support my bill to hire 1,000 additional agents?

ANSWER: The Department's highest national priority is to prevent criminal acts of terrorism. Since September 11, 2001, the FBI has been called on to assume an increased role in national security efforts. To more accurately reflect workload associated with this new role, the FBI has reprogrammed agents from criminal investigations to counterterrorism investigations. Since FY 2007, Congress has approved the Administration's request to permanently move 400 agents from working traditional criminal cases to terrorism cases. The Department believes the changes since FY 2007, along with the additional positions proposed in the FY 2009 budget request will more accurately balance the number of criminal and counterterrorism agents and alleviate the need for further shifts of agents from criminal matters to counterterrorism matters.

Biden 171 The Department of Justice has placed a lot of emphasis on Project Safe Neighborhood. I asked CRS to examine appropriations to determine how much has been appropriated to Project Safe Neighborhoods initiatives to fight gang and gun violence. According to CRS, only about $305 million was appropriated from fiscal year 2002 to the present to combat gun and gang violence under Project Safe Neighborhood. Yet, in your opening statement you testified that since 2001 "Project Safe Neighborhoods has committed approximately $2 billion to federal, state, and local efforts to fight gun and gang violence." Please explain this apparent discrepancy and how you reached your $2 billion figure.

ANSWER: The $2 billion dollar figure represents funding from FY 2001 to FY 2008 and includes funding spent directly by Department of Justice agencies, such as the Bureau of Alcohol, Tobacco, Firearms and Explosives, and distributed through the Office of Justice Programs. The attached table provides a detailed break-out of these amounts. The Department cannot speak to the discrepancy between our figure and that provided by CRS without knowing the methodology CRS used to reach $305 million.

Biden 172 Please provide a detailed break-down on where how this funding was allocated, in which cities and whether it was effective in driving down crime.

ANSWER: The attached table provides a detailed break-down of how this funding was allocated between Department of Justice agencies. Funding break-down by geographical location is currently not available.

Biden 176 The recent report by former Majority Leader George Mitchell found that abuse of performance-enhancing substances in baseball—including steroids

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and human growth hormone—was widespread. What is the Department doing to investigate illegal distribution and trafficking of these substances?

ANSWER: The unlawful diversion of controlled substances is a serious crime and is actively investigated by the Drug Enforcement Administration and other law enforcement agencies. Suspected violations of the Controlled Substances Act (Title 21 United States Code) are carefully reviewed by United States Attorneys Offices. The Executive Office for United States Attorneys, representatives from selected United States Attorneys Offices, the DEA, and the Criminal Division of the Department of Justice meet to discuss issues relating to internet pharmacies and the unlawful diversion of controlled substances.

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QUESTIONS FROM SENATOR KOHL

Kohl 186 On January 31, 2008, The New York Times reported that Eli Lilly was in discussions with the Department of Justice about settling a civil and criminal investigation into the company's off-label promotion of Zyprexa. Did the Department of Justice learn any new information about Eli Lilly's off-label marketing efforts and knowledge about harmful side-effects from the documents leaked by the New York Times in 2006?

ANSWER: Yes, Department of Justice lawyers did learn new information from those articles.

Kohl 187 Given the secret settlements and the grand jury investigation into Eli Lilly's practices related to Zyprexa, do you think that protective orders and sealed settlements have the potential to prevent the DOJ or other law enforcement agencies from learning about public health or safety dangers or from pursuing criminal or civil investigations based on corporate actions that impact public health or safety?

ANSWER: If a target of a DOJ criminal investigation were to invoke a protective order or sealed settlement from a private court action to prevent the government from learning facts about public health or safety issues, the Department could move the court that had entered such an order to permit the Department to have access to the needed information.

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QUESTIONS FROM SENATOR FEINGOLD

Feingold 214 As a condition of transferring sovereignty to Iraq, the United States insisted upon immunity for its contractors under Iraqi law. There are reports that the United States is negotiating to extend this immunity through a bilateral agreement. If we have been unable to hold contractors accountable under domestic law for the misuse of force against civilians, how can it possibly be appropriate to seek immunity for these contractors under Iraqi law, especially when many of the contractors are third country nationals?

ANSWER: The Department supports legislative efforts to hold U.S. contractors accountable for serious misconduct they may commit abroad, and we will continue to work with the Congress to that end. With regard to any negotiations the United States is pursuing with the government of Iraq concerning immunity for U.S. contractors, we would respectfully refer you to the State Department.

Feingold 221 Earlier this year, the Justice Department publicly issued draft regulations to implement Section 507 of the Patriot Act reauthorization legislation, Public Law 109-177. A provision of that legislation gave the Attorney General, rather than the Courts of Appeals, the authority to allow states that prove they provide competent counsel in post-conviction proceedings to "opt in" to the procedural rules in Chapter 154 of Title 28, which favor the government and disadvantage the inmate who has filed the habeas petition. Serious concerns have been raised about DOJ's proposed implementing regulations by a number of entities. The Judicial Conference has asked DOJ to reconsider the regulations, stating that the regulations provide "no guidance about the criteria to be considered by the decision maker" in assessing whether a state has provided competent counsel. The American Bar Association has said that the proposed rule "is deeply and fundamentally flawed." During your confirmation process, I asked if you would personally review these regulations and the serious criticisms leveled against them. Have you reviewed the critical comments that were filed in opposition to the proposed regulations, including those of the Judicial Conference and the ABA?

ANSWER: The Department of Justice has carefully considered all public comments received on the proposed rule and will make any changes in the final rule that are warranted on the basis of the comments.

Feingold 222 In light of the voluminous criticisms, is the Justice Department considering changes to these proposed regulations before making them final?

ANSWER: Please see the response to Question 221.

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Feingold 223 Legal ethics experts have argued that the Attorney General should not be granted this function at all because it creates an inherent conflict of interest for the nation's chief prosecutor to be adjudicating whether states can opt in to prosecutor-friendly procedural rules in habeas cases. Do you see a conflict?

ANSWER: The Attorney General is required by law to carry out the chapter 154 certification function, and has no legal discretion to refuse to do so, regardless of whether some would see a conflict of interest in the discharge of these functions. *See* 28 U.S.C. 2265(a) ("If requested by an appropriate State official, the Attorney General of the United States shall determine" whether the requirements for chapter 154 certification are satisfied); *id.* § 2265(b) ("The Attorney General shall promulgate regulations to implement the certification procedure under subsection (a).") We do not believe that there is an inherent conflict of interest for the Attorney General in carrying out the certification function under chapter 154 that he is by law required to discharge.

The functions required of the Attorney General under chapter 154 do not involve assessment of the performance of defense counsel in particular cases, nor do they involve policymaking by the Attorney General concerning the capital counsel requirements states must satisfy for chapter 154 certification. Rather, the Attorney General's role is limited to determining whether states have adopted capital counsel mechanisms that satisfy requirements that are expressly set forth in chapter 154 itself. *See* 28 U.S.C. 2265(a)(3)("There are no requirements for certification or for application of this chapter other than those expressly stated in this chapter.")

Feingold 230 The New York Times recently reported that a federal grand jury has issued a subpoena to New York Times reporter James Risen. According to Mr. Risen's lawyer, the subpoena seeks the identity of the confidential sources for a chapter of Mr. Risen's book on the Central Intelligence Agency, State of War, which was published more than two years ago. Did you personally authorize the issuance of this subpoena? If not, at what level within the Department was it authorized?

ANSWER: Because Federal Rule of Criminal Procedure 6(e) imposes a secrecy requirement on all pending Grand Jury investigations, we cannot answer any questions pertaining to a specific Grand Jury subpoena or specific Grand Jury proceedings. We can say, however, that the Department's internal Guidelines concerning media subpoenas, reprinted at 28 CFR 50.10, set out the specific factors to be considered before issuing a subpoena to a member of the media and require Attorney General approval before any such subpoena is issued.

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QUESTIONS FROM SENATOR SCHUMER

Schumer 250 The High Intensity Drug Trafficking Area Program, run through the Administration's Office of National Drug Control Policy, has played a critical role in nationwide successes in combating major drug trafficking organizations. In 2007, partly in response to both drug smuggling in from Canada and a drug pipeline moving north from New York City, four additional counties in upstate New York (Albany, Erie, Monroe, and Onondaga) were added to the New York/New Jersey HIDTA. It is my understanding that a minimum of $2 million within ONDCP is set aside each year for "new" counties to the HIDTA program. However, I understand that none of this money has made it to the New York/New Jersey HIDTA. This money could be critical for combating violent street gangs, improving the region's intelligence-sharing infrastructure, and slowing the flow of narcotics through the state's northern border with Canada. Can you please help to identify any reasons for why these new, critical counties have not gotten access to any funding available for new counties?

ANSWER: The Office of National Drug Control Policy (ONDCP) administers the HIDTA program, including the distribution of grant funding. While Department of Justice agencies such as the Drug Enforcement Administration and the Federal Bureau of Investigation play active roles in the High Intensity Drug Trafficking Area (HIDTA) program, the Department does not have a role in the distribution of grant funding to HIDTAs. Because ONDCP is not a part of the Department of Justice, we are unable to provide information responsive to your question and we would respectfully refer you to ONDCP.

Schumer 251 What commitments can you make to working with the rest of the Administration to ensure that additional funding is made available to the four counties?

ANSWER: Please see the response to Question 250.

Schumer 252 Since 1994, the National Instant Criminal Background Check system has prevented more that 1.4 million prohibited persons from purchasing firearms. On January 8, 2008, President Bush signed into law the "NICS Improvement Amendments Act of 2007," legislation that, if appropriately funded, will get states critical funding to improve their records regarding convictions, mental health history, and other disqualifying factors. What assurances can you provide that the Administration will seek full funding under the NICS Improvement Amendments Act of 2007?

ANSWER: The effectiveness of the National Instant Criminal Background Check System (NICS) in preventing gun transfers to prohibited persons depends on the

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availability to the system of automated information about which individuals are prohibited from receiving firearms. To promote the availability of automated information, the President's FY 2009 budget request seeks $200 million for the proposed Byrne Public Safety and Protection consolidated grant program for which state criminal record improvements and automation are a grant purpose area. Even before the proposing the grant consolidation for FY 2008, the Administration has a good record of seeking resources to improve state recordkeeping in the form of National Criminal History Improvement Program (NCHIP) funding.

Please see the chart that follows:

Year	NCHIP Funding Requested (Dollars in thousands)	NCHIP Funding Enacted (Dollars in thousands)
2001	70,000	34,923
2002	35,000	35,000
2003	60,000	39,740
2004	56,924	29,684
2005	56,186	24,666
2006	58,180	9,872
2007	39,180	9,872

Schumer 253 What commitments can you make to ensuring that funding for NICS is a Justice Department priority?

ANSWER: The Violent Crime and Anti-Terrorism Act of 2007, which the Administration transmitted to Congress, contains a provision that directs the Attorney General to develop standards for prompt provision of complete, accurate, and automated information and to prioritize applications for grants for improving the NICS pursuant to those standards that propose to address: (1) arrest dispositions, (2) disqualifying mental health adjudications, findings, or orders, (3) protection orders qualified for inclusion in the FBI's National Crime Information Center database, and (4) disqualifying misdemeanor convictions for domestic violence offenses. This directive would apply to the President's grant consolidation as described in the answer to 252 or any other discretionary grant program.

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QUESTIONS FROM SENATOR DURBIN

Durbin 254 I am deeply troubled by the fact that our country continues to serve as a safe haven for individuals who have been found to be responsible for horrific crimes by U.S. courts. For example, Colonel Nicolas Carranza, a former Salvadoran Vice Minister of Defense who was found liable by a federal jury in Memphis, Tennessee for the extrajudicial killing of Juan Francisco Calderon and Manuel Franco, lives freely in Memphis. Armando Fenández-Larios, a former officer in the Chilean Army and an operative in Pinochet's secret service, who was found liable for the extrajudicial killing of Winston Cabello by a federal jury in Miami, resides in the Miami area. He has not been criminally charged for the killing of Winston Cabello or extradited to Chile and/or Argentina for prosecution, despite requests from both countries. What steps has the Justice Department taken to review the presence of these individuals and others who have been held responsible by U.S. courts for acts of torture or extrajudicial killing to determine whether prosecution and/or removal would be appropriate?

ANSWER: Bringing human rights violators to justice is a mission of the very highest importance within the Department of Justice. We continue to utilize all avenues available against such perpetrators found in this country -- including criminal prosecution, denaturalization, extradition, removal, and assistance to foreign governments and to various international tribunals that are investigating and prosecuting these cases abroad. We are aware of the Carranza and Fernández-Larios matters, which have received considerable media coverage. However, we cannot comment on any specific investigative or law enforcement plans regarding individuals. Please be assured, however, that we continue to take these and other human rights allegations extremely seriously.

Durbin 255 The Justice Department has been strongly criticized in recent years for advancing policies that restrict voting rights for minority voters. Many of us hoped you would be a breath of fresh air at the Justice Department when it comes to protecting the voting rights of all Americans. But in December, just weeks after you were confirmed, the Justice Department filed an amicus brief with the Supreme Court that waged an aggressive defense of an Indiana photo ID law that has a discriminatory impact on minorities, the poor, and the elderly. The Indiana photo ID law is the most restrictive law of its kind in the nation. The Justice Department was under no obligation to file a brief in this case -- the United States is not a party in the case. The Justice Department could have stayed out of the case altogether, or it could have filed an amicus brief on the side of minority voters and in opposition to the Indiana law. It chose neither option. What role did you play in the decision to file an amicus brief on behalf of the discriminatory Indiana photo ID law? Did you personally review and approve the amicus brief that was filed?

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ANSWER: As stated in the Department's *amicus* brief, this case concerns a facial challenge to a state law that requires those who vote in person in federal elections to present a government-issued photo identification and, more generally, the appropriate constitutional standard for reviewing such a law. On April 28, 2008, the Supreme Court issued its decision rejecting petitioners' facial attack on the statute. As stated in Justice Stevens' opinion, the State's interest in protecting the integrity and reliability of the electoral process is sufficient to defeat the facial challenge.

Congress has enacted numerous requirements, including registration and identification requirements, designed to "increase the number of eligible citizens who register to vote" while simultaneously "protect[ing] the integrity of the electoral process." 42 U.S.C. 1973gg(b)(1), (3). In 2002, Congress enacted the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (42 U.S.C. 15301 *et seq.*), to establish and modernize various minimum election administration standards for federal elections. Among other things, HAVA requires voters to provide proof of identification before registering or casting their first ballot, see 42 U.S.C. 15483(a)(5)(A), (b)(2)(A), (3)(A). The Attorney General is responsible for enforcing those provisions, 42 U.S.C. 1973gg-9, 15511, and an amicus brief filed by certain Senators and Members of Congress specifically put the proper interpretation of HAVA and its effect on state laws before the Supreme Court. The Attorney General also has authority to prosecute voter fraud in federal elections. See, *e.g.*, 42 U.S.C. 1973i(c), (e), 1973gg-10. Voter fraud itself dilutes the right to vote. *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006). Legitimate efforts to detect or deter voter fraud therefore promote the right to vote.

Durbin 256 Did you agree with the decision to file this amicus brief?

ANSWER: The Department has a longstanding process in place for determining what position, if any, it will take in all cases pending before the Supreme Court. That process includes review by all interested components of the Department. That process was followed in this instance.

Durbin 257 What role, if any, did the White House play in the decision to file the amicus brief in this case?

ANSWER: Please see the response to Question 256.

Durbin 258 What position did the Civil Rights Division recommend be taken in the amicus brief in this case?

ANSWER: Please see the response to Question 256.

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Durbin 259 Were there any differences of opinion between the White House and Justice Department on what position should be taken in this case? If there were such differences, please explain what they were.

ANSWER: Please see the response to Question 256.

Durbin 265 In your written testimony you mentioned various steps that the Department is currently taking to address gang violence in numerous regions of the country. You discussed steps such as the expansion of the Comprehensive Anti-Gang Initiative to ten jurisdictions, and the focusing of GangTECC-coordinated resources in four regions of the country. Your testimony did not specifically mention steps that the Department is taking to address gang violence in the Chicago region, a region in which gang violence is a pressing concern. Please provide information on the Department's current efforts to address gang violence in the Chicago region.

ANSWER: In your question, you indicate that GangTECC has "coordinated resources in four regions of the country." This is inaccurate. GangTECC is a multi-agency center located in Washington, D.C., created by the Attorney General and designed to serve as a critical catalyst in a unified federal effort to help disrupt and dismantle the most significant and violent gangs in the United States.

The federal agents at GangTECC work in close collaboration with the prosecutors of the Criminal Division's Gang Squad. The Gang Squad is a core team of experienced anti-gang prosecutors who serve as the prosecutorial arm of the Department's efforts to achieve maximum national impact against the most significant regional, national and international violent gangs. DOJ's anti-gang efforts are complemented by the efforts of other agencies and Departments, in particular those of U.S. Immigration and Customs Enforcement at DHS. Operation Community Shield is a national law enforcement initiative that targets violent transnational gangs.

GangTECC's efforts are not focused in only four regions of the country, but nationwide, with particular attention paid to gangs with national and regional influence. GangTECC is focused on both the Latin Kings and the Gangster Disciples in the Chicago area.

The U.S. Attorney's Office for the Northern District of Illinois is actively involved in addressing gang violence in the Chicago region. The office is both aggressively prosecuting gangs and individual gang members, as well as participating in several restorative justice initiatives to address the underlying societal factors that allow gangs to exist.

Within the City of Chicago, the U.S. Attorney's office in partnership with ATF, has established Gang Strategy Teams to coordinate efforts of the Chicago Police Department, the Cook County State's Attorneys Office, and federal investigative

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agencies in the investigation and prosecution of street gangs. Several agencies participate through Project Safe Neighborhoods, such as the Illinois Department of Corrections and Cook County Probation. Outside the City of Chicago, the office has established relationships with local police departments that have high gang activity in their communities.

Most recently, the office funded seven separate initiatives focused on investigating and prosecuting gang members for various local departments using Anti Gang Initiative funding provided through Project Safe Neighborhoods (PSN). In addition, the office has aggressively pursued prosecutions against gang organizations. In FY 2005, 16 Organized Crime Drug Enforcement Task Force (OCDETF) gang investigations were initiated, resulting in 153 defendants being charged. In FY 2006, 18 OCDETF gang investigations were initiated, resulting in 96 defendants being charged. Many other gang investigations from FY2007 are pending investigation.

The U.S. Attorney's Office is also aggressively pursuing prosecution against individual gang members through PSN prosecutions. These prosecutions focus on the unlawful possession of guns by prohibited persons who are affiliated with gangs. These efforts are targeted in the Chicago neighborhoods with the highest incidences of violent crime. The office is expanding this initiative to other larger communities in the Chicago area, such as Joliet and Aurora.

Finally, the U.S. Attorney's Office participates in several Department programs that address the underlying societal factors that create an environment that allows gangs to thrive. First, the office is actively involved in two Weed and Seed sites within the city of Chicago (both are in PSN designated districts), and three other sites in the Northern District of Illinois. The Weed and Seed program uses Department funding to establish community-based solutions to crime problems, coupled with increased law enforcement efforts in those areas. Through PSN, the office sponsors parolee forums where recently released convicted felons are warned of the severe criminal consequences of being found in possession of a firearm. These convicts are provided with employment, counseling, and educational/vocational training opportunities. In FY 2007, through PSN, the office funded 12 community based social service programs that supported youth anti-violence and prisoner re-entry initiatives.

Finally, the office is engaged in the High Point restorative justice initiative funded through the Bureau of Justice Assistance, which focuses on young adult offenders engaged in gang-related criminal conduct. These youth are provided with employment and educational opportunities in lieu of criminal prosecution.

Durbin 266 Earlier this year, the President signed into law the NICS Improvement Amendments Act. This is legislation that Congress passed in response to last year's tragedy at Virginia Tech, where a mentally ill student bought several guns and used them to take the lives of 32 victims and wound 25 others. In the wake of Virginia Tech, Congress recognized that the NICS background check system was

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missing the names of many criminals, mentally ill persons, and others who are prohibited by law from buying guns. This new law directs the Attorney General to make grants to states to help them supply timely and accurate information about prohibited purchasers to the NICS system. In order to make sure the NICS system works, and in order to keep guns out of the hands of those like Cho Seung-Hui, the Virginia Tech shooter, it is essential that this new law be funded. Will the Administration commit to seek full funding for this law?

ANSWER: The effectiveness of the National Instant Criminal Background Check System (NICS) in preventing gun transfers to prohibited persons depends on the availability to the system of automated information about which individuals are prohibited from receiving firearms. To promote the availability of automated information, the President's FY 2009 budget request seeks $200 million the proposed the Byrne Public Safety and Protection consolidated grant program for which state criminal record improvements and automation are a grant purpose area.

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QUESTIONS FROM SENATOR GRASSLEY

Grassley 267 I continue to await responses to the following requests and ask that they be delivered forthwith: Questions for the record from FBI Director Robert Mueller III that were sent following the March 27, 2007, hearing titled, "Oversight of the Federal Bureau of Investigation." Specifically, responses to questions 64-83 regarding the Michael German Transcript which were said to be "provided separately" in responses date January 25, 2008. These responses were never "provided separately." It is my understanding these items have been sent for "clearance" and are awaiting final approval. I find it troubling these questions were not provided when they were said to be and I request an immediate response.

ANSWER: The Department's classified responses to the Questions for the Record referenced in your question were transmitted to the Committee on February 14, 2008.

Grassley 277 As part of your confirmation hearing, I penned a number of written questions to you about a Memorandum of Understanding (MOU) between the Attorney General, the Secretary of Treasury, and the Postmaster General regarding money laundering. This memorandum was signed in 1990, almost 20 years ago, and does not even include the Department of Homeland Security—the agency tasked with conducting many investigations into money laundering. In your responses, you stated there is no effort to update this MOU and that you were not familiar with interagency workings and could not pledge to coordinate an update to this MOU. Now that you are the Attorney General, and have three months experience, can you pledge to update this MOU so that our Nation's law enforcement agencies are working together under current authorities to investigate money laundering?

ANSWER: The basic premise of this MOU was that the Federal agency with historical jurisdiction over the "Specified Unlawful Activity" (SUA), that generated the proceeds of the money laundering offense, would have jurisdiction over the money laundering violations involving those proceeds. For example, DEA was given jurisdiction over all money laundering violations which involved the proceeds of narcotics violations. This basic premise of the MOU remains in place today, even though the MOU has not been updated to reflect the creation of DHS and the transfer of certain law enforcement functions to that agency.

While it may be advisable to update the MOU to reflect the changes that have taken place since 1990, there is no need to alter the underlying purpose and premise of the MOU, and there is no pressing need to renegotiate such a complex agreement merely to change the name of the parties involved when the Homeland Security Act's Saving Clause (section 1512, now codified at 6 U.S.C. § 552) clearly provides for DHS's interests in the agreement.

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Grassley 278 On January 25, 2008, the Department provided a series of in-depth responses to questions I asked about the False Claims Act. These responses indicated that the outstanding caseload of qui tam cases at the Department was approximately 1000 cases. I'd appreciate some further elaboration on those cases including responses to the following: Please provide, in dollars, a ballpark estimate of the total potential liability that these 1000 qui tam cases represent.

ANSWER: Since the Department's response of January 25, 2008, the Department has completed its investigation of many *qui tam* cases, but has also received and started investigating many newly filed *qui tam* cases. Accordingly, the current number of *qui tam* cases under investigation throughout the Civil Division and the U.S. Attorney's Offices is approximately 900.

Unfortunately, it is not possible to furnish a reliable estimate of the potential recovery in these cases. The cases are in all stages of investigation, and until an investigation is complete, it is difficult to assess the value of any given case. Many of the *qui tam* cases investigated by the Department are declined due to the absence of a viable claim. Even in cases where the Department determines that false claims have been submitted, its initial estimate of damages may be refined as additional evidence becomes available. As a result, it is not feasible for the Department to offer any ballpark estimate of damages.

Grassley 279 Of the 1,000 cases under seal, how many of those cases have been under seal for longer than 13 months?

ANSWER: Because courts will occasionally keep a case under seal even after we complete our investigation and inform the court whether we elect to intervene, our answers to this and the following questions encompass only those cases that are under seal pending the United States' decision on whether to intervene.

Of the approximately 900 cases currently under investigation, approximately 540 cases have been under investigation for more than 13 months—a period calculated beginning with the Civil Division's receipt of a qui tam case.

Grassley 280 Of the 1,000 cases under seal, how many of those cases have been under seal for longer than 24 months?

ANSWER: Of the approximately 900 cases currently under investigation, approximately 330 cases have been under investigation for more than 24 months.

Grassley 281 Are there any cases under seal that have been under seal for longer than 36 months?

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ANSWER: Of the approximately 900 cases currently under investigation, approximately 170 cases have been under investigation for more than 36 months.

Grassley 282 How many FCA cases under seal involve classified information or state secrets?

ANSWER: The Department's records do not track how many cases may involve classified information or state secrets.

Grassley 283 As you are aware, section 3733 of the FCA authorizes the Department to issue civil investigative demands (CIDs) when conducting a FCA investigation. The use of CIDs has been limited over the years because of statutory language prohibiting the Attorney General from delegating the authority to issue CIDs. As such, my legislation, S.2041, the False Claims Act Correction Act would remove this limitation and allow the Attorney General the authority to delegate CID issuance. In order to gain a better understanding of the Department's use of CIDs, please answer the following: In how many FCA cases did the Department issue CIDs during FY 2007? How many from September 2007 through today?

ANSWER: Since multiple CIDs can be requested in the same case, the total number of CIDs requested may be more meaningful than the total number of cases where CIDs were requested. During FY 2007, the Department issued twenty CIDs in four False Claims Act cases. From the beginning of FY 2008 through March 12, 2008, the Department issued eleven CIDs in two False Claims Act cases.

Grassley 284 In how many FCA cases during FY 2007 did line attorneys request the issuance of CIDs which were not authorized by the Attorney General? How many from September 2007 through today?

ANSWER: All CIDs requested by Department attorneys in FY 2007 and FY 2008 have been approved by the Attorney General.

Grassley 285 Does the Department view the CID as a necessary tool for investigating FCA cases? If not, why not?

ANSWER: CIDs are one of the necessary tools available to the Department for investigating False Claims Act cases. CIDs are the only means available to the Department's civil attorneys for compelling testimony and interrogatory answers during False Claims Act investigations. Moreover, CIDs provide an important supplement to the subpoena powers of agency Inspectors General for obtaining documents. However, as the Department explained in its views letter on S.2041. ("The False Claims Act Corrections Act of 2007"), and as Deputy Assistant Attorney General Michael F. Hertz

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reiterated during the February 27, 2008 hearing on that bill, the current CID provisions contain restrictions, including the cumbersome requirement that all CIDs be personally approved by the Attorney General. Thus, the Department has typically sought other means to acquire evidence where possible.

Grassley 286 The FBI's Office of Professional Responsibility (OPR) has had a reputation for having a double standard of discipline, one for supervisors and a harsher one for line agents. After a special report in 2004 by former Attorney General Griffin Bell and Former Associate Director Lee Colwell, the FBI implemented several reforms to address the criticisms. In attempting to do follow-up oversight, I have been denied information on many occasions with claims that there is a policy of not providing OPR files to Congress. For example, a former FBI agent named Cecilia Woods came to my office saying that she was retaliated against for reporting that her supervisor engaged in an inappropriate intimate relationship with a paid FBI informant. The FBI denied access to the documents from the OPR investigation of her supervisor, citing DOJ policy. After your confirmation hearing, last summer, I asked you whether you would continue the policy of withholding from Congress all OPR documents, and if so, what is the legal basis for saying that this entire category of information is off-limits to Congress. In your written response, which we did not receive until last Friday, you said you were not yet familiar with the policy or its legal basis. Now that you have been on the job for a while, can you please explain whether you believe Congress should be prohibited from seeing final reports or other documents from OPR? If so, on what legal grounds?

ANSWER: Consistent with longstanding Executive Branch policy, the Department's goal in all cases is to satisfy legitimate oversight interests while protecting significant Executive Branch confidentiality interests. As a general matter, the disclosure of OPR investigative files implicates significant individual privacy interests because these files discuss allegations against individuals under investigation. The Department has consistently offered to accommodate Congressional requests for information about OPR investigations through briefings, minimizing the intrusion on the privacy of Executive Branch employees.

Grassley 287 How can Congress do its Constitutional duty to conduct oversight if the Executive Branch will not open up its files so that we can get to the bottom of allegations brought to us by whistleblowers?

ANSWER: Please see the response to Question 286.

Grassley 288 The Department of Justice is the lead agency for terrorist financing investigations and must address the challenges posed by alternative financing mechanisms which continue to be exploited by both terrorist and criminal

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organizations. What specific procedures have been established by the Department of Justice to educate and train law enforcement officials about the various alternative financing methods being used by criminal and terrorist organizations?

ANSWER: The FBI is by law the lead agency for terrorism investigations, including terrorist financing investigations. The Bureau and the Department use a variety of programs and vehicles to share such information among ourselves and with other law enforcement agencies and international partners.

The FBI's Counterterrorism Division (CTD) provides terrorist financing information and training for law enforcement officials and support personnel, including intelligence and financial analysts, primarily through the Terrorist Financing Coordinator (TFC) Program. Every FBI Field Division designates a TFC, who functions as the primary liaison between CTD's Terrorist Financing Operations Section (TFOS) and the law enforcement officials and support personnel conducting field investigations. TFOS is in regular communication with the TFCs to share information regarding current terrorist financing cases, events, and trends. TFOS has recently established a TFC team website where the TFCs can share information directly with each other and with TFOS, including information regarding new terrorist financing methods they are encountering in local investigations. TFOS provides training for the TFCs at annual TFC conferences and TFCs are introduced to the full scope of the terrorist finance related work done in the FBI during visits to FBI Headquarters.

TFCs are encouraged to provide training for local law enforcement partners regarding terrorist financing trends and methods, including alternative financing methods, and to submit requests to TFOS to provide speakers for regional training events for local and state police. TFOS sends an agent and analyst team to 10 to 15 field office Joint Terrorism Task Forces (JTTFs) each year, providing training regarding terrorist financing trends and methods, investigative tools useful against these trends, alternative finance mechanisms, and case reviews. This training targets multiple agencies because JTTFs include state and local police departments and often also include the Drug Enforcement Administration, Immigration and Customs Enforcement (ICE), U.S. Secret Service, Customs and Border Patrol, and Internal Revenue Service (IRS), among others. The intelligence products developed by TFOS Intelligence Analysts regarding the various financing methods being used by terrorist groups and cells are distributed to law enforcement officials and analysts throughout the FBI and the broader intelligence community in a variety of formats.

Field offices are encouraged to respond to requests for training from their local partners, and the FBI also provides training for regional and state-level law enforcement organizations and other agencies, such as the State Department Foreign Service Institute and Naval Criminal Investigative Service (NCIS), upon request. The FBI regularly participates in training conducted by other government agencies such as the Federal Deposit Insurance Corporation, the Federal Financial Institutions Examination Council, the Office of the Comptroller of the Currency, and the IRS Criminal Investigative Division.

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Additionally, like the FBI, the Justice Department conducts national security training for federal prosecutors, mostly at the National Advocacy Center in Columbia, South Carolina, about the latest terrorism trends, including terrorism financing. For example, the Justice Department conducted training for prosecutors on investigating non-governmental organizations for terrorist financing as well as a program on obtaining international evidence in terrorism matters that included discussion on obtaining financial information. While these programs are mainly for training federal prosecutors (AUSAs and Main Justice litigators), certain conferences provide team training for AUSAs, JTTF members, and FBI agents. One of the most recent team training programs focused on Hizballah investigations, many of which center on fundraising and material support allegations.

Moreover, Justice Department representatives have participated in and taught at various meetings and conferences within the United States and overseas attended by prosecutors and law enforcement personnel involving these same terrorist financing issues. For example, the criminal prosecutors in the National Security Division's Counterterrorism Section have regularly scheduled and frequent meetings with the FBI's International Terrorist Operations Sections and with its Terrorist Financing Operations Section to ensure, *inter alia*, that all parties are current with the latest trends and developments in alternative terrorist financing methods. The Department's Criminal Division includes among its training offerings for foreign nations, presentations that address terrorist financing typologies, including various alternative financing methods.

Information on such methods is also regularly shared by DOJ components with other federal law enforcement and intelligence gathering officials who, along with DOJ components, sit as co-members of the interagency groups that manage U.S. participation in the multilateral international organizations that concern themselves with terrorist financing. Such multilateral international groups include the US delegations to the Financial Action Task Force, the Organization of American States' Counterterrorism Committee and the G8 Lyon Roma Group.

In addition, the Justice Department's National Security Division's Counterterrorism Section has regional coordinators that stay in close contact with the coordinators of the Antiterrorism Advisory Councils (ATACs), federal-state-local law enforcement collectives located in each federal judicial district and managed by our U.S. Attorneys. These ATACs facilitate the Justice Department's dissemination of information and intelligence on specific cases and new threats and trends in terrorism financing to state and local law enforcement. Additionally, when classification permits, we share information on alternative financing mechanisms with the non-Justice Department ATAC members.

Outside of the counterterrorism context, the FBI's Criminal Investigative Division is responsible for overseeing and coordinating the FBI's criminal money laundering program, conducting money laundering and other financial crime related training, including training regarding alternative financing mechanisms, throughout the United

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States for both law enforcement and task force personnel. This training is made available to state and local officers where appropriate, and the FBI has worked closely with DOJ's Asset Forfeiture and Money Laundering Section to educate and inform federal, state, and local law enforcement regarding the processes, procedures, terms, and methodologies of alternative financing and remittance mechanisms.

Grassley 289 What procedures have been instituted by the Department of Justice to share this information with other departments and agencies that may encounter alternative financing mechanisms in their investigations? If none currently exist, are procedures being developed?

ANSWER: The FBI's TFOS participates in a variety of working groups and interagency initiatives that facilitate the sharing of information regarding various aspects of terrorist financing, including alternative financing mechanisms. These groups include the National Security Council-led Sub-Counterterrorism Security Group (Sub-CSG) on Terrorist Financing and a variety of Department of Defense-led working groups with multiple agency participation including Joint Interagency Task Forces (East and West), the Joint Intelligence Task Force for Counterterrorism, and the threat finance coordination mechanism for the Army's Central Command. These interagency initiatives, which include initiatives with Financial Crimes Enforcement Network (a Department of Treasury entity) (FinCEN), ICE, and other agencies, are generally sensitive in nature. Further, the FBI and the Department routinely share information about typologies and methodologies in the context of interagency preparation for meetings with various multilateral terrorist financing and anti-money laundering organizations, such as the Financial Action Task Force and the Organization of American States' Counterterrorism Committee.

The FBI also participates with other agencies in personnel exchange programs to facilitate case coordination and information exchange. Currently, FBI counterterrorism personnel are detailed to ICE, the Central Intelligence Agency (CIA), and the National Security Agency, and employees of the Treasury Department, CIA, ICE, and NCIS are detailed to the FBI's CTD.

Beyond the counterterrorism context, the FBI works closely with DOJ's Asset Forfeiture and Money Laundering Section and has a representative at FinCEN headquarters who serves as a liaison between the FBI and FinCEN and is in a position to learn about new investigative issues concerning alternative financing mechanisms. The FBI produces both Intelligence Information Reports and broad, strategic-level analyses based on Suspicious Activity Report (SAR) filings that identify criminal enterprises and businesses involved in the suspicious movement of funds. This information is disseminated externally to the intelligence community and to other Federal, state, and local law enforcement agencies through LEO and Intelink.

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Grassley 290 The Department of Justice will likely play a significant, long-term role in providing training and technical assistance to Mexico through the Merida Initiative. In fact, I have heard that to be successful, this project must extend far beyond the three year time frame established by the State Department. What is the Justice Department's long-term strategy and timeline for implementing its provisions of the Merida Initiative?

ANSWER: The Department has been working closely with Mexico for decades to address our mutual concerns over the drug trafficking and other criminal activity that threaten each of our nations. The Merida Initiative (Merida) is a multi-year proposal for foreign assistance funding for equipment and training to confront the criminal organizations that threaten security in Mexico and Central America and that have transnational ramifications. The Merida Initiative will increase and accelerate our collaborative efforts, and illustrates our commitment to become partners with these governments and support the will they have recently demonstrated in attacking the criminal organizations that are no longer local problems but threats to the rule of law and national security throughout our shared hemisphere.

We will ask for continued Merida-level funding if appropriate. In any case, we expect that our common fight to stem the flow of narcotics into the United States and emasculate the cartels that gain profit and power from that trade will continue until we win.

Grassley 292 What additional resources do you believe are necessary to ensure that the Department of Justice adequately executes its provisions of the Merida Initiative?

ANSWER: U.S. law enforcement deploys a variety of programs to fight crime in Mexico and along our common border, many of which are consolidated in our National Southwest Border Counter Narcotics Strategy. The Department has not yet determined whether additional resources, beyond those requested in the President's 2009 Budget will be necessary in future years.

Grassley 294 In 1990, I sponsored legislation known as the Antiterrorism Act of 1990. This legislation created a civil remedy for any individual, their estate, survivors or heirs, who were injured or killed by an act of terrorism, to sue those who committed the act or sponsored the terrorist act. I prepared this important legislation to empower victims of terrorism to take the fight back to the terrorists and hit them where it counts, in their pocket books and bank accounts. It helps victims seek justice by become an active participant in recovering funds from those who seek to harm Americans at home, or abroad. I am happy to report that some victims have successfully utilized this statute to win awards against terrorists and sponsors of terrorism. Just as I intended, these courageous victims are taking the fight back to the terrorists through American courts and are winning.This

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legislation is a vital tool in the war on terror and just as in 1990, while money will never bring back a loved one, it can help to prevent terrorists from committing other violent acts against Americans. However, I am concerned that as judgments against sponsors of terrorism pile up, there may be political efforts to have our government intervene and unduly influence the decisions of the courts or hamper enforcement of court judgments. Attorney General Mukasey, do you appreciate my comments on the purpose and history of the Antiterrorism Act of 1990?

ANSWER: The Department also believes that that Antiterrorism Act of 1990 is an important statute. The Department of Justice has authority, pursuant to 28 U.S.C. § 517, to attend to the interests of the United States in any pending suit, and we use that authority to protect the interests and obligations of the United States, including those related to international law and foreign relations.

Grassley 295 Will you pledge to support this law?

ANSWER: The Department supports the properly enacted statutes of the United States, including the Antiterrorism Act.

Grassley 296 Will you ensure that the Department acts in accordance with the original intent of the Antiterrorism Act?

ANSWER: The Department applies and interprets the Antiterrorism Act and other statutes in accordance with appropriate canons of statutory construction. These include looking to court decisions as well as to Congress' evident purpose in passing the Act.

Grassley 297 Will you pledge to support victims of terrorism who bring forth good faith claims and win judgments against terrorists and state sponsors of terrorism?

ANSWER: The Department supports victims of terrorism. The question of whether a specific plaintiff or judgment creditor is entitled to relief sought in the courts depends on the particular facts at hand.

Grassley 299 How will the Justice Department meet these audit requirements under the bankruptcy law?

ANSWER: As noted above, the Department has submitted an Operating Plan for FY 2008 to the Appropriations Committees of the Senate and the House of Representatives that, if approved, will allow for the reinstatement of a more limited number of debtor audits using prior year unobligated balances.

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Grassley 300 Pub. L. No. 109-8 requires the U.S. Trustee Program to file motions for Chapter 7 debtors who meet the presumption of abuse under 11 U.S.C. 707(b). How many 707(b) motions were brought in 2007? What was the outcome of these motions?

ANSWER: In fiscal year 2007, the USTP filed 3,370 motions to convert or dismiss under section 707(b)(2) of the Bankruptcy Code based on a presumption of abuse. Of the 2,833 motions disposed of in fiscal year 2007, the outcomes were as follows: 1,099 cases were voluntarily converted to chapter 13; 417 cases were voluntarily dismissed; 391 cases were dismissed after court hearing; 69 motions were denied by the court; and 857 motions were withdrawn by the United States Trustees, typically as a result of debtors providing additional information that demonstrated special circumstances.

It is important to note that even if a case is determined not to be "presumed abusive" under the means test calculation, the reform law does not preclude the USTP from taking action when it finds the case to be abusive under a "totality of the circumstances" or bad faith analysis. Accordingly, the USTP filed 1,411 motions to convert or dismiss in fiscal year 2007 under section 707(b)(3) of the Bankruptcy Code. Of the 1,143 motions disposed of in fiscal year 2007, the outcomes were as follows: 355 cases were voluntarily converted to chapter 13; 113 cases were voluntarily dismissed; 244 cases were dismissed after court hearing; 39 motions were denied by the court; and 392 motions were withdrawn by the United States Trustee.

NOTE: The USTP's data collection systems are specific to the date of action (e.g., filing or disposition of a motion); therefore, the number of cases disposed of in one fiscal year, for example, may relate to motions filed in a previous fiscal year.

Grassley 301 How many times has the Justice Department declined to file these motions in 2007?

ANSWER: Approximately 10 percent of all chapter 7 debtors are above their state's median family income and, of those, about 10 percent are presumed abusive under the means test formula. The USTP declines to file motions to dismiss in more than 30 percent of all presumed abuse cases that do not voluntarily convert or dismiss. This means that the USTP exercises its discretion under the new law and does not file an enforcement action based solely upon the mathematical means test formula without consideration of other factors. During FY 2007, 4,308 cases were presumed abusive, and the USTP declined to file motions in 1,441 cases. Despite the high rate of declinations, the USTP files motions to dismiss for abuse at about three times the rate it did prior to the reform law (about one motion per 98 chapter 7 cases versus one per 274 cases before enactment of the new law).

Grassley 302 Why has the Justice Department declined to file these motions?

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ANSWER: The USTP has judiciously implemented the new law and has utilized the means test as a useful tool for identifying abuse. Based on an analysis of the specific facts and circumstances of a case, United States Trustees may exercise the discretion given to them by the Congress to decline to prosecute cases that are not appropriate for dismissal even though the presumption of abuse has arisen. Under 11 U.S.C. § 707(b)(2)(B), debtors have an opportunity to rebut the presumption of abuse by demonstrating "special circumstances." There are three "special circumstances" that account for about 75 percent of the USTP's declinations: loss of job or income (not due to health); medical reasons; or a one-time income event which artificially inflated monthly income prior to filing.

Grassley 303 What efforts will you personally undertake to make sure that this mandate of the bankruptcy law is fulfilled?

ANSWER: The United States Trustee Program has assembled a substantial record of accomplishment since enactment of the BAPCPA. The Department will continue to support the efforts of the USTP and work cooperatively with all components of the bankruptcy system to satisfy its obligations to implement the law with fairness, efficiency, and effectiveness for the benefit of all stakeholders. Through the appropriations process, we will continue efforts to ensure a sufficient level of funding for the USTP to carry out the mandates of the BAPCPA.

Grassley 305 Was her alien file ("A-file") reviewed at the time? If not, why not?

ANSWER: As indicated in the above response, in accordance with procedures then in place, Nada Prouty's alien file was not reviewed at the time. Procedures for the corroboration of naturalization information provided in employment applications called for the FBI to accomplish this through contact with the former INS, whose mission included the creation, management, and retention of alien files. The FBI has since revised its procedures to include a review of the alien file.

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QUESTIONS FROM SENATOR BROWNBACK

Brownback 325 On December 4, 2007, the House considered on suspension and passed a proposed reauthorization of the Trafficking Victims Protection Act, H.R. 3887. H.R. 3887 has now been referred to this Committee. The Administration has indicated its strong support for reauthorizing this vital anti-trafficking law. However, the Department of Justice has issued a views letter opposing certain provisions contained in the House bill, particularly those that would eliminate the requirement that prosecutors demonstrate that trafficking victims engaged in prostitution due to force, fraud, or coercion. Under the House bill, any person who "persuades, induces, or entices" another person to engage in illegal prostitution would be guilty of sex trafficking. We all recognize that prostitutes may be extremely reluctant to testify against their pimps, even where their pimps actually do use force, fraud, or coercion to lure them into or keep them in prostitution. Advocates for the House bill's expanded trafficking definition have argued that removing the need to prove force, fraud, or coercion will lift a great weight off the backs of prosecutors and allow them to charge all pimps with "per se" sex trafficking crimes. Would eliminating the force, fraud, or coercion requirement allow DOJ to conduct "per se" pimping or trafficking prosecutions?

ANSWER: It is a misconception and a misnomer to refer to "per se" pimping crimes. All crimes have elements that must be proven beyond a reasonable doubt, as is required under our criminal justice system, and the proposed legislation is no exception. The proposed legislation would require proof beyond a reasonable doubt that a defendant persuaded, induced, or enticed a person into prostitution. Based on our prosecutorial experience under statutes criminalizing similar conduct, such as the Mann Act and the current sex trafficking statute as it applies to minors, this element of proof will generally require testimony of victims and witnesses; absent such testimony, the relevant acts of the defendant, and relevant knowledge and intent, often cannot be proven beyond a reasonable doubt. The victim's testimony is generally essential to proving the defendant's involvement in transporting or recruiting the victim for prostitution purposes, as there are generally few other sources of evidence to establish the defendant's conduct, knowledge, and intent beyond a reasonable doubt.

Since the basic challenges to securing any victim testimony must still be overcome to establish the elements of any pimping crime, removing the force, fraud, or coercion requirement will not enable the Department to increase the number of prosecutions. The force, fraud, or coercion requirement is not an obstacle preventing the highly successful prosecution of trafficking crimes. The Department has consistently prosecuted force, fraud, or coercion crimes with great success, and where force, fraud, or coercion cannot be proven beyond a reasonable doubt, the Department has successfully prosecuted Mann Act charges and other federal crimes.

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Brownback 326 The Mann Act, for example, does not require evidence of force, fraud, or coercion. It simply makes it a crime to transport an individual in interstate or foreign commerce for prostitution. Is DOJ generally able to prosecute Mann Act cases without testimony from the victim? What sort of testimony is required?

ANSWER: Although prosecution of Mann Act cases generally requires victim testimony, each case is individually assessed to determine whether there is sufficient evidence to establish each element of the offense beyond a reasonable doubt even without the victim's testimony. However, the best source of evidence that an individual was transported across state lines is often the individual herself. In cases where the person was transported by car or where the transportation costs were paid in cash, it can be difficult to obtain extrinsic evidence that there was movement across state lines, and the victim's testimony is often crucial to establish that she was being transported for the purpose of engaging in prostitution.

There are also several reasons why a victim would be called to testify even in cases where all the elements of the offense can be proven without her testimony. As a strategic matter, having the victim testify puts a face on the crime, focusing the jury on the very real consequences of the defendant's actions. Testifying can also be cathartic and therapeutic for the victim, allowing her an opportunity to tell her side of the story. Many victims and witnesses have described the process of testifying as an empowering one, which results in holding the defendant accountable for the entirety of his conduct and vindicating the full scope of the wrongs the victim has suffered.

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QUESTIONS FROM SENATOR COBURN

Coburn 327 Last week, DOJ's Inspector General Glenn Fine testified before the Judiciary Committee. He sharply criticized the Department of Justice's (DOJ) Office of Justice Programs (OJP), which exists to manage DOJ's extensive grant programs. Specifically, he stated that OJP has "a spotty record of monitoring the approximately $2-$3 billion of grants it awards each year." He added that problems at OJP "raise questions about how effectively taxpayer grant funds are being spent." He also criticized OJP for not staffing the new Office of Audit, Assessment and Management (OAAM), which is intended to enhance internal oversight. What will you do to ensure OJP's problems are resolved – or at least improved – during the remainder of your tenure at DOJ?

ANSWER: Ensuring that the Department properly monitors the grants programs it administers is necessary for effective stewardship of public funds. The Department has made strides in this area, conducting on-site monitoring reviews of over 20% of open grant awards in FY 2007. Additionally, as of June 2008, 16 of the 26 positions allocated to OAAM have been filled, 8 more are in final selection or clearance, and two more are posted. During the remainder of the Attorney General's tenure, he will continue to emphasize the importance of effective monitoring and internal oversight.

Many significant improvements in regard to oversight of OJP's grants are explained in detail below.

Coburn 328 Given that there are several divisions (e.g. NIJ, OIG, grant managers) that perform some aspects of oversight for grant programs, is OAAM's oversight duplicative of the oversight functions already existing in DOJ through these other divisions?

ANSWER: OAAM's oversight role is unique to those functions exercised by grant management staff and the National Institute of Justice (NIJ). OAAM is comprised of three divisions, the Audit and Review Division, the Program Assessment Division, and the Grant Management Division. Each Division plays a unique but coordinated role that enhances the ability of the agency to effectively administer its grant programs. These Divisions coordinate with one another to maximize effectiveness and work extensively with bureaus and offices to comprehensively improve internal operations and external oversight capabilities.

The Audit and Review Division (ARD) is comprised of two branches — the Audit Coordination Branch and the Process Review Branch. The Audit Coordination Branch manages all activity related to audits of OJP operations and OJP grants and manages the process for grantees designated as high-risk. The Process Review Branch within ARD and conducts internal reviews of OJP processes and makes recommendations to enhance and strengthen internal controls as required by Office of

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Management and Budget Circular A-123, Management's Responsibility for Internal Control. Through this function, ARD works closely with OJP offices to improve financial and information technology practices to maintain a strong internal control structure.

The Program Assessment Division (PAD) is responsible for coordinating the monitoring efforts of OJP offices and COPS grant monitoring staff. This oversight includes a quarterly review to ensure that offices attain a monitoring level of at least 10 percent of open award funding annually as well as review of the quality of monitoring conducted. PAD works with offices to address monitoring deficiencies where identified.

In addition to its monitoring oversight, PAD conducts programmatic assessments of grant programs and initiatives. These assessments are comprised of grant compliance and performance reviews to identify programmatic and policy successes, as well as to identify areas that require improvement or would benefit from strengthened oversight. Assessments encompass a review of individual grants to ensure core requirements are being met. It also includes a review of grant performance information, such as progress reports and performance measures that, when aggregated, provide a grant program-level picture of short-term performance in real time and can be used to affect critical policy and budget decisions. While PAD works in close collaboration with NIJ to share information and coordinate activities, PAD's function is different from that of NIJ's Office of Research and Evaluation, whose mission is to develop, conduct, and direct research and long-term outcome evaluations of criminal justice activities across a wide variety of topic areas.

The Grants Management Division (GMD) creates and maintains tools, policies, and practices to support OJP grant managers in managing their grants effectively. This includes the maintenance of the Grant Manager's Manual, a reference document that governs grant management requirements across OJP throughout the grant management lifecycle. GMD also trains staff on these requirements, providing opportunities for grant managers to enhance their core oversight skills. The GMD also supports OJP's efforts to streamline and standardize grant management policies and procedures across the agency by coordinating the design and enhancement of OJP's Grant Management System, an end-to-end Web-based grant management system.

While the OIG is responsible for identifying and reporting on waste, fraud, and abuse, OAAM is uniquely positioned to enhance the oversight of grant programs from all aspects of grant management by creating internal policies and procedures, making recommendations for improvement of management practices, and providing assistance to ensure improvements are implemented in an appropriate and timely manner.

Coburn 329 If OAAM does not perform duplicative oversight functions, how does it compliment the already existing oversight functions within OJP?

ANSWER: Please see response to question 328.

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Coburn 330 Are grant managers accountable for their performance regarding grants they manage? Do they have enough training to address problematic issues reflected in the semi-annual OIG reports evaluating OJP performance?

ANSWER: Grant managers are held accountable for their performance. In FY 2007, OAAM drafted a model Grant Manager Performance Work Plan (PWP) for FY 2008. The PWP addresses all critical elements outlined in the Grant Managers Manual and establishes specific, measurable, achievement-based criteria for effective grants management, against which performance of OJP grant management staff will be evaluated. The PWP is intended to increase accountability of OJP staff and improve team and organizational performance by creating a results-oriented work environment for those individuals responsible for oversight of federal grant dollars.

In FY 2007, OAAM, in coordination with OCIO, also developed management reports using the Enterprise Reporting Tool (ERT) to allow for greater transparency into OJP's grant management process. Reports now enable OJP management to track the processing times for applications, grant adjustment notices, progress reports, and closeouts. These reports enable management to remediate instances where grant managers have not processed their workload in a timely manner. These reports are also used to identify the types of modifications grantees are requesting which result in system enhancements. Reports outlining grantee drawdown amounts and the obligation amounts from the financial reports provide grant managers with information they can use to more effectively manage their grants.

OAAM maintains OJP's Grant Manager's Manual (GMM) which documents policies and procedures for the administration and management of all OJP grants and grant programs. Annually, OAAM publishes the GMM. In an effort to ensure GMM changes, new policies, and important themes are communicated and implemented, OAAM provides annual GMM training. In FY 2007, OAAM conducted OJP-wide GMM training for over 400 grant managers, staff accountants, and other OJP employees. OAAM is in the process of developing the FY 2008 training curriculum.

In FY 2007, OAAM further developed its commitment to developing grant management skills and capabilities by providing a two-day course on basic grant management principles and effective monitoring techniques, during which 30 new grant managers were trained. In addition, OAAM distributed a survey to OJP grant managers in an effort to capture grant manager training needs. OAAM used survey results to develop a Grants Management Training Program for FY 2008. The program has been designed to provide grants management staff with the knowledge, skills, tools, and resources needed to successfully perform job functions and meet professional development goals. One component of the training program is a new grant management course that provides a comprehensive foundation in grant management concepts and OJP-specific procedures. In addition to introducing the broad concepts of grant management, the program includes associated functional skills training and subject matter seminars. In February 2008, OAAM provided a one-day course on the use of

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grants, cooperative agreements and contracts, during which 18 grant managers were trained.

In 2007, in coordination with OCIO, OAAM implemented the first session of the GMS certificate training which was designed to give OJP staff the tools needed to be proficient in managing their workload in GMS. Weekly training sessions were held on each of the GMS modules, such as the Application Processing, Progress Reports, Grant Adjustment Notices, and Grant Monitoring modules. Users were provided with step-by-step directions to complete various tasks in GMS as well as an overview of DOJ/OJP grant management policies. In order to receive a certificate of completion, participants were required to attend each of the four sessions on GMS modules, as well as a GMS overview session. In FY 2007, 271 OJP staff participated in these weekly trainings and 24 grant managers completed the certification program. OAAM offered this series of classes again in January 2008.

Coburn 331 Has OJP taken the proper steps to correct deficiencies identified by past OIG reports? What are OJP's plans for correcting the more recent deficiencies noted by the January 2008 OIG report Review of the Office of Justice Programs' Paul Coverdell Forensic Science Improvement Grants Program?

ANSWER: OJP promptly takes steps to implement corrective actions in response to OIG recommendations. During FY 2007, the OIG issued five reports to OJP with recommendations, one of which was closed within eight months of issuance. OJP anticipates full closure of the remaining four reports by the end of FY 2008.

With respect to the January 2008 OIG report on the Review of the Office of Justice Programs' Paul Coverdell Forensic Science Improvement Grants Program, OJP and the OIG have reached agreement on the corrective action plan for two of the three recommendations and OJP is working with the OIG to resolve the remaining recommendation.

Coburn 332 If OJP cannot find solutions to the problems noted by OIG, is another layer of oversight needed to improve efficiency in monitoring the multiple grant programs administered by OJP?

ANSWER: No. Since its inception, OAAM has sought to improve its oversight capability by strengthening and standardizing its grant management processes, improving grant monitoring and grant performance management, and enhancing internal controls around information technology and financial management.

Specific to grant monitoring, in FY 2007 OAAM began an aggressive program to improve the monitoring efforts of OJP and COPS grant managers, beginning with the creation of an OJP/COPS-wide programmatic and fiscal monitoring plan, which included all planned on-site monitoring activity for the year. With this plan in place, OJP and

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COPS grant management staff have the ability to coordinate their programmatic monitoring efforts within and between bureaus and program offices, as well as with the OCFO and their financial monitors. With enhanced coordination, OJP and COPS staff have been able to ensure a more comprehensive, coordinated oversight effort.

Creating a monitoring plan has also allowed OAAM to review and report, on a quarterly basis, the level of monitoring completed, and to review monitoring documentation for completeness and quality. By placing a greater emphasis on grant monitoring, OJP and COPS were able to conduct on-site monitoring reviews of 1,026 grants in FY 2007, for a total of $1.9 billion monitored. This equates to over 20 percent of open grant award funds monitored.

In addition, through quality reviews, OAAM has identified opportunities to improve the quality of grant monitoring. The first was the need for a common monitoring format and site visit document submission. In response to this need, OAAM worked with representatives from OJP offices and COPS to develop a standard grant monitoring tool making it possible for OJP staff to monitor grants consistently and thoroughly across the agency by reviewing 28 common elements that address the administrative, financial, and programmatic elements of each grant. This tool was implemented beginning in FY 2008 and is expected to further enhance the quality of monitoring efforts.

In addition to the creation of this monitoring tool, OAAM created a better strategy for completing desk-based reviews of grants to identify those grants in need of more intensive, on-site monitoring. To meet this need, OAAM developed and implemented an OJP/COPS-wide grant assessment tool that uses 15 standard criteria to determine those grantees in need of assistance through on-site monitoring. In addition, each office is able to add additional, program-specific criteria that may be appropriate. The grant assessment tool was used to create the FY 2008 programmatic monitoring plan, and using this tool. OJP and COPS have assessed over 4,000 grants to date.

OAAM continues to work with OJP offices and COPS to enhance the quality of reviews. In FY 2008 this will include enhancements to the grant monitoring and grant assessment tools.

In addition to the monitoring program, OAAM has implemented a rigorous program assessment function in which individual grants are reviewed to create an aggregate, overarching picture of grantee compliance, and grant program success at large. Program assessment is used to identify the immediate benefits of OJP and COPS programs, as well as to identify areas for programmatic improvement, or increased oversight.

Coburn 333 In OIG's various semi-annual reports, each notes specific examples of grantees that are not complying with grant requirements, leading to millions of dollars in questioned costs charged to grants. Has OJP taken steps to make certain

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that grantees are actually held responsible for submitting required paperwork to receive grants, and ensuring each follows guidelines that clearly note what purposes are appropriate for using grant funds?

ANSWER: OJP has taken several recent steps within the Grants Management System (GMS) to ensure that grant recipients comply with the terms and conditions of their grants. OJP grantees use GMS to apply for funding, request modifications to their awards, submit the required programmatic and financial reports and the required documents needed to closeout out their grants. Since 2005, OJP has coded various business rules into the GMS. For example:

1. To ensure that grantees comply with financial requirements, GMS is configured to prohibit grantees from requesting a no-cost extension 30 days or less before the end date of the grant or after the end date of the grant. If the grantee can demonstrate undue burden and the request is approved from the Administrator of the Bureau or Program Office, a no-cost will be generated by internal staff.

2. To ensure that grantees submit required progress reports, in December 2006, OJP released an enhancement to the progress report module. With the release of this enhancement, grantee funds are automatically frozen when grantees are delinquent in submitting their progress reports. Grantee funds are also automatically frozen when they are delinquent in submitting the quarterly financial reports.

3. To streamline information to effectively and efficiently monitor grant expenditures, in October 2007, OJP integrated a module to allow quarterly financial status reports to be submitted online with GMS.

4. To improve the timeliness of closing out grants, in February 2008, OJP deployed enhancements to the grant closeout module. With the release of the enhancements to the closeout module, grantee funds are automatically frozen 91 days after the end date of the grant.

OJP is aggressive in ensuring that grantees address the issues identified by the OIG in grant audits conducted by the OIG and audits conducted in accordance with OMB Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations*. OJP's audit follow-up process with grantees ensures that issues identified by the OIG are timely resolved by either repaying unallowable grant expenditures, providing further support that substantiates the grantees' expenditures, or developing appropriate procedures to ensure future compliance. Between October 2007 and February 2008, OJP closed 66 reports, which included 166 recommendations and questioned costs totaling $9.5 million.

As part of the OJP's efforts to further improve oversight of grantees, in September 2007, OJP developed a high-risk order that outlines a streamlined process to more

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effectively and timely address issues with high-risk grantees to ensure appropriate use of OJP funds. Systemic issues noted with grantees during any aspect of OJP's administration of grants are resolved through this process.

See responses to questions 327, 328, and 332 above for information concerning OJP's enhanced monitoring efforts to oversee grantee compliance.

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U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 2, 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 Attorney General Michael B. Mukasey following his appearance before the Committee on January 30, 2008. The hearing concerned Department of Justice Oversight. This submission supplements our transmittal, dated June 27, 2008, and 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,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to Attorney General Michael B. Mukasey Senate Committee on the Judiciary DOJ Oversight Hearing on January 30, 2008 Part Two

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 1 At last week's oversight hearing, you would not agree with me that waterboarding an American citizen anywhere in world is torture and illegal. Under what circumstances or with what justifications would you consider waterboarding an American not torture and not illegal?

ANSWER: As the Attorney General stated during his appearance before the Committee, because waterboarding is not among the practices currently authorized for use in the CIA program, we do not believe that it would be appropriate to answer categorically questions concerning the legality of waterboarding absent a set of circumstances that call for those answers.

Leahy 2 We are engaged in a debate in the Senate about this Administration's proposal to grant retroactive immunity to telecommunications carriers who participated in secret warrant less surveillance efforts for more than 5 years in violation of the Foreign Intelligence Surveillance Act, presumably some of the same carriers that later disconnected wiretaps when the bills were not paid. What payments were made to telecom companies to compensate for their participation in surveillance efforts including that which came to know as the President's program and the Terrorist Surveillance Program?

ANSWER: The Senate and House Intelligence Committees have conducted extensive oversight of operational aspects of the National Security Agency activities described by the President in December 2005 and now commonly known as the Terrorist Surveillance Program. The Judiciary Committees of both Houses have also been provided with documents, held hearings, and have been briefed on this Program. The specifics of an arrangement between the Government and a telecommunication carrier to provide classified assistance with foreign intelligence surveillance efforts cannot be further discussed in an unclassified setting.

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Leahy 3 The Justice Department has now opened a formal investigation into the CIA's destruction of tapes showing the use of harsh interrogation techniques, including waterboarding. When that investigation has concluded, would you have any objection to the Department's Inspector General doing a subsequent investigation and reporting on the appropriateness of the tapes' destruction?

ANSWER: As you know, the Department has opened an investigation into the CIA's destruction of interrogation tapes. The Department's preliminary inquiry into this matter was conducted jointly with the CIA's Inspector General, because the inquiry concerned the acts of CIA personnel. Because the Department's criminal investigation is now ongoing and CIA's Office of Inspector General is supporting the criminal investigation, it would be premature to speculate as to whether any future Inspector General investigation, by the CIA or otherwise, would be appropriate.

Leahy 4 What were the Department's policies or legal views between 2002 and 2005 about the preservation or destruction of documentation or recordings of interrogations? Have you acted to change those policies since you learned of the destruction of the tapes?

ANSWER: The CIA's destruction of the tapes is currently the subject of an ongoing criminal investigation. As such, it would be premature to comment at this time on the Department's policies or legal views between 2002 and 2005 regarding the preservation or destruction of documentation or recordings of interrogations, or the role, if any, played by Department of Justice personnel in this matter.

Leahy 15 The Department's time-honored guidelines, set forth in the Department's "red book"—its guidebook on "Federal Prosecution of Election Offenses"—were revised under the outgoing, discredited leadership group to turn the traditional practice of not bringing last-minute investigations and actions on its head. The policies in the new "green book" provide great latitude for the Department to influence the outcomes of elections. We learned of this shift last year and were made aware of its dangers in investigating the actions of interim U.S. Attorney Bradley Schlozman, who replaced fired U.S. Attorney Todd Graves and brought election-eve indictments in a highly contested election in Missouri. What steps are you and the Department taking to make sure that there is no repeat of this type of conduct?

ANSWER: This question includes several components, which we address separately. As an initial matter, earlier this year, the Attorney General circulated a memorandum to all Department employees emphasizing the Department's existing policies with respect to political activities. The memorandum reiterated that "politics must play no role in the decisions of federal investigators or prosecutors regarding any investigations or criminal charges." The Attorney General has also reiterated this message personally on numerous occasions in his meetings with Department personnel.

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With respect to the question, there was nothing improper about the timing of the registration fraud indictments in Missouri. Evidence submitted to the Department reflected that the subjects had submitted numerous bogus voter registrations to a get-out-the vote organization. No voters needed to be interviewed; the Department's consultation procedures for such matters were followed; and the charges did not violate the Department's policy against interfering with an ongoing election. This policy focuses on the timing of investigations of alleged voter fraud—not the timing of filing charges that have already been investigated—and discourages overt criminal investigation during the period immediately prior to an election or on Election Day in order to avoid chilling lawful voting activity or interjecting a criminal investigation into an ongoing campaign.

Simply stated, the Department's 1995 election crime manual was revised because it was out of date. The main authors of the 2007 manual are two career prosecutors in the Criminal Division's Public Integrity Section. These senior prosecutors are the Department's experts on election crimes and collectively have over sixty years of experience in the investigation and prosecution of election fraud and campaign financing crimes. The updated draft went through several revisions by its authors. After review and approval by the Section and Criminal Division, the manual was forwarded to other Department components prior to publication. Its authors received no substantive suggestions from anyone outside the Criminal Division.

The 2007 manual incorporates the landmark changes enacted by Congress in the Bipartisan Campaign Reform Act of 2002 (BCRA), and especially the enhanced criminal penalties for campaign financing crimes included in these reforms. It also incorporates the Department's renewed commitment to addressing election fraud and campaign financing crimes that is exemplified by the Department's Ballot Access and Voting Integrity Initiative. The initiative was created in 2002 to increase the Department's efforts to protect voting rights and deter and prosecute election crimes, and recognizes that it does little good to protect a person's right to vote if that person's vote is subsequently diluted or eliminated by fraud.

As in other areas of criminal law enforcement, the effect of vigorous and impartial enforcement of the federal statutes criminalizing various types of election crimes is likely to extend beyond the defendants charged in specific cases and deter others who are considering similar conduct. While this deterrence is not capable of measurement, it remains an important societal and governmental goal. Congress also has recently recognized the importance of deterring crimes. *See* BCRA § 314(b)(1) (mandating a new sentencing guideline for campaign financing crimes that would reflect "the need for appropriate and aggressive law enforcement action to prevent such violations."). The 2007 manual also incorporates the Department's additional enforcement experiences prosecuting election crimes over the past decade, and recognizes that there are situations where prosecution of an individual act of election fraud or campaign fraud may be warranted. Rather than providing what is in essence a blanket immunity for an individual who commits a federal crime, this approach allows prosecutive decisions to be made on a case-by-case basis, as is the case in other areas of criminal law enforcement.

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Moreover, there has been no substantive change in the Department's policy regarding noninterference with elections. For over two decades, the Public Integrity Section and its Election Crimes Branch have counseled United States Attorneys' Offices against taking overt criminal investigative measures involving alleged election fraud, such as interviewing voters or issuing grand jury subpoenas for ballot documents, until the election in question has been concluded and its results certified. This policy reduces the risks of chilling legitimate voting, interfering with the administration of elections by the states, or transforming a criminal investigation into a campaign issue by appearing to legitimize unsubstantiated allegations. Rather than being "watered down" or weakened, the text was expanded in the updated manual to provide additional guidance and assistance as a result of the Department's ongoing criminal enforcement efforts in this area.

Election crimes strike at the heart of our democratic form of government and the Department is committed to the vigorous and impartial enforcement of the federal criminal statutes enacted by Congress to combat these serious crimes.

Leahy 19 One of the most disturbing features of the Justice Department in this Administration has been the complicity of the Department's supposedly independent and impartial Office of Legal Counsel in providing secret legal memoranda defining torture down to meaninglessness, excusing warrantless spying on Americans contrary to our laws and, more recently, justifying the absolute immunity of White House employees from Congressional subpoenas without reference to a single legal precedent. Jack Goldsmith, a conservative former head of the Office of Legal Counsel who found many of these opinions to be "deeply flawed and sloppily reasoned" rescinded several of the most extreme of them, only to see some reinstated in other forms after his departure. In response to questions from Senator Schumer at your confirmation hearing, you committed to this Committee that you would conduct a review of OLC opinions in several areas, including detention policies, interrogation policies, and policies relating to warrantless wiretapping. Have you conducted this review and in what areas? If not, why not?

ANSWER: As the Attorney General committed in his letter to the Committee, dated October 30, 2007, he has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to review Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

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Leahy 20 Have you determined that any OLC opinions are suspect? If so, what action have you taken?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Leahy 21 Congress cannot legislate in the dark. With this Committee, in particular, that means we must know how the Executive Branch interprets the law on critical national security issues. Yet this Administration has steadfastly refused to provide the Congress with key opinions from the Office of Legal Counsel on electronic surveillance and their interpretation of the laws on torture. Will you commit to providing this Committee, under appropriate security protections, the OLC legal opinions that we have been requesting for years and that we require in order to fulfill our constitutional responsibilities?

ANSWER: The Administration has made extraordinary accommodations in recent months to accommodate Congress's interest in these matters. Highly classified opinions concerning the Terrorist Surveillance Program have been made available to, among others, the Intelligence and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, the Intelligence Committees briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Since the Attorney General's testimony, the Administration has further accommodated congressional interest in this subject by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration has made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Leahy 22 I have been concerned with this Administration's attempt to use obscure and formerly rarely asserted legal doctrines to shroud their actions in a veil of secrecy. We have seen the White House make blanket assertions of executive privilege and novel assertions of immunity to interfere with Congressional oversight. We have also seen the vast expansion in the use of the state secrets privilege to deny litigants their day in court by the mere assertion that the disclosure of some evidence in the case might harm national security. Federal courts faced with these blanket assertions by the government have dealt with them in widely different ways, leading to disparate results such as protracted litigation in some cases and outright dismissal in others without the court ever reviewing any evidence whatsoever. What legal standard does the Department invoke when reviewing claims of executive privilege or when deciding whether to assert state secrets privilege in litigation?

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ANSWER: When deciding whether to advise the President that he may invoke executive privilege or whether it is appropriate to assert the state secrets privilege, the Department applies the longstanding principles and precedent that have guided the Executive Branch for decades. In the area of executive privilege, the President has invoked executive privilege or the immunity of his senior advisers only rarely, and those invocations have been consistent with longstanding precedent from Administrations of both parties, as explained in the Attorney General's February 29, 2008, letter to Speaker Pelosi, as well as the Department's July 24, 2007, letter to Chairman Conyers. Copies of both letters are attached.

With respect to the state secrets privilege, since September 11, 2001, there has been a marked increase in civil litigation brought by private parties challenging the actions of the Government in the field of national security. Such litigation may risk disclosing details regarding our signals intelligence capabilities and operations, our sources and methods of foreign intelligence gathering, and other important and sensitive activities that we are presently undertaking in our conflict. Accordingly, consistent with past practice, the United States has invoked the state secrets privilege to ensure that civil litigation does not undermine the national security by forcing the disclosure of highly sensitive information.

The state secrets privilege, which dates back to the 19th century and is rooted in the Constitution, *see United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Reynolds*, 345 U.S. 1, 7-10 (1953); *El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007), protects national security information from disclosure when "there is a reasonable danger that compulsion of the evidence will expose [state] matters which, in the interest of national security, should not be divulged." *Reynolds*, 345 U.S. at 10. The privilege is particularly important during times, such as the present, when our Nation is engaged in a conflict with an enemy that seeks to attack the homeland.

Leahy 23 It seems that the Administration's default position has become to adopt these privileges whenever its actions might face public scrutiny. What steps does the Department take to ensure that these privileges are asserted only when necessary?

ANSWER: With respect to executive privilege, over the past seven years, the Administration has sought to work with Congress to accommodate its legitimate oversight interests, and the President has asserted executive privilege with respect to only three matters and only as a last resort. The advice that the Department has provided to the White House on these matters has been consistent with this view, and with the longstanding practice by Administrations of both parties.

With respect to the state secrets privilege, the Government asserts the privilege to prevent harm to national security. In so doing, the Government follows a cautious and careful process to ensure that the privilege is not, in the words of the Supreme Court, "lightly invoked." *Reynolds*, 345 U.S. at 7. As set out by the Supreme Court, the privilege must be invoked by the United States only through a "formal claim of

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privilege," *id.* at 7-8, and such an invocation must come from "the head of the department which has control over the matter," after giving "actual personal consideration" to the matter. *Id.* Because the state secrets privilege is asserted in litigation, the Department of Justice also must agree that asserting the privilege is legally appropriate.

Even if the Executive Branch determines that the state secrets privilege is applicable, "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege." *Reynolds*, 345 U.S. at 8. As just one of many examples, the United States Court of Appeals for the Ninth Circuit recently noted that the Government's assertion of "the basis for the privilege is exceptionally well documented. Detailed statements [in the Government's classified filings] underscore that disclosure of information concerning the Sealed Document and the means, sources and methods of intelligence gathering in the context of this case would undermine the government's intelligence capabilities and compromise national security." *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007) (emphasis added).

Leahy 39 In November, I sent you a letter expressing my concerns that flawed bullet lead analysis done by the FBI for many years may have led to wrongful convictions. As you know, the National Academy of Sciences issued a report in 2005 discrediting bullet lead analysis, and the FBI stopped conducting bullet lead testing that same year. But over the last two years, the Justice Department has not taken steps to find or correct the cases where it was misused. As a former judge, I am sure you share my fear that this faulty forensic evidence may have been introduced in the estimated 2,500 cases where it was used. Two months ago, I asked you to provide the Judiciary Committee with the list of cases where FBI bullet lead analysis was used, and to advise the Committee what steps you've taken to correct any unjust convictions resulting from bullet lead analysis. When can I expect a response to my letter? Have you taken any action in response to my letter?

ANSWER: The Department provided a response to your letter on June 30, 2008.

Leahy 42 Because of strong objections from the administration and some Republicans, the OPEN Government Act did not include a provision expressly reversing the so-called "Ashcroft memo" – a misguided policy of your two predecessors to reverse the Clinton administration policy of a presumption of openness with regards to the disclosure of information under FOIA. Will you commit to review and consider overturning this policy?

ANSWER: The Attorney General will commit to review the "Ashcroft memo".

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QUESTIONS FROM SENATOR SPECTER

Specter 48 The McNulty Memo creates a lower standard and level of review for requests for client communications to the lawyer. The Memo provides lesser treatment to client communications to the lawyer by allowing prosecutors to weigh an organization's refusal to provide this information against the company as a negative factor in its charging decision. How do you justify giving client communications to the lawyer a lesser degree of protection than lawyer communication to the client?

ANSWER: The McNulty Memorandum does not create different standards or levels of review for lawyer-to-client communications and client-to-lawyer communications. First, under the Memorandum, prosecutors must undertake a rigorous internal analysis before they may request a corporate entity to waive its attorney-client privilege. Specifically, they must demonstrate the existence of a "legitimate need" for the potentially privileged information; they must explore alternate means of obtaining the potentially privileged information; and they must seek certain approvals from and consult with senior Department officials.

Critically, the McNulty Memo identifies two separate and distinct categories of potentially privileged information. "Category I" information includes copies of key factual documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct; organization charts created by company counsel; and factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel. Such information may or may not actually be privileged, depending upon the circumstances pursuant to which the company or its attorneys collected it. Although the United States Attorney has the authority to approve Category I waiver requests, prosecutors are required to consult with the Assistant Attorney General of the Department's Criminal Division prior to making such requests.

"Category II" information includes actual attorney-client privileged communications or non-factual (i.e., analytical) attorney work product, including legal advice provided to the corporation before, during and after the underlying alleged misconduct occurred. Included within this category, for example, are communications from corporate personnel to corporate counsel, made for the purpose of seeking legal advice regarding whether to pursue a planned course of conduct. Only the Deputy Attorney General has the authority to approve Category II waiver requests.

In short, the McNulty Memo calls for higher-level review for non-factual attorney-client communications. It does not distinguish between "lawyer-to-client" and "client-to-lawyer" communications.

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Specter 61 In an article from the George Washington University Law Review entitled "State Secrets and the Limits of National Security Litigation," Professor Robert Chesney proposes that Congress modify the state secrets privilege and presents several solutions, such as recalibrating the reasonable risk balancing test test to increase the discretion of the judge to disagree with the executive branch's assertion that national security interests warrant exclusion of evidence or dismissal of a complaint. Do you think legislative modifications should be made to the privilege, and, if so, do you have any specific proposals to aid Congress in this effort?

ANSWER: We do not believe that legislative modifications should be made to the state secrets privilege. The Constitution and settled Supreme Court precedent define the law governing the state secrets privilege. This body of law already provides the appropriate standard and strikes the appropriate balance between the need to protect the national security in civil litigation and the need to protect the rights of litigants in cases that implicate national security information.

Specter 63 Do you agree there is a great benefit in having a uniform standard – including classified procedures – to allow for the evaluation of the state secrets privilege?

ANSWER: As noted in the response to Question 61, there already is a well-established, uniform standard to evaluate assertions of the state secrets privilege. Also, as noted in the response to Question 60, although it is not obliged to do so, it is the general practice of the Executive Branch to submit classified declarations and information to federal judges for *in camera, ex parte* review in cases in which the privilege is asserted to ensure that courts will be satisfied that information is subject to the state secrets privilege.

Specter 67 Do you believe that Congress has the constitutional authority to create National Security Courts to try cases against accused terrorists?

ANSWER: Yes.

Specter 68 If so, what procedural protections for both the accused and the Government's classified evidence would you recommend beyond what Congress already did in the Classified Information Procedures Act (Publ.L. 96-456, Oct. 15, 1980)?

ANSWER: The Department has not proposed the creation of a national security court, and this therefore is not a matter on which the Department has taken a position. The Department stands willing to work with Congress with respect to legislative proposals in this area.

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Specter 69 If you still support congressional action to create National Security Courts, do you also believe that Congress has the constitutional authority to legislate a) procedures for invoking and reviewing state secrets privileges; and b) procedures governing the use of extraordinary renditions?

ANSWER: The Department has not examined the questions that you pose. As you know, the Department has separately addressed the state secrets legislation that has been introduced in the Senate in our views letter to the Committee, dated March 31, 2008.

Specter 80 Has the Department sought to study the relatively low 'failure to appear' rates in the criminal defendant context to see if methods and procedures could be applied to lower the 'failure to appear rates' for illegal aliens?

ANSWER: The Department has not commissioned a study to examine the 'failure to appear' of non-citizens, but would be willing to explore the possibility of such a study with the Committee. In the late 1970s and early 1980s, the Department's National Institute of Justice commissioned some studies on failure to appear rates, but these studies did not focus on illegal aliens.

Specter 81 The Department of Homeland Security's Inspector General reported in 2006 that, at the state and local level, a substantial number of deportable aliens are released rather than removed at the conclusion of their sentence because not enough is done to ascertain their immigration status. What systems are in place at the federal prison level to alert Immigration and Customs Enforcement (ICE) of criminal aliens in custody at federal prison?

ANSWER: The Bureau of Prisons (BOP) has established procedures at each of its institutions to notify Immigration and Customs Enforcement (ICE) about non-U.S. citizens in BOP custody. Most BOP institutions use a Detainer Action Letter (a notification or inquiry sent to a federal, state, or local jurisdiction requesting a formal action be lodged if that jurisdiction intends to place a release hold on an inmate) to notify ICE. Other BOP facilities have established specific procedures with their local ICE office to provide this information. These procedures include providing the local ICE office with rosters of non-U.S. citizens within the facility. In addition, ICE has access to the BOP's online inmate information system and has the ability to prepare lists of inmates by facility and to monitor these inmates' pending releases.

Because the BOP provides access to this information, ICE has the information it needs to place detainers on criminal aliens. If the BOP does not receive a detainer or response on a particular criminal alien from ICE prior to the inmate's release, as a matter of routine practice, the BOP will ordinarily follow up by contacting the local ICE office prior to releasing the inmate from custody.

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Specter 82 How effective are these procedures in identifying and reporting criminal aliens?

ANSWER: The various methods implemented by the BOP have proven to be very effective in notifying ICE of criminal aliens in BOP custody. However, it remains the responsibility of ICE to review these cases to determine if a detainer will be lodged.

Specter 83 Could any of these procedures be implemented at the state and local level?

ANSWER: The Department of Homeland Security will need to determine whether the procedures that have been established between ICE and the BOP could be implemented at the state and local level.

Specter 84 A 2006 OIG report states that for want of detention space, 36% of undocumented aliens apprehended by the DHS Office of Detention and Removal (DRO) are released pending adjudication of their status, and 62% of them then fail to surrender for removal pursuant to a final order of the Executive Office of Immigration Review. Speeding the removal process would free up detention space to ensure undocumented aliens do not take advantage of the procedural process we offer them by absconding. Procedures already exist to speed up the process, but they are not utilized. 8 U.S.C. §1225, enacted during the Clinton administration, provides for expedited removal of any removeable alien who cannot establish 2 years of continuous presence in the United States. Aliens in expedited removal may be deported without further hearings or review unless they claim a fear of persecution if returned. Nevertheless, current regulations drastically limit the use of expedited removal applying it only to arriving aliens, those who arrived by sea, or those who are encountered within 100 miles of the border AND have not been in the U.S. for more than two weeks. Given the funding problems, the public calls for enforcement, and the high risk of flight, why are the DOJ and DRO not using expedited removal to the full extent allowed by law?

ANSWER: The Homeland Security Act of 2002 reorganized key immigration responsibilities within the Executive Branch. One of the key changes was to transfer many of the authorities relating to the removal of aliens from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, §§ 441(2), 442(a)(3), 451(b), 116 Stat. 2192, 2193, 2196, 6 U.S.C. §§ 251(2), 252(a)(3), 271(b) (2000 ed., Supp. II); *see also* 8 U.S.C. § 1103 (discussing responsibilities of Secretary of Homeland Security and Attorney General). This transfer included certain authorities under 8 U.S.C. § 1225(b) to remove without a hearing before an immigration judge aliens who do not claim asylum. Accordingly, the decision to expand the scope of the expedited removal program for aliens who do not claim asylum is generally entrusted to the Secretary of Homeland Security.

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Specter 85 How quickly could the DOJ and ICE implement expedited removal to the full extent allowed by law?

ANSWER: Please see the response to Question 84.

Specter 86 Do you believe it would be possible to have criminal illegal aliens serve their sentences in their home countries and reimbursing those nations with SCAAP grant dollars? This approach has the advantage of lower cost incarceration abroad and renders moot the problem of recidivism upon release. The U.S. is already party to a treaty with Mexico providing for prison transfers but it requires the prisoner express consent. (See, 18 U.S.C. §§ 4100-4115) What types of offers do you think might be made to prisoners as an incentive to consent to transfer?

ANSWER: The Department understands the potential benefits of allowing criminal illegal aliens to serve their sentences in home countries with possible reimbursement with SCAAP grants. The Department is willing to work with Congress to examine the feasibility of such a program.

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QUESTIONS FROM SENATOR KENNEDY

Kennedy 87 The nation was disgraced in the eyes of the world by the Bybee "torture memorandum," a 2002 legal opinion by the Office of Legal Counsel that defined torture so narrowly that it justified interrogation techniques widely recognized as illegal. As the memo stated: "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." Anything short of this standard would not be torture, the memo said. CIA interrogators called the memo their "golden shield," because it allowed them to use virtually any interrogation method they wanted. The memo also created a commander-in-chief exception, which no legal authority had ever recognized. It stated that the President and the officials he directs are not bound by laws passed by Congress against torture. The memo also stated that officials can avoid prosecution for their acts of torture by invoking the defenses of "necessity" or "self-defense"—even though the Convention Against Torture, an international treaty ratified by Congress in 1994, states very clearly that "no exceptional circumstances whatsoever" may be invoked as a justification for torture. All of the arguments in the memo are morally repugnant, and they are also legally repugnant. The torture memo did not come to light until 2004, and when it did, it created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come. We've been told that the Bybee memo was withdrawn at the end of 2004, but its legal reasoning has never been repudiated by the Administration. In addition, we've recently learned about two other secret "torture memos" issued by the Office of Legal Counsel in 2005. In your confirmation hearings before this Committee, you stated that "the Bybee memo, to paraphrase a French diplomat, was worse than a sin, it was a mistake. It was unnecessary." I agree wholeheartedly that the memo was a mistake, but I'm troubled that you didn't repudiate its contents explicitly. Nor did you do so in response to my written questions. Your statement that the Bybee memo was "unnecessary" leaves the alarming impression that you may actually agree with its legal reasoning. Dean Harold Koh of the Yale Law School has said that the Bybee memo was "perhaps the most clearly erroneous legal opinion I have ever read." He called it "a stain upon our law and our national reputation."
If you agree that the Bybee memo was legally erroneous, please explain why in as much detail as possible.

ANSWER: As the Attorney General made clear before his confirmation, he believes that the "Bybee memo" was a mistake, and the Department correctly withdrew the opinion in 2004. Among other matters, the Attorney General disagrees with the Bybee memo's interpretation of "severe physical pain or suffering" under the anti-torture statute, its understanding of the President's Commander in Chief authority, and its discussion of the necessity defense. After withdrawing the Bybee memo, the Office of Legal Counsel issued a memorandum in 2004 that "supersedes in its entirety" the 2002 memorandum. Memorandum for the Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Legal Standards Applicable Under 18*

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U.S.C. §§ 2340-2340A (Dec. 30, 2004). The Department believes that this opinion sets out the correct interpretation of the anti-torture statute, and we have relied upon this opinion in our subsequent opinions in this area.

Kennedy 88 Do you agree or disagree with the memo's claim that "necessity" can justify the use of torture?

ANSWER: We disagree.

Kennedy 89 Do you agree or disagree with the memo's claim that "self-defense" can justify the use of torture?

ANSWER: We disagree.

Kennedy 91 As Attorney General, have you completely rescinded the Bybee memo? I want to learn exactly what steps you've taken to ensure that the legal analysis of the Bybee memo has been completely repudiated—not just sugarcoated or replaced with yet another secret memo, but totally and unambiguously repudiated.

ANSWER: As discussed in response to Question 87, the Department rescinded the Bybee memo and replaced it with the public Levin memorandum providing the Department's interpretation of the anti-torture statute. The Department has followed the standards set out in the Levin memorandum in all subsequent opinions addressing the anti-torture statute.

Kennedy 92 Waterboarding has become the worldwide symbol for America's debate over torture, and it became the centerpiece of your confirmation hearings after you refused to take a position on whether it's unlawful. In fact, even though you claimed to be opposed to "torture," you refused to say anything whatever on the crucial questions of what constitutes torture and who gets to decide the issue. Courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture, but you refused to say so. And then, in a letter sent to this Committee on January 29, you once again refused to state the obvious—that waterboarding has been, and continues to be, an unlawful act of torture. Your letter told us that the CIA does not currently use waterboarding, but that fact had already been disclosed. What your letter completely ignored is the fact that the CIA did use waterboarding, and no one is being held to account. In your letter, you wouldn't even commit to refuse to bring waterboarding back should the CIA want to do so. You would not take waterboarding off the table. Your letter also ignored the fact that the CIA continues to use painful stress positions, extreme sleep deprivation, and other techniques that are every bit as abusive as waterboarding—

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techniques that the Department of Defense has rejected as illegal, immoral, ineffective, and damaging to America's global standing and the safety of our own servicemen and women overseas. Your refusal to rule out specific torture techniques harms America's global standing and breeds mistrust throughout the world. When America fails to draw clear lines on these techniques, it puts our own troops at risk. If we won't say whether it is unlawful for us to use sleep deprivation, waterboarding, and stress positions, then we increase the likelihood that other countries will use the same practices on us. Your evasive approach to torture has no benefit for our national security, but it has tremendous costs for your personal credibility and for the credibility of our government. This country needs an Attorney General who will say what the law is and who understands that America should be the world's leading voice against torture. In a recent interview with The New Yorker magazine, the Director of National Intelligence, Admiral Mike McConnell, stated: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me [waterboarding] would be torture." At your oversight hearing on January 30, I asked, "Would waterboarding be torture if it was done to you?" and you replied, "I would feel that it was." When our Director of National Intelligence and our Attorney General both acknowledge that waterboarding would be torture for them, doesn't that call into question the soundness of any definition of torture that excludes waterboarding?

ANSWER: In his testimony, the Attorney General stated that if waterboarding were done to him he would feel that it was "torture" in the colloquial sense; at the same time, he made clear that his subjective feeling on this matter was quite different from providing a legal determination on whether such hypothetical conduct would violate the anti-torture statute. Similarly, we understand that Director McConnell has testified his comments were not intended to suggest legal views on the question. As the Attorney General explained in his testimony, waterboarding is not currently authorized for use in the CIA interrogation program and therefore may not be used. In the absence of concrete—rather than hypothetical—facts and circumstances that require the Attorney General's legal opinion, it would not be appropriate to give an opinion on the legality of waterboarding.

Kennedy 93 Several weeks ago, reporters asked you whether you were prepared to answer this Committee's questions on waterboarding. According to the Wall Street Journal, you said that your response to our questions would "aim at precision but never achieve clarity." This comment gave the troubling impression that you intended to provide answers which appear to be precise but are not actually clear. Why is it so difficult to "achieve clarity" in response to questions about something as important and as serious as torture?

ANSWER: Although we understand the strong interest in this question, we do not think it would be responsible to address a difficult legal question in the absence of concrete facts and circumstances. Because waterboarding is not among the practices currently authorized for use in the CIA program, it would not be appropriate to answer questions

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concerning the legality of waterboarding absent a set of circumstances that call for those answers. It is precisely because this issue is so important, and the questions so difficult, that we cannot—and should not—provide answers to questions about circumstances that do not present themselves today, and may never present themselves in the future.

Kennedy 94 In your letter of January 29, you defended your refusal to answer our questions on waterboarding partly with the argument that to determine whether something is torture will depend on the "concrete facts and circumstances." Without knowing the facts and circumstances of a given case, you said, it would be irresponsible to give a legal opinion as to whether any specific interrogation technique violates our laws. The problem with this argument is that our laws against torture were designed so that some abusive practices would always be impermissible. Cruel, inhuman, and degrading treatment is always impermissible. If waterboarding isn't always cruel, inhuman, and degrading, then it's hard to see what is.Under what "facts and circumstances," exactly, would it be lawful to waterboard a prisoner?

ANSWER: As the Attorney General testified, waterboarding is not currently among those techniques authorized for use under the CIA program, and he has not had the occasion to decide whether the technique would be lawful under current law. Whether waterboarding would be legal for use in the CIA program would depend upon whether it complies with the anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Executive Order 13440. Some of those prohibitions, such as the anti-torture statute, are absolute and prohibit the proscribed conduct regardless of the government interest implicated.

Kennedy 95 Under what facts and circumstances would it be lawful to pull his fingernails out?

ANSWER: The War Crimes Act specifically prohibits acts of "mutilation or maiming" for individuals covered by the Act. The term "mutilation or maiming" is defined in the Act. *See* 18 U.S.C. § 2441(d)(1)(E). Executive Order 13440 likewise prohibits "acts of violence serious enough to be considered comparable to . . . mutilation." In addition, such a practice would almost certainly be considered done with an intent to cause severe physical pain, in violation of the anti-torture statute.

Kennedy 96 Under what facts and circumstances would it be lawful to sexually abuse him?

ANSWER: The War Crimes Act prohibits "sexual assault or abuse" for individuals covered by the Act. The term "sexual assault or abuse" is defined in the Act. *See* 18 U.S.C. § 2441(d)(1)(H). Executive Order 13440 likewise prohibits CIA personnel from engaging in all "sexual or sexually indecent acts undertaken for the purpose of

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humiliation, forcing the individual to perform sexual acts or to pose sexually, [and] threatening the individual with sexual mutilation."

Kennedy 97 Under what facts and circumstances could the United States government lawfully bring back the rack and the screw?

ANSWER: Federal law specifically prohibits torture and cruel and inhuman treatment, and Executive Order 13440, which governs the CIA program, prohibits "acts of violence serious enough to be considered comparable to" torture and cruel or inhuman treatment. We would think that these provisions preclude the use of "the rack and the screw."

Kennedy 98 Are there any interrogation techniques that you would acknowledge are always illegal? If so, what are these techniques, and how do you draw the line between these techniques and those such as waterboarding that you do not categorically rule out?

ANSWER: Yes. For example, please see the responses to Questions 94 through 97. In addition, Executive Order 13440 sets out a non-exclusive list of acts that would be unlawful under any circumstances.

Kennedy 99 At the January 30 oversight hearing, in response to questioning from Senator Feingold, you appeared to say that you would not come to Congress to explain, in a classified setting, how it is that you came to conclude that the CIA's "enhanced interrogation program" is lawful in its entirety. Is it correct that you refused Sen. Feingold's request to provide such a briefing?

ANSWER: The Attorney General's response simply reflected the fact that he was not in a position to commit to the disclosure of classified information outside of the Intelligence Committees. The Administration has taken several steps to accommodate congressional oversight in this area. The Senate Select Committee on Intelligence has been fully briefed on all aspects of the CIA program, including the Department's legal analysis of interrogation techniques. More recently, in an extraordinary accommodation of Congress's oversight interest in this area, highly classified opinions concerning the CIA interrogation program were made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

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Kennedy 100 Given that Congress enacted the laws against torture that you are now charged with interpreting and enforcing, I find it extremely troubling that you would prevent Congress from learning how you are doing so. How are we to know if the laws need to be revised, when the Justice Department will not even let us know how they are being applied?

ANSWER: Please see the response to Question 99.

Kennedy 101 How are we to exercise our oversight function?

ANSWER: Please see the response to Question 99.

Kennedy 102 If I have characterized correctly your answer to Sen. Feingold, it is hard to reconcile it with your repeated pledges during the confirmation process to work openly with this Committee on even the most sensitive of issues. One leading commentator observed that your answer to Sen. Feingold's question showed "disdain" for Congress and its constitutional role. On what grounds are you defending your apparent refusal to brief congressional committees, in a classified setting, on the CIA's interrogation program?

ANSWER: As noted, the Administration has fully briefed the Intelligence Committees on all aspects of the CIA's interrogation program. With respect to the Judiciary Committee, please see the response to Question 99.

Kennedy 104 Based on the information you now possess, have you ruled out the opening of an investigation into past practices relating to torture?

ANSWER: Please see the response to Question 103.

Kennedy 105 How can we say to the world that America doesn't use torture ever, under any circumstances, while you simultaneously try to preserve doubt and ambiguity on that very question?

ANSWER: To be clear: the United States does not authorize the use of torture under any circumstances. The Administration has consistently emphasized that torture violates both domestic and international law, and it is abhorrent to American values. There should be absolutely no ambiguity whatsoever on that point.

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Kennedy 106 I'm disappointed that you seem determined to keep secret your interpretations of our laws against torture, and to avoid prosecution of anyone who may have violated them. Why, exactly, should Americans, members of Congress, and people around the world believe you are strictly interpreting and vigorously enforcing these laws, when you refuse to provide any public evidence that you are doing so?

ANSWER: The Department of Justice publicly released its interpretation of the federal statute prohibiting torture more than three years ago. In a December 30, 2004 opinion by the Office of Legal Counsel, the Department emphasized that: "Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law, for example, 18 U.S.C. §§ 2340-2340A; international agreements, exemplified by the United Nations Convention Against Torture; customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President." It is true that we are unable to reveal publicly the classified operational details of the CIA program, but the December 2004 OLC opinion is public in its entirety; it remains binding on the Executive Branch today; and all legal analysis of the CIA program since December 2004 has been consistent with that opinion and with the additional standards set by the Detainee Treatment Act of 2005, the Military Commissions Act of 2006, and Executive Order 13440.

Kennedy 108 Haven't these techniques and the Administration's interrogation policies been publicly discussed and debated for years?

ANSWER: No. The interrogation techniques in the CIA program have remained classified since its inception.

Kennedy 109 Haven't large numbers of detainees passed through our detention system in Iraq, Afghanistan, and the CIA's secret sites who could speak to the interrogation techniques we employ there?

ANSWER: No. The U.S. military interrogation techniques are published in the Army Field Manual, but the techniques available to the CIA are not. Fewer than one hundred terrorists have been detained by the CIA as part of this program since its inception in 2002. The CIA's alternative interrogation methods have been used with fewer than one-third of the terrorists who have ever been detained in this program, and certain of the methods have been used on far fewer still.

Kennedy 110 Hasn't the United States made a public, legal commitment in the Geneva Conventions and in our statutes to reject all forms of torture?

ANSWER: Yes.

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Kennedy 111 More than three months ago, when we met in my office, I spoke with you about the need for the next Attorney General to undertake fundamental reforms in the Office of Legal Counsel. Too often in this Administration, important OLC opinions have been issued without the necessary review at the highest levels of the Department and by other affected agencies. Many of the opinions were not legally sound and have led us in the wrong direction. They formed the legal basis for the abuse of detainees, evasion of the Geneva Conventions, and trials of detainees by poorly conceived military commissions. We've been embarrassed in the eyes of the world and we've failed to hold terrorists accountable. The former head of the Office of Legal Counsel, Jack Goldsmith, recently stated that under this Administration, OLC "took shortcuts in its opinion-writing procedures" so as to "control outcomes in the opinions and minimize resistance to them." Mr. Goldsmith acknowledged that numerous OLC opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious." It was remarkable. The head of OLC admitted publicly that the Office's opinions were "deeply flawed: sloppily reasoned, overbroad, and incautious"—yet, as far as we know, those opinions still have not been reviewed and rewritten in any systematic way. It was disturbing to learn last November that OLC issued two further secret opinions authorizing the use of extreme interrogation techniques in 2005, after it had publicly withdrawn the notorious Bybee torture memo. It's disappointing, to say the least, that we have to learn about these secret torture memos from the news. Before he was sidelined by the White House, Deputy Attorney General James Comey told his colleagues at the Justice Department that they would all be "ashamed" when the world eventually learned of these opinions. The world has now learned of them, and once again there's a scandal involving opinions of the Office of Legal Counsel, issued in secret, authorizing interrogation techniques widely believed by people outside the Department of Justice to violate laws against torture. The author of the 2005 torture memos was Steven J. Bradbury, who has been the acting head of the Office of Legal Counsel since February 2005. In late June 2005, he was formally nominated to take over the position, and last week the President nominated him again to lead OLC. It's recently been revealed in the press that Mr. Bradbury was given a "tryout" before he was officially nominated to lead the Office. His nomination was delayed while the President's counsel, Harriet Miers, "decided to watch Bradbury for a month or two," according to a Justice Department official. The official said that Mr. Bradbury "was sort of on trial." The purpose of this tryout, it seems, was to see if Mr. Bradbury would be sufficiently accommodating to the President's desires—rather than stand up for the rule of law. As the New York Times notes, "While waiting to learn whether he would be nominated to head the Office of Legal Counsel, Mr. Bradbury was in an awkward position, knowing that a decision contrary to White House wishes could kill his chances." It was during this trial period, which lasted almost 6 months, that Mr. Bradbury authored at least one and possibly both of the new torture memos that have just come to light. Do you agree that Stephen Bradbury was on a "tryout" before he was nominated to head the Office of Legal Counsel?

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ANSWER: We do not believe that is the case, and indeed, the facts suggest otherwise. After a distinguished career in private practice, Mr. Bradbury came to the Office of Legal Counsel to serve as the number two attorney in the Office to both Jack Goldsmith and then to Acting Assistant Attorney General Daniel Levin. After serving in that role for a year, Mr. Bradbury was nominated to head the office as the Assistant Attorney General.

As you note, there was a period of about five months between Mr. Levin's departure and the President's nomination of Mr. Bradbury. That lag, however, is not surprising. Mr. Levin left at the beginning of the President's second term, which was a time of significant transition in which a new Attorney General had just been confirmed, a new White House Counsel had been appointed, and many other positions had to be filled at the Department and elsewhere in the Administration. As is typically the case, the President's decision to nominate an individual occurs some time before the nomination is actually transmitted, and the transmittal of the nomination then awaits the successful completion of a thorough background check. Accordingly, the transmittal of Mr. Bradbury's nomination to the Senate in June 2005 was the end of the nomination process, rather the beginning, and the timing of the nomination in no way supports the suggestion of a "trial period."

Finally, we would note that Mr. Bradbury made clear to the *New York Times*, and in subsequent statements, that no one ever suggested to him that his nomination would depend on how he ruled with respect to a particular opinion. Mr. Bradbury carries no agenda but his views of the law, and he does not hesitate to provide his candid views of what the law requires or prohibits. Mr. Bradbury is an exceptional and honorable lawyer who has served the Department and Nation admirably during his tenure in the Office of Legal Counsel.

Kennedy 112 What does that say about the relationship between the White House and the Department of Justice?

ANSWER: Please see the response to Question 111.

Kennedy 113 What does it say about the Administration's commitment to the rule of law when Justice Department officials are given a "tryout" to make sure that they will do exactly what the President wants, rather than follow the law?

ANSWER: Please see the response to Question 111.

Kennedy 114 I was heartened that during your confirmation hearings, you committed to review OLC's opinions. You stated: "I'm going to review the significant decisions of the Office of Legal Counsel, particularly those relating to national security, so as to make certain that they are sound." In your letter of

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January 29, you stated that you have reviewed the legal analysis of the techniques currently authorized for use in the CIA's program. Does this mean you have reviewed all OLC opinions issued under this Administration on harsh interrogations?

ANSWER: As the Attorney General committed in his letter to the Committee, dated October 30, 2007, he has reviewed the Office of Legal Counsel opinions insofar as they concern practices that are currently authorized for use in the CIA's interrogation program. The Attorney General found those practices to be lawful, and found the Office's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to provide a definitive review of Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

Kennedy 115 If so, do you agree with all of these opinions?

ANSWER: The Attorney General found the analysis in the OLC opinions that he reviewed to be correct and sound.

Kennedy 116 Will you produce for the Committee the OLC opinions dealing with interrogation tactics? Your conclusion that waterboarding can be a lawful practice makes it difficult to accept your judgment on the lawfulness of other techniques. It is, therefore, extremely important for the Committee to see the OLC opinions, so that we can perform our oversight duties and modify the law, if necessary.

ANSWER: We respect Congress's oversight in this area, and we believe that this Administration has made substantial accommodations in recent months to accommodate those interests. Highly classified opinions concerning NSA surveillance activities have recently been made available to the Intelligence and Judiciary Committees of both Houses of Congress. As to the CIA's interrogation program, the Intelligence Committees have been briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Recently, the Administration further accommodated congressional interest by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Kennedy 117 Would you be willing to conduct a briefing for the Committee on the contents of the OLC interrogation memos?

ANSWER: Please see the response to Question 116.

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Kennedy 118 Have you revised or withdrawn any Office of Legal Counsel opinions that you found to be legally deficient, whether dealing with national security or other subjects?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Kennedy 119 When Janet Reno was Attorney General, she had a presumption in favor of public disclosure of OLC opinions, so that citizens and lawmakers could stay informed, and faulty opinions could be exposed. She also had a policy of consulting with relevant agencies about the substance of the opinions, because the agencies often have the most expertise. I believe that both of these policies should be brought back. We need a much more open and collaborative process to ensure that the nation is not damaged by more flawed OLC opinions. Will you restore the presumption in favor of public disclosure of OLC opinions?

ANSWER: The OLC opinion publication process reflects a commitment to a basic policy of openness in government, and it is the same process OLC has followed during prior administrations. OLC also regularly consults with other interested agencies in the preparation of its opinions. From 2005 to the present, OLC published 69 opinions, and more will be published shortly. In addition, we are making efforts to reduce the period of time between when an opinion is signed and when it is published.

This publication practice, however, does not diminish the interest that the Government may have in particular instances in preserving the confidentiality of other nonpublic OLC opinions. As recognized by *Principles to Guide the Office of Legal Counsel*, a statement of principles written by former OLC attorneys, "[t]here nonetheless will exist some legal advice that properly should remain confidential." Maintaining the confidentiality of OLC legal advice is often essential to the functioning of the Department, the President, and the Executive Branch. In 1993, Walter Dellinger, who was at that time the nominee to serve as Assistant Attorney General for the Office of Legal Counsel, provided the following response to a question from Senator Grassley:

> I share [the Attorney General's] commitment [to a basic policy of openness in government]. Openness promotes public confidence that the government is making its decisions through a process of careful and thoughtful reasoning. At the same time, I recognize that, in some types of cases, there are considerations weighing against the release of opinions. Some categories of documents, such as opinions on matters classified for reasons of national security, are especially sensitive. In addition, opinions may reflect legal advice given as part of the government's deliberative process, and protection of some of these opinions may be necessary to ensure that decisionmakers are willing to

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> seek candid legal advice before they act. Opinions resolving inter-agency disputes are likely to be strong candidates for disclosure. Although government decisionmaking requires a certain measure of confidentiality, the government should not reflexively seek secrecy.

We agree with this statement from Assistant Attorney General Dellinger.

Kennedy 120 Will you ensure that OLC consults with lawyers in affected agencies in the drafting of OLC opinions?

ANSWER: The Office of Legal Counsel ordinarily does consult with affected agencies in drafting an opinion, and they are committed to continuing that practice.

Kennedy 121 At the oversight hearing, I commended you for taking a number of positive steps to investigate the destruction of the CIA interrogation tapes, including:

- **launching a full-scale criminal investigation;**
- **moving the investigation out of Main Justice;**
- **accepting the recusal of the Eastern District of Virginia's U.S. Attorneys office;**
- **appointing John Durham, a seasoned and respected prosecutor; and**
- **making the FBI the lead investigative agency.**

Each of these steps shows sensitivity to potential conflicts of interest and a desire for a meaningful investigation. But I'm troubled that you decided not to make Mr. Durham an independent counsel, to ensure against even the appearance of impropriety. You repeated to the press last week that you will not appoint an independent counsel. Many of us are increasingly convinced that appointment of an independent counsel is essential to give this investigation the full credibility it needs. We know that the Office of Legal Counsel issued opinions—including the discredited Bybee torture memorandum—that gave CIA interrogators the legal foundation for using abusive interrogation techniques. Even after the Bybee memo was exposed as legally and morally reprehensible and was withdrawn in late 2004, we've learned that OLC, under Stephen Bradbury, issued two new secret opinions that authorized the use of techniques like those depicted on the tapes. Obviously, OLC and the senior leadership of the Department will suffer further embarrassment if graphic depictions of these techniques ever become public. In addition, reports have surfaced that high-level Bush Administration lawyers, including Alberto Gonzales, were consulted about the destruction of the tapes. Mr. Gonzales was Attorney General for several months before the tapes were destroyed, and he may well have consulted with lawyers in the Justice Department about their destruction. The investigation will necessarily reach into the highest levels of the Department and the Administration. In fact, the Department is litigating cases in

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which detainees have asked the Administration to produce evidence that may include the tapes, and the Department has opposed such requests. Recently, Judge Roberts of the U.S. District Court in D.C. ordered the Department to report in writing on the destruction of the tapes. In another case, the Department is defending the CIA in a lawsuit under the Freedom of Information Act for production of documents relevant to detainee abuse. Judge Hellerstein of the U.S. District Court in the Southern District of New York commented the other day that the CIA's claim to have no records of the tapes "boggles the mind."
The Justice Department is in the untenable position of resisting efforts to learn more about the destroyed tapes, while at the same time it is supposedly investigating the destruction of the tapes. It's a classic conflict of interest. Finally, the Administration's credibility on matters concerning torture stands at an all-time low. Your own confirmation was nearly derailed by your refusal to state the obvious—that waterboarding, which is one of the practices reportedly shown on the destroyed tapes, is torture. The conclusion is inescapable that we need an independent counsel to investigate and prosecute the destruction of the tapes. Do you continue to stand by your decision not to appoint an independent counsel?

ANSWER: Yes, we do not believe that the circumstances warrant the appointment of a Special Counsel under the Department's Regulations. As we have explained, the Attorney General has appointed John Durham, who has been designated for purposes of this investigation as the Acting U.S. Attorney for the Eastern District of Virginia, to lead this investigation. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations in the past, and the Attorney General has instructed him to follow the investigation wherever the evidence may lead.

Kennedy 122 If so, do you have in place a process for determining whether the appointment of an independent counsel may become necessary as the investigation progresses? Will you reconsider if new facts arise?

ANSWER: We do not believe that the circumstances warrant the appointment of a Special Counsel under the Department's regulations. Should new facts come to our attention, we of course will consider whether they warrant a different conclusion.

Kennedy 123 To whom does Mr. Durham report? Will he be required to expose specific investigative steps?

ANSWER: For purposes of this investigation, Mr. Durham functions as the Acting United States Attorney for the Eastern District of Virginia. Accordingly, he reports to the Deputy Attorney General. Mr. Durham's investigation will proceed in accordance with established Department policies on all matters related to his investigation.

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Kennedy 124 Will he be required to obtain approval before seeking an indictment?

ANSWER: Please see the response to Question 123.

Kennedy 125 Over a month ago, I wrote you a letter—to which I never received a response—stating that this "investigation must also include an effort to recover and examine what was on the destroyed tapes. Surely, the content of the tapes may prove highly relevant in determining why the tapes were destroyed. If the conduct depicted on the tapes involved the commission of crimes, it, too, must be pursued. America's laws against torture are every bit as important as our laws against obstruction of justice, and they too deserve the vigorous enforcement that you pledged in your confirmation hearings. As in any truly independent investigation, the investigators must be allowed to follow the evidence wherever it leads and to bring any wrongdoers to justice." I understood from your testimony that you will allow the investigation to include the conduct shown on the tapes. Is that correct?

ANSWER: The Department is committed to conducting a comprehensive and impartial investigation into the CIA's acknowledged destruction of videotapes of certain interrogations of detainees. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations. He has been authorized to follow this investigation wherever the evidence leads.

That said, no one should expect Mr. Durham's investigation into the destruction of CIA tapes to encompass a review of past conduct approved as lawful by the Department. The lawfulness of conduct undertaken at the time in good-faith reliance upon the Department's advice can no more depend upon the retrospective views of a particular U.S. Attorney than it could on the views of a particular Attorney General. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subjected to criminal investigation for it. Accordingly, the CIA tapes investigation will proceed consistent with the Department's interpretation of governing criminal statutes, as well as with fundamental fairness to those government officials who relied on the Department's advice in the past.

Kennedy 126 Specifically, will investigators be permitted to consider whether the conduct shown on the tapes is torture? If so, will they be permitted to consider prosecution of anyone who engaged in torture?

ANSWER: Please see the response to Question 125.

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Kennedy 127 If the investigation will not be covering the conduct on the tapes, does that mean you've decided that the conduct—including waterboarding—was lawful? If you haven't reached that conclusion, how can you prohibit investigators from looking into possible crimes?

ANSWER: The question whether to initiate an investigation into conduct that took place in 2002 and 2003 based upon advice provided by this Department cannot—indeed, must not—depend upon the retrospective views of the Attorney General in place years later. Before the CIA used this technique, the CIA sought advice from the Department of Justice, and the Department advised the CIA that its use would be lawful under the circumstances and within the limits and the safeguards of the program. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, then they should not be subjected to criminal investigation for it. This principle recognizes that it would be unwise, and terribly unjust, to expose those who relied in good faith on those prior decisions to possible criminal penalties.

Kennedy 128 Will you make a public commitment that you will not prohibit the investigators from looking into possible crimes—and that you will authorize them to look into the conduct shown on the tapes? If you can't do that, aren't you ignoring possible evidence of torture?

ANSWER: Please see the response to Question 125.

Kennedy 129 I'm concerned about the partisan and ideological nature of the current Commission on Civil Rights. Press reports spotlight Republican Commissioners have changed their party affiliations to Independent in order to bypass the statutory requirement that no more than 4 of the eight Commissioners may be from the same political party. The Commission was created over fifty years ago to be the conscience of the country on civil rights matters, to shine a clear and impartial light on civil rights issues. The Commission's role in documenting discrimination in the right to vote led to the original passage of the Voting Rights Act of 1965 and several of its subsequent reauthorizations. But under the Bush Administration, the Commission has repeatedly failed to hold hearings on current civil rights issues, such as access to voting equipment, tactics to prevent minorities from voting, and the serious problem of hate crimes. The Commission has abandoned its fact-finding role and engages only in briefings that seem intended to advance a partisan agenda. The law governing the Commission was intended to ensure balance on the Commission – with four Republicans and four Democrats. But in December 2004, the Office of Legal Counsel issued an opinion stating that Republicans could switch their party affiliation to Independents to in order to be appointed to the Commission, even if there were already four Republicans members. Relying on this opinion, Commissioner Abigail Thernstrom and Commissioner Gail Heirot, both long-time Republicans, declared themselves independents shortly before their appointment. The non-partisan Congressional

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Research Service recently reviewed the OLC opinion and concluded that "a reviewing court would [likely] find the OLC opinion unpersuasive and the recent appointments violative of the political balance requirements of the statute." Will you rescind the December 2004 opinion of the Office of Legal Counsel on party-switching by nominees to the Commission?

ANSWER: No, the Department will not rescind the opinion. The December 2004 opinion concludes that, under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. After careful review, we have concluded that this opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction. Accordingly, it would not be appropriate to withdraw that opinion.

As you note, the Civil Rights Commission has eight members—four appointed by the President, two by the Speaker of the House, and two by the President pro tempore of the Senate. 42 U.S.C. § 1975(b). The statute provides that "[n]ot more than 4 of the members shall at any one time be of the same political party." *Id.* § 1975(b). The analysis by the Congressional Research Service referenced in your question suggests that, for purposes of section 1975(b)'s political balance requirement, a commissioner's party affiliation is fixed at the time of appointment and any later changes should not be taken into account. Memorandum for the Senate Committee on the Judiciary, from Morton Rosenberg, Specialist in American Law, American Law Division, Congressional Research Service, *Re: Political Balance Requirements at the United States Commission on Civil Rights* (Jan. 3, 2008). The CRS analysis, however, does not explain how that result can be squared with the language of the statute, under which no more than four members "shall at *any one time be* of the same political party." CRS argues that the legislative history conflicts with the December 2004 OLC opinion. Even assuming that the legislative history could overcome the plain language of the statute, *but see Ratzlaf v. United States,* 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."), CRS cites nothing in the legislative history specifically discussing whether it is appropriate for an appointing authority to account for changes in existing commissioners' party affiliation. Instead, CRS points to general legislative history indicating that the Commission is to be independent.

CRS only expresses concern that, under the OLC opinion, commissioners may manipulate their party affiliations and thereby give rise to political imbalance. However, the alternative reading of the statute suggested by the CRS analysis does not provide better protection against manipulation through insincere changes in party affiliation. If party affiliation were fixed at the time of appointment, a prospective appointee could change his or her affiliation just before appointment to become an Independent, change that affiliation back immediately after appointment, and be counted throughout his or her term as an Independent for purposes of the political balance requirements. Indeed, that alternative interpretation would permit the scenario set forth in your question:

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"Republicans could switch their party affiliation to Independent[] . . . in order to be appointed to the Commission, even if there were already four Republican[] members."

The interpretation set forth in the OLC opinion better serves interests in political balance in the event of sincere changes in party affiliation. Suppose, for example, that on a Commission composed of four Republicans and four Democrats, one of the Democratic commissioners made a sincere change of affiliation and became a Republican, and one of the other Republican members then resigned. Under the alternative reading suggested by the CRS analysis, the President would next have to appoint another Republican or an Independent and could not appoint a Democrat, even though the Commission would already have four Republicans and only three Democrats. The OLC opinion, however, would call for the appointment of a Democrat or Independent, thus better preserving the Commission's balance.

Sincere changes of party affiliation are well known among those in public life. For example, Senators Ben Nighthorse Campbell, James Jeffords, Richard Shelby, and Robert Smith, and Representatives Rodney Alexander, Nathan Deal, Virgil Goode, Phil Gramm, Robert Stump, and Billy Tauzin all changed their party affiliation while serving in Congress. Former Commission member Mary Frances Berry reportedly changed her party affiliation while on the Commission, identifying herself as an Independent beginning in the 1980s. News accounts indicate that one of the sitting Commissioners who changed her registration from Republican to Independent had, before her appointment to the Commission, registered both as a Democrat and as an Independent. Considering commissioners' changes in party affiliation in making new appointments is not only directed by the plain language of the statute—a point the CRS analysis does not appear to contest—but also better promotes interests in preserving the political balance of the Commission. We are not aware of a more persuasive alternative interpretation of section 1975(b). Accordingly, it would not be appropriate to withdraw the OLC opinion.

Finally, as suggested by the CRS Report, *see* CRS Report at CRS-11, Congress retains the authority to amend the terms of the statute if it wishes to make a Commissioner's party affiliation at the time of appointment controlling for purposes of presidential appointments under section 1975(b).

Kennedy 157 A report in December by the Justice Department's Office of the Inspector General brought to light serious problems in the Office of the Pardon Attorney. The head of the Office, Roger Adams, has been accused of mismanagement, and even worse, of racism in making decisions about pardon applications. The investigators also found that Mr. Adams threatened retaliation against those who made complaints about his management. Such behavior is reprehensible and undermines the purpose of the pardon process. Some of the complaints date back to 2001, and the office currently has a backlog of over 2,000 applications for clemency. Surprisingly, Mr. Adams was merely been shuffled to another position in the Department's management, even though the allegations are

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very serious. Are you troubled by the situation in the Office of the Pardon Attorney?

ANSWER: An outstanding candidate has been selected for the position of Pardon Attorney. He began his new assignment on April 28, 2008. He is a current Department employee who began his Justice Department career in 1999 after retiring from the United States Marine Corps. For 16 of his 22 years in the Marines, he served as a judge advocate as well as in various capacities including stints as a prosecutor and as a defense counsel for military personnel, and also a stint as a military judge. Since joining the Department, he has been assigned to the Narcotics and Dangerous Drug Section within the Criminal Division. He began his service as a trial attorney in the Drug Intelligence Unit (DIU) and was then promoted to Deputy Director and then Director of the DIU. We are confident he will do an excellent job leading the Office of the Pardon Attorney.

As to the backlog, the Department receives over 1,000 new clemency petitions each year. For fiscal year 2007, the Department received 1,259 petitions. To give a historical perspective, this administration has already received more clemency petitions than any other administration in the 20th century except for President Franklin D. Roosevelt. The processing and evaluation of these cases takes significant time, and in many cases, several years. Under both the previous Administration and the current Administration, the Department has seen sharp increases in the number of clemency petitions received. Unlike prior administrations, however, the overwhelming number of petitions received in the last two administrations have been petitions for commutations of sentence. With the advent of guideline sentencing and the elimination of parole, commutations can be the only way for many prisoners to be released early; however, a commutation of sentence remains an extraordinary form of relief that is rarely granted.

You are correct that Mr. Adams was detailed to another Department component. However, since that time he has retired from government service.

Kennedy 159 What steps will you take to guarantee that clemency applications are processed fairly and efficiently?

ANSWER: Clemency applications which are submitted to the Office of Pardon Attorney go through a multi-step review before they are forwarded to the White House for the President's consideration. An outstanding candidate has been selected for the position of Pardon Attorney. His new assignment began on April 28, 2008. (For more details about the candidate's background, please see the response to Question 157, above.) We fully expect the new director will respect the review process while also ensuring, through the review process, that all applications will be processed fairly and efficiently. In the application subject to the Inspector General's Report, in an abundance of caution, the Department is conducting a de novo review of the application. It is worth noting, the Inspector General's Report found a sufficient basis for denying the clemency application.

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QUESTIONS FROM SENATOR BIDEN

Biden 167 During your Senate confirmation hearing you pledged to review significant OLC decisions to ensure that such decisions are "sound, soundly reasoned, and soundly based." A recent opinion issued by the Congressional Research Service found no legal basis for a 2004 OLC memo interpreting the statute governing appointments to US Commission on Civil Rights. The 2004 OLC memo misconstrues the statutory requirement protecting US Commission on Civil Rights' independence and bipartisanship by allowing the President to appoint as many commissioners of the same political party as he chooses as long as the sitting commissioners switch from Republican to Independent prior to presidential appointments. In sum, the OLC opinion sanctions political manipulation of the appointment process to an independent commission. It violates the plain language of the statute which governs the appointment process to the Commission and clearly states that no more than four members of Commission shall be of the same political party. Given your promise to ensure that OLC opinions are soundly based, will you withdraw this clearly unsound OLC opinion?

ANSWER: No, the Department will not rescind the opinion. The December 2004 opinion referenced in your question concludes that, under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. As explained in the response to question 129, we have concluded after careful review that the December 2004 OLC opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction.

Biden 179 In a letter you sent to members of the Judiciary Committee before your appearance on January 30, 2008, you stated that you would refrain from stating whether waterboarding was illegal under US law. You said that, "it is not an easy question. There are some circumstances where current law would appear clearly to prohibit the use of waterboarding. Other circumstances would present a far closer question." When I asked you whether "torture" was a relative question, you noted that under the Detainee Treatment Act, the legality of certain interrogation methods would be analyzed under the "shocks the conscience" standard, which you said was "essentially a balancing test of the value of doing something as against the cost of doing it." Is the Department of Justice's position that whether waterboarding is legal in a particular circumstance is determined by using the "shocks the conscience" standard? Please explain.

ANSWER: As the Attorney General testified, waterboarding is not currently among those techniques authorized for use under the CIA program, and he has not had occasion to decide whether the technique would be lawful under current law. Whether

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waterboarding would be legal for use in the CIA program would depend upon whether it complies with the anti-torture statute, the Detainee Treatment Act of 2005, the War Crimes Act, and Executive Order 13440. Some of those prohibitions, such as the anti-torture statute, are absolute and prohibit the proscribed conduct regardless of the government interest implicated.

In the Attorney General's testimony, he referenced the Detainee Treatment Act's prohibition on "cruel, inhuman, or degrading treatment or punishment." This standard incorporates the Fifth Amendment's substantive due process prohibition on conduct that "shocks the conscience," which the Supreme Court has held to require consideration of the governmental interest at stake. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court observed that "our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id.* at 850. As the Supreme Court explained, a court first must consider whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8.

Biden 182 The administration recently announced its plan to renominate Steven Bradbury to be the Assistant Attorney General for the Office of Legal Policy. As you know, the Senate previously opposed his nomination because of his role in establishing the administration's torture policy. As revealed in the New York Times on October 4th of last year, Mr. Bradbury authored several legal memoranda that authorized the continued use of so-called "enhanced interrogation techniques" against detainees after Congress passed the Detainee Treatment Act of 2005, which banned the practice. Have you reviewed the Office of Legal Counsel opinions that Mr. Bradbury has contributed to that relate to the legality of interrogation practices?

ANSWER: We are aware that individual Senators have expressed concerns about Mr. Bradbury's nomination. With respect to your question, the Attorney General has reviewed the Office of Legal Counsel opinions insofar as they concern interrogation practices that are currently authorized for use in the CIA's interrogation program. He has found those practices to be lawful, and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Biden 183 Do you agree with Mr. Bradbury's analyses on this subject?

ANSWER: The Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

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Biden 184 To assist in Mr. Bradbury's confirmation process, will you make these legal opinions available to the committee for review?

ANSWER: In an extraordinary accommodation of Congress's oversight interest in this area, highly classified opinions concerning the CIA interrogation program were made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

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QUESTIONS FROM SENATOR FEINSTEIN

Feinstein 188 You testified that the telephone companies who cooperated with the Terrorist Surveillance Program "have been compliant with the law." As you are aware, 18 U.S.C. Section 2511(2)(a)(ii)(B) states that a provider is authorized to provide assistance if the provider has received a certification from a proper authority "that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required." Have you reviewed all of the requests for assistance that were sent to the telecommunications providers?

ANSWER: We have considered a variety of information, including requests for assistance sent to telecommunications providers, in concluding that providers who cooperated with the Terrorist Surveillance Program complied with the law and should be afforded liability protection.

Feinstein 189 Is it your opinion that each of the requests complied fully with the requirements of 18 U.S.C. Section 2511(2)(a)(ii)(B)?

ANSWER: The Department cannot comment on that question in an unclassified setting in light of the state secrets privilege assertion in ongoing litigation concerning this very issue. The Department already has provided the Members of the Senate and House Intelligence and Judiciary Committees with classified briefings and documents on this matter.

Feinstein 190 Is it your belief that there were other laws besides 18 U.S.C. Section 2511 that would have authorized the alleged assistance? If yes, please identify such laws.

ANSWER: As you note, 18 U.S.C. § 2511(2)(a) may provide such authorization. That statute also provides that no cause of action shall lie when a person who provided the assistance received a court order or a certification. In addition, in its January 2006 public white paper, the Department set forth its position that statutory authority for the Terrorist Surveillance Program was provided by the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541). The Department's classified legal opinions regarding that program have been provided to the Senate and House Intelligence and Judiciary Committees.

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Feinstein 191 The New York Times reported last fall that although the so-called Bybee memo on torture was rescinded in late 2004, DOJ's Office of Legal Counsel (OLC) issued two secret memos on interrogation techniques in 2005. Those memos reportedly endorsed physical abuse and simulated drowning. James Comey (then the Deputy Attorney General) said that DOJ would be "ashamed" when the world learned of the memos. Are the policies contained in those secret memos the current policy of the Administration?

ANSWER: Without accepting as true the *New York Times* article's characterization of Mr. Comey's views, we are not able to comment on the Department's internal deliberations over these classified matters. As reported in that article, the remark allegedly attributed to Mr. Comey supposedly was associated with an opinion addressing the lawfulness under the anti-torture statute of the CIA's use of a combination of interrogation techniques. The Department has disclosed that the Office of Legal Counsel issued three classified opinions relating to the CIA program in May 2005. [In advising the CIA about the lawfulness of its proposed interrogation methods, OLC considered the methods both individually and in their combined use. OLC concluded that its legal review should consider how the proposed methods were intended to be used in practice, in order to ensure that their combined use would not exceed what the law permits. If OLC had addressed the interrogation methods only individually, in isolation, and failed to address the overall way they were actually expected to be used in a typical interrogation, OLC's legal advice would have risked being artificial and incomplete. Giving incomplete advice would have been irresponsible and unfair to the people who were relying on OLC's advice.

With respect to your question about current policies, the classified OLC opinions were fully consistent with the Department's public December 30, 2004 opinion interpreting the anti-torture statute and the 2005 opinions reaffirmed that torture is abhorrent to American law and values and is not to be condoned or encouraged in any way. The Attorney General has reviewed the 2005 opinions insofar as they address interrogation practices currently authorized for use in the CIA program, and he found them to be correct and sound. These opinions have recently been made available to both the Intelligence and the Judiciary Committees; with respect to this accommodation, certain sensitive information that pertained to sources and methods was redacted from the opinions made available to the Judiciary Committees.

Feinstein 192 Have the two memos been rescinded?

ANSWER: No.

Feinstein 193 Have you ordered new memos to be issued?

ANSWER: No.

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Feinstein 194 Admiral Michael McConnell, the Director of National Intelligence, testified in open session before the Senate Select Committee on Intelligence on February 5, 2008 that he believed the OLC opinions on interrogation techniques should be provided to the oversight committees. Will you provide them?

ANSWER: We believe that the Administration has made substantial accommodations in recent months to accommodate Congress's interest in these matters. As you know, the Intelligence Committees have been briefed on both the classified details of and the legal basis supporting the program and unclassified briefings also have been provided to Congress. Recently, the Administration made an additional, extraordinary accommodation of congressional interest in this area by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

Feinstein 195 Defense Secretary Robert Gates, Chairman of the Joint Chiefs Admiral Michael Mullen, and former Secretary of State Colin Powell are among the senior Bush Administration officials who have called for the detention facility at Guantanamo Bay to be closed. And it is my understanding that the U.S. military thinks it is now feasible to close Guantanamo. For example, there are about 275 detainees currently at Guantanamo and there are reportedly enough beds to house all of them at the naval brig in Charleston, South Carolina – which has already handled enemy combatants such as Jose Padilla. How many Guantanamo detainees can be repatriated?

ANSWER: Our understanding is that the Department of Defense does not believe that any existing military detention facility has the capacity to hold these detainees under the security conditions necessary to ensure the safety of U.S. personnel. With respect to the question of how many detainees may be repatriated, the United States has repatriated well more than half of the enemy combatants who have been detained at Guantanamo Bay. Of those who remain, the United States has designated approximately 60 detainees for transfer, provided that their home countries or third countries will accept them and subject to assurances of humane treatment. Also, where appropriate, the United States seeks security-related assurances before repatriation. With respect to the remaining detainees, we would refer you to the Department of Defense for more information as to how many it may be possible to repatriate in the future.

Feinstein 196 How many detainees cannot be repatriated?

ANSWER: Department of Defense prosecutors have stated that approximately 80 enemy combatants are likely to be prosecuted by military commission, and therefore we are not seeking to repatriate them. We would direct you to the Department of Defense for additional details as to whether others may be repatriated.

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QUESTIONS FROM SENATOR FEINGOLD

Feingold 198 When I asked you whether telephone companies should be expected to comply with 18 U.S.C. § 2511, which prohibits telephone companies from complying with government requests for assistance unless the company receives a court order or a proper certification, you responded that "[t]he telephone companies have been compliant with the law." Section 2511(2)(a)(ii) of title 18 expressly grants immunity to companies that comply with the court order/certification requirement. If it is in fact the case that the telephone companies complied with the law, as you state, they are already immune from suit. Why does Congress need to pass a law to grant telephone companies immunity if they already have it?

ANSWER: As explained previously, under current law a company cannot invoke a certification defense in litigation, and a court cannot rule on such a defense, without disclosing state secrets. Nor can a company assert, or a court rule on, a defense that no assistance was provided. That is because, among other reasons, the identity of any company that assisted with classified intelligence activities, and the nature of any such assistance, remains highly classified. As the Senate Intelligence Committee stated in its report on S. 2248, "the identities of persons or entities who provided assistance to the U.S. Government are protected as vital sources and methods of intelligence," and it would be "inappropriate to disclose the names of the electronic communication service providers from which assistance was sought, the activities in which the Government was engaged or in which providers assisted, or the details regarding any such assistance." The Committee further recognized that private entities have been precluded "from taking advantage of existing immunity provisions" because of the state secrets problems. Accordingly, telecommunications providers are unable to defend themselves against numerous lawsuits pending in the federal courts.

The bipartisan Senate immunity provision would allow the resolution of the issue in litigation without the disclosure of state secrets. In addition, it is narrowly targeted at the current litigation and is designed to provide immunity specifically for those cases. Thus, an action may be dismissed under the Senate bill only if the Attorney General certifies to the court that either (1) the company did not provide the alleged assistance; or (2) the assistance was provided in connection with a communications intelligence activity authorized by the President between September 11, 2001, and January 17, 2007, designed to detect or prevent a terrorist attack (or activities in preparation for a terrorist attack) against the United States, and described in a written request from the Attorney General or head of an element of the Intelligence Community (or deputy of such person) indicating that the activity was authorized by the President and determined to be lawful. A court must review the Attorney General's certification before an action may be dismissed, and the immunity does not extend to Government officials or criminal conduct.

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Providing this liability protection is critical to the national security. First, it will prevent the disclosure of national security information in litigation. Second, as the Director of National Intelligence and the Attorney General have explained, we have experienced significant difficulties in working with private sector companies because of the continued failure to provide such liability protection. Exposing the private sector to the continued risk of multibillion-dollar class action suits for allegedly assisting in efforts to defend the country understandably makes company counsel much more reluctant to cooperate and much more inclined to litigate our requests for assistance—thereby delaying the surveillance we are requesting—in order to insulate their companies and shareholders from liability. Without their cooperation, our efforts to protect the country cannot succeed. As the Senate Intelligence Committee recognized, "the Intelligence Community cannot obtain the intelligence it needs without assistance from these companies." The Committee also concluded that "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future without unnecessary court involvement and protracted litigation," and the "possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation."

Feingold 199 Even assuming there was some value in Congress enacting yet another provision to immunize companies that complied with the law, the immunity provision that the Senate is currently considering contains no requirement that companies have complied with 18 U.S.C. § 2511 in order to receive immunity. Would you support amending the provision to provide immunity only to those companies that complied with 18 U.S.C. § 2511?

ANSWER: No. After conducting an extensive study of the issue and the underlying classified information, the Senate Intelligence Committee concluded that the companies that provided assistance acted in good faith and are entitled to protection from civil suit in this unique historical circumstance. Moreover, as explained above, the Committee also found that immunity is critical for the protection of national security. Having reached such determinations, there is no reason to condition immunity on compliance with the particular requirements of 18 U.S.C. § 2511(2)(a)(ii). Ultimately, resolution of that narrow question does not change the fact that immunity is both the just and fair result and in the best interest of the national security.

Feingold 201 Your January 29, 2008, letter to Chairman Leahy described the process by which new interrogation techniques may be added to the CIA interrogation program. That process includes a step in which you must determine whether the proposed technique would be lawful. Will you commit to informing the full membership of the relevant committees of Congress of your view of the legality of any new techniques before they are implemented?

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ANSWER: As the Attorney General has testified, there is a defined process by which a technique should be considered for use in the CIA interrogation program, one step of which would require the Attorney General's analysis of the lawfulness of the technique under the circumstances and limits proposed. The Attorney General committed that he would notify the Judiciary Committee if waterboarding is ever again authorized for use in the CIA program. With respect to any other proposed technique, the Intelligence Committee has been briefed on the classified details of the CIA program, including the Department's legal analysis, and we would expect that the Committee would be notified should there be any additions to the program in the future.

Feingold 202 If your answer to the above question is anything other than "yes," when would you propose to provide to Congress your views on any newly-added techniques?

ANSWER: Please see the response to Question 201.

Feingold 203 I asked you whether you would come to Congress and, in a classified setting, provide a detailed explanation of your conclusion that the particular techniques included in the CIA interrogation program are lawful. You indicated that you would not do so, because "[t]he view that I have of the details of the program is embodied in classified letters," and that these letters "explain it far beyond my ability to do it . . . in a session with Congress where I'm not sitting with the authorities in hand and with the people at hand to do that review, which has been done in the letters." What are the "classified letters" to which you were referring?

ANSWER: The Attorney General was referring to the OLC opinions concerning the CIA interrogation program.

Feingold 204 If these letters have not yet been provided to the Intelligence or Judiciary Committees, will you provide them in a classified setting? If your answer is no, please set forth in detail the legal basis for your withholding of these letters.

ANSWER: The Administration has made substantial accommodations in recent months to accommodate Congress's interest in these matters. The Intelligence Committee has been briefed on both the classified details of and the legal basis supporting the program, and unclassified briefings also have been provided to Congress. Recently, the Administration took an additional, extraordinary step by making available to the Intelligence Committees the classified OLC opinions on the CIA program. In addition, the Administration made available to the Judiciary Committees three of those opinions, with limited redactions necessary to protect intelligence sources and methods.

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Feingold 205 As you pointed out in your January 29, 2008, letter, it is ultimately your responsibility, as the Attorney General of the United States, to determine whether interrogation techniques employed by the government are lawful. Moreover, in your confirmation hearings, you testified that you would conduct an independent review of the lawfulness of any currently approved interrogation techniques. In light of these facts, it is puzzling that you take the position that you cannot explain the basis for your conclusions to Congress because your explanation would be less authoritative than, or might somehow differ from, the review done by others in the "classified letters" you reviewed.

ANSWER: Respectfully, we do not believe that is the Attorney General's position. As he had committed, the Attorney General conducted his own review of the techniques currently authorized for use in the CIA program, and determined that those techniques are lawful and that the Department's analysis of those matters was correct and sound. The Department has explained its legal views with respect to the classified techniques to the Intelligence Committee. We are unable to discuss those classified details, however, in a public setting.

Feingold 206 In my letter to you dated December 10, 2007, I requested that you provide any current or past legal analyses of the CIA's interrogation program, such as Office of Legal Counsel memoranda. I have not received a response to this request. Will you provide those analyses? If your answer is no, please set forth in detail the legal basis for your withholding of these memoranda.

ANSWER: Please see the response to Question 204.

Feingold 207 You testified that senior advisers to the President who claim executive privilege in response to subpoenas from Congress are "immune" from contempt prosecutions. You also testified that this "immunity" is granted by the President. Please provide legal authority for your claim that the President may immunize executive officials from contempt proceedings.

ANSWER: The Department's views on this matter are well established. For a recent discussion of the Department's position and the relevant authorities, we would refer you to the Attorney General's February 29, 2008 letter to Speaker Pelosi, as well as the Department's July 24, 2007 letter to Chairman Conyers. Copies of both letters are attached.

Feingold 208 You've previously indicated that the rationale for the Department of Justice refusing to undertake contempt prosecutions in these cases is that the advisers relied on the President's invocation of the privilege. Under that rationale, the President, not the adviser, would be directly responsible for any non-compliance with the subpoena. And, of course, refusing to comply with a subpoena in the

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absence of a valid privilege claim is unlawful. Does the current law allow Congress to refer the President for contempt prosecution where he improperly invokes executive privilege to prevent an adviser from responding to a Congressional subpoena? If not, do you agree that the law should be amended to allow such a referral?

ANSWER: The plain text of the criminal contempt of Congress statute only authorizes referrals of individuals for prosecution who themselves have been subpoenaed. *See* 2 U.S.C. § 192. Here, the individuals subpoenaed declined to provide information based on an assertion of executive privilege by the President that the Department of Justice had previously determined was legally proper. Amending the statute to allow Congress to make a criminal referral of the President for "improperly" invoking executive privilege and directing a subordinate not to comply with a subpoena would raise serious constitutional questions.

Feingold 209 As you know, the individual who ordinarily would be responsible for investigating the destruction of the CIA interrogation tapes is the United States Attorney for the Eastern District of Virginia. However, he recused himself for unspecified "conflicts," and the investigation is being conducted instead by First Assistant United States Attorney for the District of Connecticut, John Durham. In the absence of any public explanation of what "conflicts" presented ordinary procedures from being followed, it could appear to the public that the Department was simply shopping for an investigator it preferred. When Chairman Leahy asked you about the details of the recusal request, you stated, "I'm not going to get into the details." What was the basis of your refusal to answer Chairman Leahy's question?

ANSWER: The Department has a strong interest in maintaining the confidentiality of internal deliberations on matters such as this, particularly where they related to an ongoing criminal investigation. As the Attorney General stated during his testimony, "Facts [in the recusal request] were teased out in such a way as to present the possibility that there could be a conflict." Furthermore, the Department noted in announcing the appointment of Mr. Durham as Acting United States Attorney for the Eastern District of Virginia for the purpose of investigating the CIA's destruction of interrogation tapes, that the United States Attorney's recusal request was granted out of an abundance of caution, in accordance with Department of Justice policy, in order to avoid any possible appearance of a conflict with other legal matters handled by that office.

Feingold 210 It is critically important that there be public confidence in the outcome of this investigation. To avoid any appearance that the recusal of the United States Attorney was based on political or other improper considerations, please specify the nature of the "conflicts" that led to the recusal.

ANSWER: We can assure you that the recusal was not based on political or other improper considerations. Please see the response to Question 209.

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Feingold 211 Chairman Leahy asked you why John Durham wasn't given the kind of authority that Special Counsel Patrick Fitzgerald was given in the investigation into the leak of CIA agent Valerie Plame's identity. You responded, "There's a regulation regarding when you appoint a special counsel and when you don't. You appoint a special counsel when there's a conflict." In fact, however, Mr. Fitzgerald was not appointed under that regulation. Instead, Acting Attorney General James Comey invoked 28 U.S.C. § 510 to delegate the full powers of the Attorney General to Mr. Fitzgerald in connection with the investigation. This was done for the express purpose of freeing Mr. Fitzgerald from the restrictions imposed by the special counsel regulations, in particular, the requirement that the special counsel report to the Attorney General and obtain his approval for certain investigatory steps. The decision to invoke 28 U.S.C. § 510 and thus ensure Mr. Fitzpatrick's independence was widely hailed as an important step toward safeguarding the integrity of the investigation. Will you agree to do the same for Mr. Durham's investigation of the destruction of the tapes?

ANSWER: The Department is committed to conducting a comprehensive and impartial investigation. The Attorney General named Mr. Durham as the Acting United States Attorney for the Eastern District of Virginia for the purposes of investigating the CIA's acknowledged destruction of tapes of interrogations. As such, he has at his disposal all resources available to any United States Attorney to enable him to complete his investigation. Like all United States Attorneys, Mr. Durham will report to the Deputy Attorney General and to the Attorney General.

Feingold 224 Government officials, as well as declassified documents issued in response to a FOIA request, have recently confirmed that both the CIA and the Pentagon have issued national security letters to obtain financial records from financial institutions here in the United States. Executive Order 12,333 places primary responsibility for domestic intelligence gathering with the FBI, and limits the ability of other intelligence agencies to spy domestically.What role should the CIA and military intelligence agencies play with respect to domestic intelligence gathering operations? If other intelligence agencies need information on Americans, would it be preferable for them to ask for follow-up from the FBI, which has the expertise and appropriate safeguards in place to conduct domestic operations?

ANSWER: Various federal agencies are authorized by statute to use national security letters to obtain certain types of information. For example, 50 U.S.C. § 436 provides, among other things, that "[a]ny authorized investigative agency may request . . . financial records, other financial information, and consumer reports as may be necessary in order to conduct any authorized law enforcement investigation, counterintelligence inquiry, or security determination" under certain specific circumstances. Whereas NSLs issued by the FBI are compulsory in nature, NSLs issued by other agencies, such as the CIA or DoD, are voluntary in nature (with the exception of NSLs issued pursuant to 15 USC § 1681v). In other words, the agencies can make the requests, but the receiving institution

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is not obligated to respond. *See* 50 U.S.C. § 436(a)(1). Other national security letter authorities, for example, require the Federal Bureau of Investigation to make such requests. *See, e.g.*, 18 U.S.C. § 2709. These statutes, among others generally referred to as national security letter statutes, permit appropriate agencies to obtain information related to their authorized responsibilities.

Pursuant to Executive Order 12333, the Central Intelligence Agency is required to coordinate its "collection of foreign intelligence or counterintelligence within the United States . . . with the FBI as required by procedures agreed upon by the Director of [National] Intelligence and the Attorney General." *See* Executive Order 12333 § 1.8(a). Similarly, the Department of Defense is required to coordinate its "counterintelligence activities . . . within the United States . . . with the FBI pursuant to procedures agreed upon by the Secretary of Defense and the Attorney General." *See* Executive Order 12,333 § 1.11(d). The procedures required by Executive Order 12333 are designed to ensure appropriate deconfliction of activities by these agencies and appropriate protection of the privacy and civil liberties of Americans.

Feingold 225 Do you have any concerns about a situation in which the CIA or the Defense Department might issue an NSL to the same financial institution that the FBI works with regularly? Do these coextensive authorities present the opportunity for confusion for the institutions that might receive them, for example if they receive overlapping requests?

ANSWER: As noted in response to Question 224, the national security letter statutes permit appropriate agencies to obtain information related to their authorized responsibilities. The financial institutions and other entities that are authorized to provide information pursuant to these statutes regularly provide information to appropriate federal government agencies under various provisions of existing law. If financial institutions receive similar or identical information requests from more than one agency, they would simply respond to them separately.

Feingold 227 Does the Justice Department provide any legal review of particular NSLs issued by these other agencies, or get notice when the CIA or Defense Department issues NSLs?

ANSWER: Requests made pursuant to national security letter provisions are generally required to be accompanied by written certifications by senior officials within the agency authorized to make such requests to ensure that particular legal requirements are met. For example, 50 U.S.C. § 436 requires a request under that section to be "accompanied by a written certification signed by the department or agency head or deputy department or agency head concerned, or by a senior official designated by the department or agency head concerned (whose rank shall be no lower than Assistant Secretary or Assistant Director)" certifying that particular requirements of that statute are met. *See* 50 U.S.C. § 436(a)(3). As such, each agency authorized to use such authority is required to certify,

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through an appropriate senior official, that the particular statutory requirements have been satisfied. The Department of Justice is not required under these statutes to review such determinations by these officials nor is the Department required to be notified of such requests made pursuant to statutory authority. As noted above, pursuant to Executive Order 12333, both the Central Intelligence Agency and the Department of Defense are required to coordinate certain intelligence activities within the United States with the FBI pursuant to procedures agreed upon by the relevant cabinet members and the Attorney General.

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QUESTIONS FROM SENATOR SCHUMER

Schumer 231 On three occasions during your confirmation process, you assured me that you would undertake a review of existing opinions of the Office of Legal Counsel. I asked you in a private meeting, during your confirmation hearing, and in written questions, whether you would re-examine legal opinions relating to the Terrorist Surveillance Program, detention, interrogation, and torture. On these occasions, you assured me that you would undertake such a review and withdraw any opinions that you found to be legally unsustainable. You have also assured me that when you completed your review of operative OLC opinions you would take steps to make it known to Congress if appropriate. Have you completed such a review and re-examination of OLC opinions related to the Terrorist Surveillance Program, and policies of detention, interrogation, and torture?

ANSWER: As the Attorney General stated in advance of his January 31, 2008, hearing before the Senate Judiciary Committee, he reviewed the Department's legal advice concerning those practices that are currently authorized for use in the CIA's program. He found those practices to be lawful, and found the Department's analysis and conclusions concerning those practices to be correct and sound. The Attorney General has not found it necessary to go further and to provide a definitive review of Office of Legal Counsel opinions, or portions of those opinions, that do not address matters currently before him.

Schumer 232 If you have completed the review, have you directed that any OLC opinions be corrected and/or withdrawn?

ANSWER: No, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found those practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Schumer 233 If you have not yet completed the review, could you please inform me of the review's progress and when Congress will receive a response?

ANSWER: Please see the response to Question 231.

Schumer 234 In the written questions submitted during your confirmation process, Senator Durbin referenced two OLC opinions approving the legality of abusive interrogation techniques authored by Steven Bradbury. He asked that you review all OLC opinions regarding interrogation techniques. You pledged to do so. Specifically, have you reviewed Mr. Bradbury's opinions on interrogations, specifically those dated May 10, 2005, and May 30, 2005? Do you stand by them?

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ANSWER: Yes, the Attorney General has reviewed the Office of Legal Counsel's legal analysis of practices that are currently authorized for use in the CIA's interrogation program. The Attorney General has found practices to be lawful and has found the Office's analysis and conclusions concerning those practices to be correct and sound.

Schumer 235 If not, will you commit to completing your review by February 27th? Will you commit to advising the Committee whether you agree with the legal reasoning contained in those opinions?

ANSWER: Please see the response to Question 234.

Schumer 236 The authorizing statute of the United States Commission on Civil Rights provides that no more than half of the Commission's members may be from a single political party. Two members of the current Commission are independents who were registered Republicans at the time of their appointments, but who changed their party affiliation while in office. After these commissioners became independents, the Office of Legal Counsel (OLC) issued an opinion on December 4, 2006, concluding that the Commission's statutory limits apply only to a Commissioner's partisan affiliation at the time of his or her nomination. A day after the OLC issued this opinion, the President nominated two Republicans to fill vacancies on the Commission. Thus, the current Commission is composed of two Democrats, four Republicans, and two independents who were previously registered as Republicans. During your confirmation process, you pledged to re-examine a number of key OLC opinions and to withdraw any opinions that you found to be legally unsustainable. I request that you also reexamine the OLC opinion issued on December 4, 2006 that interprets the partisan balance provisions of the Civil Rights Commission's authorizing statute. Will you commit to conducting such a review and re-examination? If not, please explain the reasons for your refusal to reexamine this OLC opinion.

ANSWER: We believe you are referencing an OLC opinion released December 6, 2004. *See* http://www.usdoj.gov/olc/2004/12062004_crcbalance.pdf. That opinion concludes that under the plain terms of 42 U.S.C. § 1975(b) (2000), where a member of the Civil Rights Commission changes his or her party affiliation after the time of appointment, the statute calls for the President to consider that change in making future appointments to the Commission. As explained in the response to Question 129, we have concluded after careful review that the December 2004 OLC opinion correctly construes the statutory language and that its interpretation serves the purposes identified in the legislative history at least as well as the proposed alternative construction.

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Schumer 237 Will you commit to advising the Committee whether you agree with the legal reasoning in this OLC opinion?

ANSWER: Please see the response to Question 236.

Schumer 238 Will you commit to withdrawing this OLC opinion if you find that the legal reasoning is flawed or insufficient?

ANSWER: As explained in response to Questions 129 and 236, we have concluded that the opinion is correct and should not be rescinded.

Schumer 239 As you have acknowledged, waterboarding cannot be used by the United States military because it would be a clear violation of the Detainee Treatment Act. Moreover, we know from a multitude of distinguished generals and military officials that coercive techniques like waterboarding are ineffective and beneath the dignity of the United States. Indeed, in a letter to American armed forces in Iraq, General Petraeus wrote: "Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows that they also are frequently neither useful nor necessary.... In fact, our experience in applying the interrogation standards laid out in the Army Field Manual...shows that the techniques in the manual work effectively and humanely in eliciting information from detainees. And, as we wrote in our October letter to you and as Senator Durbin has pointed out, the "highest-ranking military lawyers in each of the U.S. Armed Forces' four branches" said unequivocally that waterboarding is illegal and violates Common Article 3 of the Geneva Conventions. The Marine Corps Staff Judge Advocate stated flatly that "threatening a detainee with imminent death, to include drowning, is torture under 18 USC §2340."" Unlike you, these military lawyers do not believe waterboarding presents a "close" legal question. How can all of these distinguished lawyers come out so differently on the question than you? Where are they wrong in their reasoning?

ANSWER: As the Attorney General stated during his testimony, because waterboarding is not among the practices currently authorized for use in the CIA program, we do not believe that it would be appropriate for the Attorney General to answer categorically questions concerning the legality of waterboarding absent a set of circumstances that call for those answers.

Schumer 240 Am I correct that in your mind it is still a "close question" whether the waterboarding of an American by Iraqi insurgents, for example, violates the Geneva Conventions?

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ANSWER: With respect to the conflict in Iraq, it seems unrealistic to expect that Iraqi insurgents would comply with any legal standard, because they have demonstrated no respect for the law of war. Rather, they target civilians, and they murder and torture the people whom they capture. Nonetheless, we do agree that in interpreting and applying the Geneva Conventions, we are interpreting legal principles that could potentially apply to American citizens, and that this supplies an additional reason why the United States must adhere fully to its obligations under the Geneva Conventions. That said, for reasons we have explained, we continue to believe that it would be inappropriate to give an opinion on the legality of waterboarding under current law in the absence of concrete facts and circumstances that require the Attorney General to opine on this legal question.

Schumer 241 Senator Feinstein successfully negotiated into the Intelligence Authorization conference report extending the Army Field Manual to the CIA. Among other things, if passed into law, that bill would forbid the CIA from engaging in certain coercive interrogation practices – including waterboarding. That conference report was passed by the House of Representatives in December. In this matter is Congress acting within its Constitutional authority?

ANSWER: The Department expressed some constitutional concerns with certain provisions of the Intelligence Authorization Act for Fiscal Year 2008, but we did not express any constitutional concern with section 327, which would have required CIA personnel to comply with the Army Field Manual on Interrogations. As you know, on March 8, 2008, the President vetoed the Intelligence Authorization Act.

Schumer 242 Would the President have any legal basis to avoid complying with such a law?

ANSWER: Please see the response to Question 241.

Schumer 243 If Congress passes such a law, will you advise the President to sign it or will you advise the President to veto it? (I note that you have recently publicly stated your views on whether the President should veto other bills if passed, such as one related to FISA.)

ANSWER: The President vetoed the Intelligence Authorization Act, and the Department supported that decision.

Schumer 244 Recently, the Director of National Intelligence Mike McConnell made some comments in the New Yorker about waterboarding. He said this: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me it would be torture." Do

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you agree that if waterboarding involves water draining into the mouth or nose, it clearly constitutes torture?

ANSWER: We understand that Director McConnell clarified in subsequent congressional testimony that the quoted statements in the *New Yorker* were not intended to suggest legal views on the question. As the Attorney General stated in his testimony, waterboarding is not currently authorized for use in the CIA interrogation program and therefore may not be used. In the absence of concrete—rather than hypothetical—facts and circumstances that require Attorney General's opinion, it would not be appropriate to give an opinion on the legality of waterboarding.

Schumer 245 If the CIA asked for authorization to engage in a form of waterboarding that caused water to drain into the mouth or nose, would you deny that authorization? If so, on what grounds?

ANSWER: Please see the response to Question 244.

Schumer 246 Did any of the waterboarding techniques that were reportedly discontinued involve "water draining into the mouth or nose"?

ANSWER: General Hayden acknowledged publicly that waterboarding was used in the past on three senior al Qaeda terrorists, but that it is no longer part of the CIA's program. Obviously, the operational details of the CIA's interrogation program remain highly classified. Any questions concerning additional details about waterboarding, or about any other practice, should be directed to the CIA.

Schumer 247 In a recent "National Journal" article, Ambassador John Negroponte made some on-the-record statements about waterboarding. He said, "We've taken steps to address the issue of interrogations, for instance, and waterboarding has not been used in years. It wasn't used when I was director of national intelligence, nor even for a few years before that." This statement makes clear that waterboarding was once used – in the not-too-distant past – by the American government. Just this week, Director McConnell confirmed that three individuals were waterboarded. Why was the practice removed as an authorized technique?

ANSWER: Following the enactment of the Detainee Treatment Act in December 2005, the CIA commenced a comprehensive policy and operational review of the interrogation program, which eventually resulted in a narrower set of proposed interrogation methods. While that review was underway, the Supreme Court held in *Hamdan* in June 2006 that Common Article 3 applies to our armed conflict with al Qaeda, Congress passed the Military Commissions Act of 2006, and the President issued Executive Order 13440 to prescribe additional requirements under the CIA program. As part of the legal and policy

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review, and these developments in the law, the CIA concluded that waterboarding would not be part of those practices proposed for use in the CIA program. The CIA accordingly did not request that the Department of Justice examine the legality of waterboarding in light of these developments in the law.

Schumer 248 Was it for legal or policy reasons or a combination of the two?

ANSWER: Please see the response to Question 247.

Schumer 249 If there were not any question of criminal or civil liability on the part of any official for past conduct, would that in any way change your analysis or your willingness to analyze the legal questions surrounding waterboarding?

ANSWER: No. The question whether to initiate an investigation into conduct that took place in 2002 and 2003 based upon advice provided by this Department should not depend upon the retrospective views of the Attorney General in place years later. If our intelligence professionals rely in good faith on advice that they are given by the Department of Justice, they should not be subjected to criminal investigation for it. Accordingly, the Attorney General's reluctance to opine in the abstract on the legality of waterboarding does not turn on the impact that any such an opinion could have on the criminal or civil liability of individuals for past actions.

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QUESTIONS FROM SENATOR DURBIN

Durbin 263 Other than the joint investigation being conducted by the Inspector General and Office of Professional Responsibility, what steps, if any, have you taken to investigate whether any selective prosecutions were brought by the Justice Department between 2001-2007?

ANSWER: Department policy and regulations require Department employees to report evidence and non-frivolous allegations of misconduct. Also, the Office of Professional Responsibility reviews judicial opinions for judicial criticism or findings that might warrant investigation, and conducts investigations when information from other sources suggests that an investigation is warranted. These processes assure that non-frivolous accusations of selective prosecution receive appropriate scrutiny.

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QUESTIONS FROM SENATOR GRASSLEY

Grassley 268 As you are aware, I'm a long time supporter of whistleblowers and believe that they have helped uncover all sorts of financial irregularities and mismanagement within the Executive Branch. During the hearing, I asked about a January 22, 2008, letter you signed along with the Director of National Intelligence McConnell, Secretary of Defense Gates, and Secretary of Homeland Security Chertoff objecting to S.274, the Federal Employee Protection Act of 2007. In response to my question, you stated that the process outlined in S.274 where national security whistleblowers could make protected disclosures to Congress, "cuts off the supervisory chain and cuts off even the President from the chain of reporting. That raises separation of powers issues and creates a situation where somebody is essentially encouraged to bypass supervisors." Further, you added that you believe S.274 is "not the way to do it" and that you were "not saying that this is drawing of the line in the sand." Instead, you said you were willing to work with the Senate on this important legislation. Accordingly, please answer the following: Does Congress have a constitutional right to classified information from Executive Branch employees acting outside their chain of command?

ANSWER: The Supreme Court has recognized that the President's "authority to classify and control access to information bearing on national security . . . flows primarily from" his constitutional authority under Article II as Commander in Chief "and exists quite apart from any explicit congressional grant." *Department of Navy v. Egan*, 484 U.S. 518, 527 (1988); *see United States v. Nixon*, 418 U.S. 683, 711 (1974) (to the extent a claim of presidential privilege "relates to the effective discharge of the President's powers, it is constitutionally based"); *id.* at 710 ("claim of privilege on the ground that [information constitutes] military or diplomatic secrets" necessarily involves "areas of Art. II duties" assigned to the President). Accordingly, it is the long-standing position of the Executive branch, and of Administrations of both political parties, that the President has "the right . . . to decide to withhold national security information from Congress under extraordinary circumstances." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 95 (1998). That includes the authority "to decide, based on the national interest, how, when and under what circumstances particular classified information should be discussed to Congress." *Id.* at 100.

Of course, the Department agrees that Congress has an interest in receiving the information that enables it to carry out its important legislative responsibilities. The Executive branch remains committed to accommodating Congress's legitimate oversight needs in ways that are consistent with the Executive Branch's constitutional responsibilities. Under the National Security Act and long-standing practice between the Legislative and Executive Branches, the Executive Branch keeps certain Members of Congress appropriately informed regarding national security matters.

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Grassley 269 Does a national security whistleblower really need to try to contact the President directly before making a protected disclosure to Congress?

ANSWER: An individual may make any such disclosure to the Special Counsel or to the Inspector General of an agency. 5 U.S.C. § 2302(b)(8)(B); Inspector General Act of 1978, 5 U.S.C. App. 3. Those entities, with certain restrictions and following applicable procedures, may communicate with Congress regarding whistleblower complaints.

Grassley 270 If so, what sort of mechanism is in place for this individual to have his or her claim heard by the President? Are Executive Branch employees aware of such a mechanism?

ANSWERS: An individual need not contact the President directly, but he must follow (and report up) the chain of command to obtain authorization from his department or agency for the disclosure of classified information to Congress. An individual does not have a unilateral right to determine how, when, and under what circumstances classified information may be disclosed to Congress. Rather, such disclosures must be authorized by the individual's supervisors or other appropriate officials within his department or agency.

Grassley 271 If there is not a mechanism in place, what is the process for an individual to raise concerns within the Executive Branch?

ANSWER: Please see the responses to Questions 269-270.

Grassley 304 On November 14, 2007, Senator Bond and I wrote to you seeking information on about the former FBI and CIA agent Nada Nadim Prouty, who recently pled guilty to various charges, including immigration fraud and unauthorized access to FBI case information dealing with Hezbollah, her relatives, and herself. Why did the FBI's employment screening background investigation fail to discover that Prouty had overstayed her student visa?

ANSWER: Nada Prouty applied for employment with the FBI by application dated 7/9/97. At the time, she was known as Nada Alley, and was required to provide citizenship information in her application, including country of citizenship, how acquired, and, if naturalized, date and place of naturalization and naturalization certificate number. Then-current procedures required the FBI to confirm her naturalization "directly from the appropriate registration authority." This was accomplished by accessing automated Immigration and Naturalization Service (INS) records in accordance with reciprocity mandates. Although the automated records were searched in accordance with then-current procedures, the records associated with that search did not contain information pertaining to the overstay.

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Grassley 306 Did the A-file contain information regarding her visa overstay? If not, why not?

ANSWER: While the alien file is not retained by the FBI, the FBI reviewed that file in the context of its review of this matter and found that the information regarding Prouty's overstay is contained in the alien file.

Grassley 307 What is the FBI's policy regarding hiring agent applicants who have overstayed their visas? If it is not disqualifying, please explain why not?

ANSWER: All FBI employees must possess Top Secret security clearances and be United States citizens. Individuals illegally residing in the United States on expired visas are not eligible for employment by the FBI. When the FBI conducted Nada Alley's background investigation we received confirmation of naturalization from INS, as indicated above. Having received the confirmation of naturalization from automated records, we did not review the alien file. The FBI has since revised this procedure.

Grassley 308 Does the FBI have a policy of heightened scrutiny of employment applications from recently naturalized foreign nationals from high risk countries with a high degree of terrorist activity? If not, what steps do you believe should be taken to implements such a policy?

ANSWER: Yes, the FBI does provide heightened scrutiny with respect to employment applications from recently naturalized foreign nationals from high risk countries. Since the attacks of September 11, 2001, the demand for personnel with particular foreign language skills and cultural backgrounds has created a unique challenge for the FBI. To address this challenge, the FBI created a Post Adjudication Risk Management (PARM) Program, which was initially developed to address the threat associated with hiring high risk contract language specialists. The PARM program, which has since been expanded to include all personnel with high risk indicators, is designed to track and monitor high risk personnel through periodic audits and other appropriate security checks on a continual basis.

Grassley 309 Do you agree that knowledge that she had overstayed her visa should have triggered additional scrutiny of her marriage and citizenship application, which were both fraudulent?

ANSWER: Yes.

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Grassley 310 The FBI's employment screening background investigation failed to discover that Prouty engaged in a sham marriage in order to obtain citizenship. Prouty never lived with her purported spouse, which background investigators should have known. According to the FBI, Prouty's female roommate was interviewed during the background investigation and indicated that the two were roommates at the time she was allegedly married to the man through whom she obtained U.S. citizenship. However, the FBI did not follow-up to determine why Prouty was not living with her "husband." Why did the FBI background investigation fail to uncover this information and what steps do you intend to take to ensure that further background investigations are more thorough?

ANSWER: While the background investigation conducted prior to Prouty's 1997 FBI employment was conducted under the procedures in place at that time, those procedures were revised significantly following the 2001 arrest of FBI Agent Robert Hanssen and have been further revised in the wake of Prouty's fraud. For example, the FBI's 1997 procedures required the verification of some information, such as marriages, through a check of public records rather than interviews, so a fraudulent marriage would not have been exposed. While background investigation interviews reveal a great deal, their value is largely dependent on the quality of the questions asked. FBI background investigation procedures have, therefore, been reviewed to ensure we do not rely inappropriately on public record information. In addition, the FBI has expanded applicant background investigations to include, at a minimum, the review of the alien file by an investigator. Depending on the circumstances of the case, the FBI may also require review of the alien files of the applicant's relatives, references, or associates.

Grassley 311 In response to the Prouty case, the FBI indicated that it is going to determine how many agents are naturalized citizens from high-risk countries and re-examine their backgrounds to some degree. However, the details about how and when such a review will be done are not clear. Do you agree that the FBI's previous reliance on citizenship decisions made by another agency in a different context is misplaced when making hiring decisions critical to national security? If so, what steps do you intend to take to ensure that naturalized agent applicants are screened more thoroughly?

ANSWER: The FBI acknowledges that previous reliance on citizenship decisions made by another agency was misplaced when making hiring decisions. To correct this deficiency, the immigration files of all foreign born applicants will be reviewed during initial security processing. With regard to on-board employees, the FBI will review their immigration files during their periodic reinvestigations. The FBI is also focusing on better training analysts and investigators to recognize immigration issues, including fraudulent marriages and citizenship fraud.

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Grassley 312 Will you agree to provide regular and detailed updates to the Committee on the progress of the FBI's effort to re-check the backgrounds of foreign-born FBI agents in response to the Prouty case?

ANSWER: Yes. The FBI would be pleased to provide updates on our progress in rechecking the backgrounds of all foreign-born Special Agents.

Grassley 313 The FBI's employment screening background investigation also failed to uncover derogatory information on Prouty's brother-in-law, former employer, and Hezbollah supporter, Talal Khalil Chahine. The FBI interviewed Chahine, who is now a fugitive indicted on tax evasion and other charges, during Prouty's background investigation, but merely to verify Prouty's employment. However, according to FBI briefers, Chahine had been the subject of a terrorism-related investigation in 1986, long before Prouty's application for FBI employment. Why does the FBI background investigation not generally include a basic name-check on references?

ANSWER: The FBI determined that Prouty's brother-in-law, Talal Khalil Chahine, is not the Talal Chahine identified as the subject of an 1986 terrorism investigation. The FBI's background investigation process was conducted in accordance with existing procedures, which called for the interview of references and verification of employment, including interviews of supervisors. Chahine was not listed as a reference or as a direct supervisor, but was interviewed as the owner of a business that employed the candidate. While procedures then in place did not require name checks on either references or supervisors; as a result of the Prouty investigation the FBI has added these checks in connection with the background investigations of foreign-born or otherwise high-risk candidates.

Grassley 314 Why should this particular investigation not have included name checks on references given Prouty's visa overstay, questionable marriage, and recent immigration from a high risk country?

ANSWER: As indicated above, Prouty's visa status was not discovered during the course of the background investigation or otherwise known by the FBI, as her naturalization was verified through automated records rather than a review of her INS file. At the time of the background investigation the legality of her marriage and subsequent divorce were not in question. In accordance with procedures in place at the time, Prouty's divorce was verified through court records and an interview of her former spouse. At the FBI's request, Prouty's immigration from Lebanon and her status in that country were reviewed by a local United States Embassy security officer, who developed no derogatory information.

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Grassley 315 Prouty passed at least two polygraph examinations, one at the FBI and one at the CIA. I recently wrote to FBI Director Mueller raising questions about the reliability of polygraph examinations for employment screening purposes. There are serious concerns that the FBI cannot establish what the false positive rate is, and therefore, does not know how many qualified, valuable candidates may be unfairly denied the opportunity to become FBI agents. This case illustrates the opposite problem, that polygraphs also produce false negatives. The notorious CIA spy Aldrich Ames also passed two polygraph examinations. In Prouty's case, the polygraph was no more effective at uncovering her fraud in obtaining U.S. citizenship. The FBI did not even ask her the question, "Have you ever committed a serious crime?" If the FBI placed more emphasis on rigorous and thorough background checks instead of placing all its eggs in the polygraph basket, perhaps Prouty's could have been prevented from infiltrating the FBI. While polygraphs are a tool that can be useful, they should not be used as a substitute for a full and complete investigation. Why was Prouty not asked whether she had committed a serious crime during her polygraph examination?

ANSWER: At the time of Prouty's polygraph examination, a question regarding serious crime was not included in the series of polygraph questions asked of applicants. The FBI is currently reviewing the applicant polygraph process with a view toward adding a question asking whether the applicant has been involved in a serious crime (including immigration/naturalization fraud).

Grassley 316 At the time of Prouty's application, were applicants generally asked that question?

ANSWER: Please see the response to Question 315.

Grassley 317 Are they generally asked that question now? Why or why not?

ANSWER: Please see the response to Question 315.

Grassley 318 The FBI computer system did not automatically alert management when an agent queries his or her own name or relatives' names, nor does the FBI systematically conduct audits to search for and address suspicious computer activity. While ACS had audit capabilities to allow an investigation of who accessed particular records after-the-fact, such an investigation is only triggered when some other event causes suspicion to fall on an agent or if a particular manager happens to decide to do a random check. What steps do you believe the FBI should take to be more proactive about internal security?

ANSWER: The FBI's Enterprise Security Operations Center (ESOC) conducts information technology (IT) security monitoring on the three major FBI system enclaves

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(i.e., the Sensitive Compartmented Information Operations Network, Secret Enclave, and Unclassified Network). In 2007, the ESOC implemented the Advanced Indication and Warning System, which provides an automated, systematic notification of questionable employee computer activities, including self searches and relative searches, which is reviewed by an analyst and forwarded for additional analysis or action as appropriate.

Grassley 321 At no time before Prouty left the FBI did it detect any of her illegal activities or warn the CIA about them, and even today it appears that the FBI is providing limited access to information about the Prouty case to the CIA. Not until a source told the FBI in 2005, two years after Prouty had left for the CIA, did the FBI discover that Prouty may have been helping her brother-in-law and Hezbollah supporter, Chahine. Does the senior CIA official responsible for security currently have access to the FBI's Prouty case file? If so, when did he first obtain it?

ANSWER: Yes. The Prouty background investigation file was provided to the CIA on 1/30/08. The FBI worked with the CIA in connection with the criminal (terrorism) investigation of Prouty.

Grassley 322 Will Prouty be deported after completion of her sentence? If so, does the CIA agree with that decision in light of information she may have by virtue of her employment at the CIA after leaving the FBI?

ANSWER: The United States will not seek deportation of Ms. Prouty as a result of this prosecution. This decision was made in consultation with the agencies for whom she worked in the past, including the CIA.

Grassley 323 Please describe the nature, extent, and initial results of the damage assessment being conducted in response to the Prouty case, including when it is expected to be complete.

ANSWER: The FBI continues to work on the damage assessment based on Prouty's conviction of conspiracy, unauthorized computer access, and naturalization fraud, considering how the loss or compromise of classified information could damage the national security, otherwise harm the United States, or advantage foreign powers, and whether countermeasures to negate or minimize the effect of the compromise are appropriate and feasible. Several FBI field divisions and a Legal Attaché office (LEGAT) have been asked to provide information regarding investigations and sources (subjects) that may have been compromised by Prouty's unauthorized computer access, and additional LEGATS have been advised of the potential risk related to Prouty's review of communications sent to those regions. The assessment has included review of investigative case files, information system audits, and interviews and, because of the volume of information under review, may not be finalized until the summer of 2008.

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Grassley 324 Please describe what lessons have been learned from this breach and what additional remedial measures will be taken to improve the FBI's internal security in light of it.

ANSWER: The FBI learned several lessons from the Prouty case. The first was the need to conduct a full review of the immigration files of all foreign-born applicants, rather than relying on USCIS database checks. With the benefit of training provided by the USCIS, the FBI has begun this process and will review the immigration files of foreign-born on-board employees during their periodic reinvestigations. The second lesson learned was the need to include in the polygraph process a question concerning the applicant's involvement in serious crimes and terrorism, and the FBI is moving forward to add this inquiry. The third was the need to ensure that the field interview and personal security interview (PSI) processes address indicators of naturalization fraud. The FBI is currently re-engineering the security interview guidelines provided to its investigators and sensitizing those involved in the background investigation process to the naturalization fraud profile and specific foreign influence issues highlighted by the Prouty matter.

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Questions for the Record Posed to
Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part Two

Attachments to Answers #22 and 207

52691.152

Office of the Attorney General
Washington, D.C.

February 29, 2008

The Honorable Nancy Pelosi
Speaker
House of Representatives
Washington, D.C. 20515

Dear Madam Speaker:

As you know, the President, asserting executive privilege, directed that Joshua Bolten, Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, not release certain documents or provide related testimony subpoenaed by the Committee on the Judiciary of the House of Representatives. The President also directed Ms. Miers to invoke her constitutional immunity from compelled congressional testimony and to decline to appear before the Committee. These directives were based on legal opinions from the Department of Justice advising that the assertions of privilege and immunity were legally proper.

Notwithstanding the President's directives, on July 25, 2007, the House Committee on the Judiciary adopted a resolution recommending that the House of Representatives cite Mr. Bolten and Ms. Miers for contempt. On November 5, 2007, the Committee referred its report on the resolution to the full House. On February 14, 2008, the House adopted a contempt resolution, which you referred on February 28, 2008, to the United States Attorney for the District of Columbia for prosecution under the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).

As explained in our July 24, 2007, letter to Judiciary Committee Chairman Conyers, a copy of which is enclosed, the Department of Justice's longstanding position taken during Administrations of both parties is "that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984). Further, as we also explained in the letter to Chairman Conyers, the same principles that preclude prosecuting an Executive Branch official for abiding by a presidential claim of executive privilege also preclude prosecuting a senior presidential adviser for lawfully invoking her constitutional immunity from compelled congressional testimony. Here, the President directed Ms. Miers to invoke her constitutional immunity, and the President's directive was based upon a legal opinion from the Department of Justice advising that such an invocation of immunity would be legally proper.

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Accordingly, the Department has determined that the non-compliance by Mr. Bolten and Ms. Miers with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers.

Please do not hesitate to contact me if you would like to discuss this matter further.

Sincerely,

Michael B. Mukasey
Attorney General

Enclosure

cc: The Honorable John Boehner
The Honorable John Conyers, Jr.
The Honorable Lamar Smith

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 24, 2007

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Judiciary Committee is voting tomorrow on resolutions calling for the House of Representatives to refer contempt of Congress citations against Josh Bolton, the Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, to the United States Attorney for the District of Columbia for prosecution pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).

As you know, the President has asserted executive privilege and directed that certain documents and related testimony not be provided in response to subpoenas issued by the Judiciary Committee in connection with its inquiry into the decision of the Department of Justice to request the resignations of several United States Attorneys in 2006. The President also directed Ms. Miers to invoke her immunity from compelled congressional testimony and decline to appear in response to a subpoena from the Judiciary Committee. These directives were based on legal opinions from the Department advising that the assertion of privilege and immunity were legally proper. *See* Letter for the President from Paul D. Clement, Solicitor General and Acting Attorney General (June 27, 2007) (addressing assertion of executive privilege); Memorandum for the Counsel to the President from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Immunity of Former Counsel to the President from Compelled Congressional Testimony* (July 10, 2007).

As it considers the contempt resolutions, we think it is important that the Committee appreciate fully the longstanding Department of Justice position, articulated during Administrations of both parties, that "the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995). As expressed by Office of Legal Counsel Assistant Attorney General Theodore B. Olson more than twenty years ago, when an Executive Branch official complies in good faith with the President's assertion of executive privilege, "a United States Attorney is not required to refer a contempt citation . . . to a grand jury or otherwise to prosecute [the] Executive Branch official who is carrying out the President's instruction . . . ." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101,

102 (1984) ("*Prosecution for Contempt of Congress*"). Two legal conclusions support the longstanding Department position:

> First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

Id.

The position Mr. Olson articulated was based on prior Department positions and has been consistently followed ever since, including in an explicit statement in a published OLC opinion by Assistant Attorney General Walter Dellinger during the Clinton Administration, recognizing that "the criminal contempt of Congress statute does not apply" in this context, because "application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. at 356.

It is the Department's view that the same position necessarily also applies to Ms. Miers's lawful invocation of her immunity from compelled congressional testimony. The principles that protect an Executive Branch official from prosecution for declining to comply with a congressional subpoena based on a directive from the President asserting executive privilege similarly shield a current or former immediate adviser to the President from prosecution for invoking his or her immunity from compelled congressional testimony—especially when, as here, the President instructs the official to do so.

Please do not hesitate to contact us if you would like further information concerning the Department's position on the pending contempt of Congress resolutions. We would be pleased to provide a fuller explanation of our views on this important matter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Lamar Smith

52691.156

U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

July 3, 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 Attorney General Michael B. Mukasey following his appearance before the Committee on January 30, 2008. The hearing concerned Department of Justice Oversight. This submission supplements our transmittals, dated June 27 and July 2, 2008, and provides responses to the remaining questions posed by the Committee.

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,

Keith B. Nelson
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

Questions for the Record Posed to
U.S. Attorney General Michael B. Mukasey
Senate Committee on the Judiciary
DOJ Oversight Hearing on January 30, 2008
Part Three

QUESTIONS FROM CHAIRMAN LEAHY

Leahy 5 In recent court filings, the Administration revealed that the White House overwrote email backup tapes for the first two years of this Administration, resulting in a failure to archive those emails, many of which are "missing" from that period and from subsequent years—by some counts millions. In addition, it was revealed in the course of our investigation into the firing of U.S. Attorneys, that dozens of White House officials made extensive use of non-governmental email accounts, such as Republican National Committee accounts, for government work. For example, former Deputy White House Political Director Scott Jennings testified that he emailed extensively using his RNC blackberry and email after he was denied a blackberry by the White House. The White House's shifting accounts of its emails and the widespread use of non-governmental emails raises many questions. Have you begun any review of the White House's policies on email and email retention?

ANSWER: No.

Leahy 6 Have you investigated whether in the implementation of those policies there has been noncompliance with laws requiring retention of White House records that belong to the American people?

ANSWER: We are not aware of any facts that would warrant a criminal investigation. The Presidential Records Act is not a criminal statute.

Leahy 7 Are you going to inquire as to whether there has been an intentional effort to avoid those laws and Congressional oversight?

ANSWER: We are aware of no facts that would suggest that such an inquiry would be warranted.

Leahy 18 We read in the newspaper the morning of your hearing that you were in line to receive a monitoring contract in connection with the diversion of a corporate criminal case. What was your involvement in the matter, how did you come to be considered, and what would the compensation have been?

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ANSWER: The corporation initially recommended several candidates for the potential monitorship to the Department component handling the investigation. The Department component interviewed those candidates, but wanted to see a broader range of candidates. One additional candidate, whom the Department component interviewed on June 7, 2007, was Michael Mukasey, who at the time was a partner at Patterson, Belknap, Webb & Tyler and the retired Chief Judge of the United States District Court for the Southern District of New York. The corporation also proposed additional candidates, and the Department component continued to interview candidates through October 2007. On September 17, 2007, Judge Mukasey was nominated to be Attorney General. As a result, he was no longer considered a candidate for this monitor position. Judge Mukasey had no discussions regarding fees or pricing during his interview process.

Leahy 26 The Judiciary Committee's hearing last month also looked into Inspector General Glenn Fine's highly critical review of the Department's implementation of the Coverdell grant program for forensic improvements. The Justice for All Act required that states receiving money under the Coverdell program certify that they have an independent entity to investigate allegations of serious negligence or misconduct. Inspector General Fine's report found many problems with the Department's implementation of this provision. Perhaps most astonishing, he found that the Department has taken the legal position that, while agencies must certify they have an independent entity where they can refer allegations of misconduct or serious negligence by forensic labs, the agencies have no obligation to actually refer such allegations for investigation. So they need to have a process, but they do not need to use it. This is clearly contrary the bi-partisan intent of Congress in the Justice for All Act. Why would the Justice Department would take a legalistic position that is so clearly contrary to the intent of the Justice for All Act?

ANSWER: The Department of Justice agrees that allegations of serious negligence or misconduct in forensic programs should be appropriately investigated. In its recent FY 2008 solicitation for the Coverdell program, the National Institute of Justice strongly encouraged the reporting of allegations of serious negligence or misconduct to the appropriate government entity. The Department is currently working collaboratively with the Office of the Inspector General to further clarify, in the best way possible, the grantees' responsibilities when they receive allegations of serious negligence or misconduct.

Leahy 29 As a former judge, do you not share my belief drawn from my days as a prosecutor that it is absolutely vital and beneficial to both sides for every defendant, particularly in cases where their lives could be on the line, to receive adequate representation?

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ANSWER: Effective assistance of counsel is a fundamental right of criminal defendants, guaranteed by the Constitution. The Attorney General shares your conviction that all defendants must be accorded this right.

Leahy 35 Many letters submitted by me and others on the Committee to you and your predecessor have gone answered for many months. Among these is a letter I sent last June to Attorney General Gonzales regarding what appears to have been false testimony to the Committee by Brett Kavanaugh, then a nominee and now a sitting judge on the powerful D.C. Circuit, that he was not aware of the Administration's legal justifications for torture until it became public in 2004. I referred the matter to the Department for investigation and any prosecutorial action the Department determined to be warranted. When can I expect an answer to my letter and an update from the Department regarding the Kavanaugh testimony?

ANSWER: On June 27, 2007, you wrote to the Attorney General concerning alleged false statements by Brett M. Kavanaugh during his judicial confirmation hearing on May 9, 2006, and in response to follow-up questions from Senators.

The Department of Justice takes allegations regarding false statements to Congress very seriously. All such matters are handled fairly and appropriately by career prosecutors in the United States Attorneys' Offices and the Department's Criminal Division. The allegations set forth in your June, 27, 2007, letter were promptly referred to the Public Integrity Section for review. Following careful review by career prosecutors in the Public Integrity Section, a determination was made that there was insufficient basis to initiate a criminal investigation.

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QUESTIONS FROM SENATOR SPECTER

Specter 45 In deciding that the McNulty Memo "strikes the appropriate balance," did you talk to Norman Veasey, the former Chief Judge of the Delaware Supreme Court, who reported on a number of abuses under the McNulty Memo?

ANSWER: The Department has carefully reviewed Judge Veasey's memorandum dated September 13, 2007, in which he recounts allegations about government demands for attorney-client waiver. Because every one of the allegations is anonymous -- identifying neither the parties, defense attorneys, or prosecutors involved -- it is difficult to evaluate the claims set forth in the memorandum. Nonetheless, the Department, as part of its examination into the attorney-client waiver issue, contacted Judge Veasey in May 2008 in an effort to assess the purported facts set forth in his report. Judge Veasey explained that he had acted only as a conduit for others at the request of the Association of Corporate Counsel, and doubted that he could be of much value. Nevertheless, Judge Veasey agreed to contact the complainants who had alleged misconduct by prosecutors after the McNulty Memo was issued, and ask them if they would be willing to speak with the Department. He said he would let the Department know what he heard. Judge Veasey has not contacted the Department since that conversation.

Specter 46 Have you done anything to assess the facts reported by Justice Veasey? For example, have you done anything to determine if a federal prosecutor, in fact, told company counsel, "I don't give a flying ---" about the policy?

ANSWER: Please see the response to Question 45.

Specter 51 The Solicitor General's amicus brief in District of Columbia v. Heller, 478 F.3d 370 (2007), the D.C. gun ban case, advocates in favor of a lower level of scrutiny of the 2nd amendment – intermediate scrutiny – would have the Court review the burden on 2nd Amendment rights against "the strength of the government's interest in enforcement." The Solicitor General acknowledged in his brief that, under intermediate scrutiny, "important regulatory interests are typically sufficient to justify reasonable restrictions."
In deciding to advocate for intermediate scrutiny, what weight did the Department place on its own initiatives, such as Project Safe Neighborhoods, to prosecute violations of 18 U.S.C. 922(g) and related offenses?

ANSWER: In District of Columbia v. Heller, the Supreme Court held, consistent with the government's brief in the case, that the Second Amendment's "right * * * to keep and bear Arms" protects an individual right to possess and use a firearm for lawful purposes, such as self-defense within the home, that is unconnected to service in the militia. The Court further held that the District of Columbia's complete ban on the possession of functional firearms in the home "would fail constitutional muster" under any of the

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standards of scrutiny generally applied to enumerated constitutional rights. The Court did not establish an explicit standard for reviewing Second Amendment claims.

Consistent with the government's brief in the case, the Court also made clear in its opinion that "the right secured by the Second Amendment is not unlimited" and does not confer a "right to keep and carry any weapon whatsoever in any manner and for whatever purpose." In particular, the Court stated that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." The Department is studying the Court's decision to determine what standard is appropriate in defending Federal firearms laws. At a minimum, the Court's decision indicates (by rejecting rational-basis review) that a form of heightened scrutiny is appropriate. In advocating for a particular standard of review, the Department considers its customary responsibility to defend the constitutionality of Federal laws but generally does not focus on any particular policy initiative.

Specter 52 Do you believe that a complete ban on handgun possession in a non-prohibited person's home can be viewed as reasonable restriction? If so, what regulatory interests, if any, would be sufficient to justify such a reasonable restriction?

ANSWER: No. In the Heller case, the Supreme Court held that a complete ban on handgun possession in a non-prohibited person's home for a lawful purpose such as self-defense violates the Second Amendment.

Specter 53 Does the Department regard 2nd Amendment rights as inferior to other Constitutional rights and classifications that are afforded protection greater than intermediate scrutiny? If so, please cite the superior rights and explain the rationale for greater protection.

ANSWER: No. As explained in the government's brief, and as the Supreme Court held in Heller, the Second Amendment protects an individual's right to possess firearms, including for private purposes unrelated to militia operations, such as self-defense of the home. In addition, as explained in the government's brief, and as the Supreme Court held in Heller, that individual right-- like the rights protected by the surrounding provisions of the Bill of Rights -- is "not unlimited" and does not confer a "right to keep and carry any weapon whatsoever in any manner and for whatever purpose." For example, consistent with the government's brief, the Court stated in its decision that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."

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Specter 54 On January 25, 2008, you reportedly told the press that you did not see any signs of turmoil when you took over the reigns at the Department of Justice. You took over those reigns from Peter Keisler, who served as the Acting Attorney General from the date of your nomination was announced until you were confirmed (September-November 2007). In your work with Peter Keisler in transitioning into the role of Attorney General, what was your impression of Peter Keisler's legal and management abilities?

ANSWER: Although Attorney General Mukasey overlapped only briefly with Mr. Peter Keisler, Attorney General Mukasey quickly recognized that Mr. Keisler's reputation as a lawyer of extraordinary intellect and judgment and, equally important, as an uncommonly honorable and decent person, was well deserved. The Attorney General believes that the Department was superbly served by Mr. Keisler's leadership and integrity during his tenure as Acting Attorney General, and also during his tenure as Assistant Attorney General for the Civil Division, among other positions.

Specter 55 Do you believe Peter Keisler deserves credit for the lack of turmoil you cited in your January 25 comments?

ANSWER: Yes.

Specter 56 On October 13, 2006, it was reported in the media that the Justice Department was investigating Rep. Curt Weldon. Three days later, FBI agents raided his daughter's home as well as five other locations in the Philadelphia area and in Jacksonville, Florida. This investigation presumably cost him his re-election. The DOJ /FBI has investigated this leak, and in the FBI responses to our questions for the record (dated 01/25/08) the FBI stated that the "investigators were unable to identify a suspect or substantially narrow the pool of suspects. Accordingly, the investigation was closed on October 1, 2007." Considering the fact that I personally asked about this investigation at a prior hearing on 12/06/06, why didn't the DOJ or FBI inform me of this closure earlier, and why was it buried in a huge document of responses to our questions for the record?

ANSWER: We respect the Senator's interest in this matter. However, we are not always in a position to provide information about particular investigations for reasons of individual privacy and law enforcement.

Specter 57 Is this demonstrative of the Department's prior noted problems giving notice of the end of an investigation to the targets of your criminal investigations?

ANSWER: The Department has an existing policy regarding advising former targets and subjects of investigations that the investigation has closed, giving the U.S. Attorney the discretion to notify an individual who has been the target of a grand jury investigation

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that he or she is no longer considered a target by the U.S. Attorney's Office. That established policy, which is set forth in the U.S. Attorney's Manual Section 9-11.155, lists the circumstances under which notification may or may not be appropriate.

Specter 60 This administration has been criticized by some organizations for its readiness to invoke the States Secrets privilege in cases such as El-Masri v. United States and other cases involving the practice of rendition operations.
Can you explain the criteria used to determine whether information that might come out in a case that poses a threat to national security and thus warrants the invocation of the privilege?

ANSWER: The determination of whether the state secrets privilege should be invoked to prevent the disclosure of information that poses a threat to national security is a judgment made by the head of an agency based upon the expertise of the Executive Branch in the area of national security, military affairs, or foreign intelligence. As the courts have recognized, "[t]he executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis, in which '[t]he significance of one item of information may frequently depend upon knowledge of many other items of information,'" and "'[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.'" *El-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007) (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

Out of respect for the court's role, the Executive Branch routinely provides federal courts with both unclassified and classified declarations that justify, often in considerable detail, the basis for an assertion of the state secrets privilege. By way of example, the Court of Appeals for the Ninth Circuit recently noted that the Government's assertion of the state secrets privilege was "exceptionally well documented" and that the court had "spent considerable time examining the government's declarations (both those publicly filed and filed under seal)." *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1204 (9th Cir. 2007). *See also El-Masri*, 479 F.3d at 312 (noting the "extensive information" in United States' classified filing that set forth "in detail the nature of the information that the Executive seeks to protect and explains why its disclosure would be detrimental to national security").

Specter 62 Sen. Kennedy and I have introduced some legislation, S. 2533, the State Secrets Privilege Act, which seeks to codify the case law that has developed over the years regarding the state secrets privilege. This has the advantage of standardizing the privilege throughout the federal court system. Do you recognize the authority of Congress to legislate in this area?

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ANSWER: We believe that S.2533 goes far beyond codifying the case law regarding the state secrets privilege, and instead would alter the constitutionally based privilege recognized by the Supreme Court. Congress has general authority to legislate with respect to the jurisdiction and procedures in the federal courts, but we believe a serious question exists whether it is constitutionally permissible for Congress to impose limitations on the state secrets privilege, which is rooted in the Constitution. *See Dickerson v. United States*, 530 U.S. 428, 437-38, (2000) (Congress may not alter *Miranda* requirements, which are "constitutionally based"); *see also Salisbury v. United States*, 690 F.2d 966, 975 & n.4 (D.C. Cir. 1982) (by enacting the Federal Tort Claims Act, "Congress did not, and perhaps could not for constitutional reasons, abrogate the state secrets privilege of the executive") (citing *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977)). The Department has serious constitutional concerns with respect to legislation that would purport to alter the Executive's well recognized constitutional authority and responsibility to protect national security information.

As the Supreme Court has long recognized, the state secrets privilege is a privilege with a firm foundation in the Constitution. In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court explained that, to the extent a claim of privilege "relates to the effective discharge of the President's powers, it is constitutionally based." *Id.* at 711. The Court went on to recognize expressly that a "claim of privilege on the ground that [information constitutes] military or diplomatic secrets" necessarily involves "areas of Art. II duties" assigned to the President. *Id.* at 710; *see Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security . . . flows primarily from" his constitutional authority under Article II as Commander in Chief "and exists quite apart from any explicit congressional grant"). The lower courts have reached the same conclusion. *See, e.g., El-Masri v. United States*, 479 F.3d 296, 303-04 (4th Cir. 2007) (holding that state secrets privilege "has a firm foundation in the Constitution"). As the Fourth Circuit stated in *El-Masri,* the Supreme Court in *United States v. Reynolds*, 345 U.S. 1 (1953), "itself suggested that the state secrets doctrine allowed the Court to avoid the constitutional conflict that might have arisen had the judiciary demanded that the Executive disclose highly sensitive military secrets." 479 F.3d at 303.

Specter 64 The Senate bill we introduced is S. 2533. Upon reviewing it, will you tell me whether DOJ supports the legislation or if Department suggests any modifications to the bill?

ANSWER: The Department of Justice strongly opposes a Manager's Amendment to S.2533, as adopted by the Committee on April 24, 2008. In a letter, dated March 31, 2008, to Chairman Leahy, we expressed the Department's view that the Manager's Amendment to S. 2533 "would needlessly and improperly interfere with the appropriate constitutional role of both the Judicial and Executive Branches in state secrets cases; would alter decades of settled case law; and would likely result in the public disclosure of national security information that would not be disclosed under current doctrine."

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Specter 65 Maher Arar is a Canadian software engineer born in Syria in 1970. On September 26, 2002, during a stopover in New York, Arar was detained by the United States Immigration and Naturalization Service and, despite carrying a Canadian passport, was deported to Syria. Arar was then held in solitary confinement in a Syrian prison and allegedly tortured until his eventual release and return to Canada in October 2003. Currently, at the request of Chairman Leahy and I, the DOJ Office of Professional Responsibility is reviewing this matter. What is the status of this investigation?

ANSWER: The Attorney General has been informed by OPR that its investigation into the Maher Arar matter is continuing, and he will be advised of the results of that Office's investigation when it is completed.

Specter 66 If it is concluded, what were the results of this investigation?

ANSWER: Please see the response to Question 65.

Specter 67 Do you believe that Congress has the constitutional authority to create National Security Courts to try cases against accused terrorists?

ANSWER: Yes.

Specter 79 According to the Executive Office of Immigration Review Statistical Yearbook, in 2006, approximately 100,000 or 60% of aliens who were not detained pending their hearing, failed to appear before an immigration judge as ordered. This number is nearly double what it was in '02. By comparison, the failure to appear rates for released federal criminal defendants is consistently less than 3%. What is the Department doing to improve upon the statistic cited in the 2006 report regarding failure to appear?

ANSWER: It is important to understand the distinction between aliens who have never been detained or were released before commencement of removal proceedings, and those who were detained at the commencement of the proceedings but then were released pending a hearing. The figures cited in this question relate to the first category, which the Executive Office for Immigration Review (EOIR) Statistical Yearbook defines as "non-detained aliens." For this category of cases, virtually all decisions to release the alien prior to commencement of removal proceedings are made by DHS. EOIR generally has no contact with non-detained aliens unless and until they are placed in removal proceedings and scheduled for a master calendar hearing. At the conclusion of a master calendar hearing, as well as other hearings, immigration judges provide all aliens with written, and usually oral, warnings regarding the consequences of failing to appear.

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In FY 2007, the failure to appear rate for non-detained aliens dropped substantially, with 34,507 or 35% of such aliens failing to appear for a hearing before an immigration judge. This substantial decline in the failure to appear rate of non-detained aliens may largely be due to the "catch and return" policy implemented by DHS beginning in August 2006, which resulted in larger numbers of aliens being placed in detention. We also note that DHS in appropriate cases has been making greater use of alternative procedures instead of placing aliens into regular removal proceedings, including expedited removal procedures for many aliens apprehended along the border and reinstatement of removal orders against aliens who had previously been ordered removed. The comparable figures for FY 2002 indicate that 28,043 or 38% of non-detained aliens failed to appear for their removal hearings.

Among aliens who were detained at the commencement of the proceedings but then were released pending their hearings, 7,407 failed to appear in FY 2007, for a failure to appear rate of 33%. These statistics are lower than in 2002, when 15,794 or 49% of aliens who were released after the commencement of removal proceedings failed to appear for their immigration judge hearing. With the exception of aliens arriving at the ports of entry, and many criminal aliens, most aliens who are detained and issued a Notice to Appear for a removal proceeding can seek a bond hearing before an immigration judge. In determining whether to order the alien's release on bond, the immigration judge takes into account, in addition to national security and danger to the community, the likelihood that the alien will appear at a hearing if released on bond.

Also, EOIR administers legal orientation programs (LOP) for detained aliens in removal proceedings, currently located at twelve immigration court sites for detained aliens, six of which are along or near the Southwest Border. Through the LOP, representatives from local nonprofit organizations provide comprehensive presentations about immigration court procedures and other basic legal information to groups of detained aliens. In addition to assisting aliens in identifying potential forms of relief from removal (including voluntary departure), the LOP emphasizes the importance of attending all immigration judge hearings after an alien has been released, and the negative consequences for failing to appear. Studies based on the first six LOP sites, which included three along the Southwest Border region, demonstrate that the LOP has a positive effect in reducing failures to appear for aliens released on bond. Expansion and improvement of EOIR-sponsored pro bono programs such as the LOP is a priority for the Department, particularly because of the positive impact such programs have on the effectiveness and efficiency of the immigration hearing process.

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QUESTIONS FROM SENATOR KENNEDY

Kennedy 90 Do you agree or disagree with the memo's claim that for purposes of the Torture Act, physical suffering can never be "severe" unless it is of "extended duration or persistence"?

ANSWER: The Bybee memo did not suggest that physical suffering could not be "severe" unless it is of "extended duration or persistence." Rather, it concluded that "severe physical suffering" was not a separate concept from "severe pain" under the anti-torture statute. The Attorney General disagrees with that conclusion and, more generally, he disagrees with the unduly narrow definition of "severe physical pain or suffering" adopted by the Bybee memo.

Kennedy 103 I was also troubled by your exchange with Senator Whitehouse at the oversight hearing. In that exchange and in other remarks, you suggested that you are strongly disinclined to open any kind of investigation into possible acts of torture by government officials or the role of the Department in authorizing such acts. Coupled with your statements about how it would be irresponsible to give an opinion on the legality of interrogation techniques in the absence of concrete facts and circumstances, you essentially refused to consider torture either backward or forward in time. You won't investigate torture that may have happened in the past, and you won't set clear rules to prohibit torture from happening in the future. Have you taken any steps to determine whether an investigation into possible past acts of torture, and the role of the Justice Department in authorizing such acts, would be appropriate? If so, please specify clearly what steps you have taken.

ANSWER: The Department has conducted investigations and, where appropriate, brought prosecutions in response to allegations of unlawful treatment of prisoners in United States custody. We have determined, however, that such an investigation would not be appropriate with respect to the use of waterboarding by the CIA. Before the CIA used this technique, the CIA sought advice from the Department of Justice, and the Department informed the CIA that its use would be lawful under the circumstances and within the limits and safeguards of the program. It is vital that our intelligence professionals be able to rely on the advice of the Department about what the law permits and what it does not. They will be unable to perform their duties to protect the country if they fear that the advice provided by one Attorney General will survive only as long as the tenure of the person who gave it, and that a subsequent Attorney General could disregard their prior reliance in deciding whether they acted within the law. Accordingly, no one who relied in good faith on the Department's past advice should be subject to criminal investigation for actions taken in reliance on that advice.

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Kennedy 107 I was also troubled by comments you made in your letter and at the hearing suggesting that it would be unwise for you to rule out specific interrogation techniques because the enemy might gain a strategic advantage from this. Exactly what advantage does the enemy gain if we publicly rule out specific torture techniques?

ANSWER: The Central Intelligence Agency's interrogation program was developed because members of al Qaeda train their members to resist traditional interrogation practices, including those disclosed in the Army Field Manual on Interrogations. While the CIA's alternative procedures are safe and lawful, they differ in important ways from those publicly authorized by other Government agencies. The continued effectiveness of the CIA program hinges in substantial part on its secrecy and the terrorists' inability to train against it and to know what interrogation practices are part of or not part of the program.

Kennedy 132 Several months ago, the Inspector General and the Office of Professional Responsibility began an investigation of the U.S. Attorney firings and the improper influence of partisan politics on personnel decisions affecting career civil servants. The politicization of personnel matters has undermined the Department's work and reputation – particularly in civil rights. The results of this joint investigation could greatly assist the Committee as it reviews several pending nominations to the Department, including the nomination for Assistant Attorney General for Civil Rights. Have you been given any indication of when the investigation will be completed?

ANSWER: As the Committee is aware, the Office of Professional Responsibility and the Office of the Inspector General recently completed a report pertaining to the improper consideration of political or ideological affiliations in the hiring of career attorneys for the Department's Honors Program and Summer Law Intern Program. The OIG and OPR have indicated to the Attorney General that they are working expeditiously to complete the remaining aspects of this joint review.

Kennedy 133 Has the Inspector General or Office of Professional Responsibility shared preliminary results of the investigation with your office?

ANSWER: Please see the response to question 132.

Kennedy 136 More than 12 million undocumented immigrants continue to live in the shadows, fearful of the present and uncertain about the future. The Senate's failure to pass comprehensive immigration reform last year will have tragic consequences for some. Many of the people we have been unable to help may find themselves in immigration court, struggling to comprehend the arcane and complex immigration laws. I'm confident we can resolve our immigration crisis, but it will

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take the strong commitment of Congress and the Administration to make this happen. As Attorney General, you can do much to set the tone for the treatment of undocumented immigrants. The Department of Homeland Security has enforcement authority, but the Department of Justice ultimately determines the legal status of those who appear before the Immigration Judges, who submit appeals to the Board of Immigration Appeals, and whose cases may be certified for your review. Your decisions, and the decisions made by your assistants, can have a life or death impact on immigrants. Your agenda in pursuing certain legal cases can also have a dramatic effect on the immigration debate. Strong enforcement against discrimination based on nationality or ethnicity and strong action against unconstitutional state and local laws attempting to regulate immigration should be a high priority. If not, the immigration debate will be filled with more rancor and hate.I'd like to know your thoughts about immigration reform. Do you believe an enforcement-only bill is a viable strategy for gaining control of our borders and worksites? What alternatives are available for dealing with the large undocumented population already living and working in the United States? Will you make a commitment to protect immigrants—both those with legal status in the United States and those who are undocumented—from discrimination and hate crimes?

ANSWER: Please see our following responses to Questions 148 and 150. The Department remains deeply committed to the vigorous enforcement of our nation's civil rights laws, including on behalf of immigrants. In recent years, the Department has prosecuted a number of high-profile hate crime cases.

Kennedy 143 It has been reported that DHS received 1.4 million naturalization applications between October 2006 and September 2007. Over the past year the naturalization backlog wait has increased from 6 months to 18 months. This is troubling. A significant number of potential U.S. citizens filed their naturalization applications hoping to vote in the upcoming November election. Thousands of applicants are left in limbo. Basic fairness dictates that the Administration should do everything possible to ensure that these naturalization applications are processed in time to allow these individuals the chance to participate in our democracy. Although this issue falls under the general jurisdiction of the Department of Homeland Security, it's an important voting rights issue, and the Department serves as the voice of civil rights within the Administration. In my view, this is an urgent matter, as failure to act timely will effectively result in vote suppression. What steps has the Department of Justice taken to alert Homeland Security to the urgency of addressing this backlog in citizenship applications? Will you reach out to Homeland Security and others in the Administration to impress on them the urgency of this matter?

ANSWER: The Department's Office of Immigration Litigation defends naturalization delay cases in the federal courts and is very familiar with the backlog issue. Our litigators have advised the Department of Homeland Security that it is important to

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resolve the backlog as soon as possible without compromising national security, and they continue to meet regularly with officials at DHS and other agencies to ensure that the government is moving as expeditiously as reasonably possible to process these applications.

Kennedy 144 Under the current sentencing structure, the ratio for powder and crack cocaine is 100:1. One gram of crack cocaine triggers the same penalty as 100 grams of powder cocaine. In addition, possession of 5 grams of crack cocaine triggers a 5 year mandatory minimum penalty. This is the only drug that has a mandatory prison sentence for a first-time possession offense. The crack powder laws were originally designed to punish those at the highest levels of the illegal drug trade, such as traffickers and kingpins. However, the amount of the drug that triggers the harsh sentences is not associated with high-level drug dealing. A report in 2005 by the Sentencing Commission found that only 15% of cocaine traffickers are high-level dealers. The overwhelming majority of defendants are low-level participants, such as street dealers, lookouts, or couriers. These laws also have a disparate impact on African Americans. In 2005, 82% of crack cocaine defendants were African Americans, even though they represent only a third of those who actually use the drug. Last year, the Sentencing Commission amended the federal sentencing guidelines to modestly reduce penalties for crack cocaine offenses by two levels. That amendment was enacted on November 1st. On December 13th the Commission made the reduction retroactive, effective March 3rd of this year, permitting prisoners already sentenced to seek the benefit of the reduction. In comments you made to the U.S. Conference of Mayors on January 24th, you stated that the decision to make the sentence reduction retroactive will result in a "sudden influx of criminals from federal prison into communities [that] could lead to a surge in new victims." I was surprised and disappointed by your comments. You told the mayors that "many of [the crack cocaine prisoners] are violent gang members." But according to the United States Sentencing Commission, the vast majority of crack cocaine offenders were not involved in violence. In 2005, fully 89 percent of all crack offenses did not involve violence and of the remaining cases, 4.9 percent involved threats but not acts of violence. You also told the mayors that there would be a "sudden influx of criminals" into their communities. But, guideline retroactivity is hardly a get out of jail free card. A prisoner must petition a federal court for the sentence reduction and convince the court that they deserve early release. The court must determine whether and to what extent a prisoner will benefit from the amended guideline. This process will take time and prisoners will not be released without a court's careful consideration of the merits, including consideration of the government's position. You further characterized these prisoners as dangerous to their communities. In fact the rate of recidivism of drug offenders is likely to be lower than estimated by the Department. According to a 2004 report from the Sentencing Commission, for Criminal History Categories II and higher, drug offenders actually have the lowest or second lowest rate of recidivism of all offenders. More important is that across all criminal history categories and for all offenders, the largest proportion of "recidivating events" that

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count toward these rates of recidivism are supervised release revocations, which can include revocations based on anything from failing to file a monthly report to failing to file a change of address. In fact, drug trafficking accounts for only a small fraction of recidivating events for all offenders. Moreover, the crack cocaine amendment will not apply to those convicted under the career offender or armed career criminal act. In addition, your statement does not address the responsibility to ensure public safety. Courts considering sentence reduction motions must take public safety into account when weighing their decision. Any prisoners eligible to seek a reduction must first convince a court that they deserve one. If a U.S. Attorney believes prisoners will pose a risk to the community if released early or feels that they are not adequately prepared for reentry, the U.S. Attorney is entitled to explain to the court why the prisoner does not deserve the reduction. The court can deny a sentence reduction on this basis. Furthermore, once released, a former inmate will be closely supervised during the reentry period. On what evidence did you base your assertion to the Mayors that many of the crack defendants who will be released are "violent gang members " and violent crime will spike in our nations' cities as these defendants are released?

ANSWER: Our assertion that many of the crack defendants who became eligible for release under the amendment are violent gang members and crime will increase is based on close analysis of the pool of offenders, which showed the majority to have significant criminal histories and close to a third to have weapon enhancement or other aggravating factors associated with the offense of arrest, which in turn increases recidivism rates. Specifically, a close look at the pool of offenders eligible for early release is illustrative of our assertion. The data from the U.S. Sentencing Commission shows that nearly 80 percent of the offenders who are eligible for early release have a criminal history category of II or higher. According to the 2004 report from the Sentencing Commission you cite, 20% to 48% of Drug Traffickers in Criminal History Category II or higher recidivated within the first two years of release. We believe the recidivism rates will be even higher for the crack offenders eligible for release because that study included only offenders sentenced in fiscal year 1992 who had both been released by 1999 and had been released from prison for two whole years. As such it excluded 15% of the offenders sentenced that same year, specifically those who were serving sentences longer than seven years and are therefore according to studies more likely to recidivate. By contrast, the crack offenders estimated by the Commission to be eligible for reductions and or release have an average original sentence of 152 months (more than 12 years), and therefore have a much higher risk of recidivating than the narrow sample included in the 2004 study.

In addition, many of the offenders eligible for release received an enhanced sentence because of a weapon or received a higher sentence because of their aggravating role in the offense. This is characteristic of crack offenders, as there is far greater violence at the local level associated with the distribution of crack as compared to powder. For example, according to Commission studies crack cocaine offenders had access to, had possession of, or used a weapon in 32.4 percent of cases in 2005, as opposed to powder cocaine offenders who had access to, had possession of, or used a

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weapon in 15.7 percent of cases. Furthermore, in addition to the Sentencing Commission's data regarding criminal history, it has been our experience in the field that gang membership or affiliation has been present in a significant number of cases. This connection to gangs is also reflected in a significant number of the presentence reports and case files.

Moreover, the dangers that could result from the early release of these offenders are amplified by the fact that retroactive application of the crack amendment means that many prisoners being will be unable to participate in specific pre-release programs provided by the Bureau of Prisons (BOP). Your sponsorship of the Second Chance Act, which the President was proud to sign into law earlier this spring, suggests that you recognize the value of these programs. In any event, preparation to reenter society intensifies as the inmate gets closer to release. As part of this process, BOP provides a specific release preparation program and works with inmates to prepare a variety of documents that are needed upon release, such as a resume, training certificates, education transcripts, a driver's license, and a social security card. BOP also helps the inmate identify a job and a place to live. Finally, many inmates receive specific pre-release services afforded through placement in residential re-entry centers at the end of their sentences. With no adjustments to BOP's prisoner re-entry processes, any reductions in sentence such as those contemplated by the retroactive application of the guideline may reduce or eliminate inmates' participation in the Bureau's re-entry programs. Without that, the offender's chance of re-offending will likely increase.

Kennedy 146 We know that 95% of offenders will eventually be released from incarceration, whether through early release or at the expiration of their term. What are you doing to ensure that the Bureau of Prison is providing adequate programming and support for successful reentry and reintegration of all former drug offenders?

ANSWER: The vast majority of the Bureau of Prisons' (BOP's) inmate programs and services are geared toward helping offenders prepare for their eventual reentry into the community. The BOP provides many self-improvement programs, including work in prison industries and other institution jobs, vocational training, education, substance abuse treatment, religious observance, parenting, anger management, counseling, and other programs that impart essential life skills. The BOP also provides other structured activities designed to teach inmates productive ways to use their time. The Department believes that Federal inmates should be held responsible for the behavior that led to their incarceration and for participating in self-improvement programs that will provide them with the skills they need to be productive, law-abiding citizens upon release. As will become apparent from the description of inmate programs that follows, preparation for reentry begins in the first days of an inmate's incarceration.

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Inmate Work Programs

The BOP provides work programs that teach inmates occupational skills and instill sound and lasting work habits and a work ethic in offenders. All sentenced inmates in Federal correctional institutions are required to work (with the exception of those who for security, educational, or medical reasons are unable to do so). Most inmates are assigned to an institution job such as food service worker, orderly, plumber, painter, warehouse worker, or groundskeeper. Approximately 18% of the BOP's eligible sentenced inmates work in Federal Prison Industries (FPI) factories -- arguably the BOP's most important correctional management tool and program.

The goal of the FPI program is to provide inmates with job skills training and work experience, thereby reducing recidivism. Through the day-to-day experience of working in a real-life factory setting, the FPI program provides the opportunity for inmates to gain specific work skills and a general work ethic -- both of which can lead to viable, sustained employment upon release.

Education, Vocational Training, and Occupational Training

The BOP offers a variety of programs for inmates to achieve at least a high school level education and to acquire marketable skills to help them obtain employment after release. All institutions offer literacy classes, English as a Second Language, adult continuing education, post-secondary education, and library services.

With a few exceptions, inmates who do not have a high school diploma or a General Educational Development (GED) certificate must participate in the BOP's literacy program for a minimum of 240 hours or until they obtain the GED. The English as a Second Language program provides inmates with limited proficiency in English with an opportunity to improve their English language skills. The BOP also facilitates vocational training for inmates and provides occupationally-oriented higher education programs. Occupational and vocational training programs are based on the needs of a specific institution's inmate population, general labor market conditions, and institution labor force needs. A limited number of traditional college courses are also available to inmates. On-the-job training is afforded to inmates through formal apprenticeship programs, institution job assignments, and work in the FPI program.

Substance Abuse Treatment

The BOP provides a comprehensive substance abuse treatment program that includes drug abuse education, non-residential drug abuse treatment, residential drug abuse treatment, and community transition treatment. Inmates must participate in a drug abuse education course if: (1) there is evidence in their pre-sentence investigation report that alcohol or drug use contributed to the commission of their offense; (2) they violated supervised release, parole, conditions of placement in a residential reentry center, or conditions of home confinement as a result of alcohol or drug use; or (3) the sentencing judge recommended that they participate in a drug abuse treatment program during

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incarceration. Participants in the drug abuse education course learn the connection between drugs and crime; are taught to distinguish drug use, abuse, and addiction; and acquire the information they need to challenge the thinking errors that led to their criminal behavior. Inmates who need further treatment are encouraged to participate in non-residential or residential drug abuse treatment, as appropriate.

Non-residential drug abuse treatment is available to 100 percent of eligible inmates in every BOP institution. Specific populations targeted for non-residential treatment services include: (1) inmates with a relatively minor or low-level substance abuse impairment; (2) inmates with a more serious drug use disorder whose sentence does not allow sufficient time to complete the residential drug abuse treatment program; (3) inmates with longer sentences who are in need of treatment and are awaiting placement in the residential drug abuse treatment program; (4) inmates identified with a drug use history who did not participate in residential drug abuse treatment and are preparing for community transition; and (5) inmates who completed the unit-based component of the residential drug abuse treatment program and are required to continue treatment until placement in a residential reentry center, where they will receive transitional drug abuse treatment.

The residential drug abuse treatment program is available in 59 BOP institutions, offering treatment to approximately 17,500 inmates each year. The program provides intensive half-day programming and half-day education or work, 5 days per week, to inmates diagnosed with a drug use disorder. The programs are managed by a doctoral-level psychologist who supervises the treatment staff and the overall provision of treatment services to inmates. Inmates in the residential program are housed together in a unit that is separated from the general population. Treatment is provided for a minimum of 500 hours over 9 - 12 months.

Residential drug abuse treatment targets major criminal/drug-using risk factors, especially anti-social and pro-criminal attitudes, values, beliefs, and behaviors. The BOP targets these anti-social and pro-criminal behaviors by reducing anti-social peer associations; promoting positive relationships; increasing self-control, self-management, and problem solving skills; ending drug use; and replacing lying and aggression with pro-social alternatives.

The BOP provides residential drug abuse treatment to all inmates with a need and who volunteer for treatment. The treatment is provided toward the end of an inmate's sentence -- approximately 36 months before release.

The fourth component of the BOP's drug abuse treatment program is community transition treatment. Community transition treatment is offered as a service to all inmates in a residential reentry center (halfway house) and is a required component of the residential drug abuse treatment program. As part of community transition treatment and to help ensure a seamless transition from the institution to the community, the BOP provides a treatment summary to the residential reentry center where the inmate will reside, to the community-based treatment provider who will treat the inmate, and to the

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U.S. Probation Office before the inmate's arrival at the residential reentry center. Participants in community transition drug abuse treatment typically continue treatment during their period of supervised release after they leave BOP custody.

Pro-Social Values Programs

Based on the proven success of the residential substance abuse treatment program, the BOP has implemented a number of other programs to address a variety of needs among certain segments of the inmate population (such as younger offenders and high-security inmates). These programs use the cognitive-behavioral therapy treatment model that is the underpinning of the residential drug abuse treatment program. The programs focus on inmates' emotional and behavioral responses to difficult situations and emphasize life skills and the development of pro-social values, respect for self and others, responsibility for personal actions, and tolerance. Many of these programs have already been found to significantly reduce inmates' involvement in institution misconduct. The positive relationship between institution conduct and post-release success offers encouragement about the ability of these programs to reduce recidivism.

Religious Programs

BOP institutions accommodate religious services and programs for inmates of the approximately 30 faiths represented within the population. Religious programs are led or supervised by staff chaplains, contract spiritual leaders, and community volunteers. Chaplains oversee worship services and self-improvement programs, such as the study of sacred writings, spiritual development, and religious workshops. BOP chaplains also provide pastoral care, spiritual guidance, and counseling to inmates. Upon request and approval, inmates may receive visits and spiritual counseling from community representatives.

Life Connections Program

The Life Connections Program is a residential multi-faith-based program that provides the opportunity for inmates to deepen their spiritual life and integrate their faith with other dimensions of their life in order to assist them with their personal growth and their reintegration into the community. Under the direction of a Chaplain and with the assistance of other Bureau staff, volunteer mentors, contracted spiritual guides, and mentors after incarceration, the program strives to contribute to an inmate's personal transformation; to bring reconciliation to the inmate, his or her victims, and the community; and to reduce recidivism. The Life Connections Programs are currently underway at five BOP facilities. BOP research has found a reduction in serious institution misconduct among Life Connections program participants. Further research is planned to assess the effect of the program on recidivism, after a sufficient number of graduates have been released.

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Medical Care, Mental Health Treatment, and Counseling

The BOP provides a full range of medical and mental health treatment services through staff health care providers, psychologists, and psychiatrists, enhanced by contract services from community medical and mental health professionals. Psychologists are available for professional counseling and treatment on an individual or group basis. In addition, staff in an inmate's living unit are available for informal counseling. The BOP also offers a variety of self-help programs to improve inmates' ability to succeed after release, such as anger management, parenting skills, health education, and health promotion programs.

Inmate Skills Development Initiative

The Inmate Skills Development initiative is a comprehensive strategy the BOP is undertaking to identify inmates' reentry needs and to track inmates' progress toward meeting those needs. The three principles of the Inmate Skills Development strategy are: (1) identifying skill strengths and deficits through a comprehensive assessment and targeting program recommendations to address identified skill needs; (2) linking programs to relevant inmate reentry skills and measuring program success by skill acquisition and demonstrable outcomes rather than simply completing the program; (3) resources are allocated to target inmates with a high risk for reentry failure. Under this initiative, the BOP will continually assess inmates' progress in reentry skills development in most of the program areas described above, as well as in other areas where inmates need skills for successful reentry.

Maintaining Family and Community Ties

The Department recognizes how important it is for inmates to maintain contact with their family and friends while in prison -- research has shown that maintaining ties with family contributes to an offender's avoidance of crime following release from prison. Visiting, telephone privileges, and correspondence are three activities the BOP provides that help inmates maintain family and community ties while incarcerated. Inmates may have contact visits with their family, friends, attorney, and other special visitors except in the BOP's administrative maximum security prison, where all visiting is non-contact. Inmates also maintain contact with the community through telephone calls and by writing and receiving letters.

Specific Release Preparation Efforts

In addition to the wide array of inmate programs described above, the BOP provides a Release Preparation Program in which inmates become involved toward the end of their sentence. The program includes classes in resume writing, job seeking, and job retention skills. The program also includes presentations by officials from community-based organizations that help ex-inmates find employment and training opportunities after release from prison.

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General preparation for reentry includes other inmate pre-release services provided at BOP institutions, such as mock job fairs where inmates learn job interview techniques and community recruiters learn of the skills available among inmates. As part of this activity, inmates prepare release portfolios, which include a resume, education and training certificates, diplomas, education transcripts, and other significant documents needed for a successful job interview.

In addition, the BOP has established employment resource centers in approximately 75 institutions. Employment resource centers assist inmates with creating release folders to use in job searches; soliciting job leads from companies that have participated in mock job fairs; identifying additional potential job openings; and identifying points of contact for information on employment references, job training, and educational programs.

Residential Reentry Centers

The BOP uses residential reentry centers (also known as community corrections centers or halfway houses) to place inmates in the community prior to their release from custody in order to help them adjust to life in the community and find suitable post-release employment. Residential reentry centers provide a structured, supervised environment and support in job placement, counseling, and other services. These centers allow inmates to gradually rebuild their ties to the community and allow correctional staff to supervise offenders' activities during this important readjustment phase. Some inmates are placed in home confinement for a brief period at the end of their prison terms -- the inmates serve this portion of their sentences at home under strict schedules, curfew requirements, telephonic monitoring, and sometimes electronic monitoring.

Kennedy 147 Why are you against a policy that would correct an imbalance in our sentencing laws and restore legitimacy to the criminal justice system?

ANSWER: The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would invigorate the Sentencing Guidelines.

Kennedy 148 Hate crimes violate everything our country stands for. More than 8,000 hate crimes are reported every year in the United States, but that's only the tip of the iceberg. The Justice Department confirmed in 2001 that many hate crimes go unreported, and the Southern Poverty Law Center estimates that the actual

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number of hate crimes committed in the United States each year is closer to 50,000. Despite the large number of such crimes every year, there has been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the Department charged 45 persons with hate crimes and convicted 38. In 2006, the Department charged 20 and convicted 19. The Hate Crime Statistics Act requires the Justice Department to publish an annual summary of crimes which "manifest prejudice based on race, religion, sexual orientation, disability, or ethnicity," using data from law enforcement agencies across the country. In 2006, there were over 9,500 victims of such crimes, an almost 10% increase from 2005. If the incidence of hate crimes is increasing, why is the prosecution of hate crimes decreasing?

ANSWER: The Department remains deeply committed to the vigorous enforcement of our nation's civil rights laws. In recent years, the Department has prosecuted a number of high-profile hate crime cases.

As permitted by federal criminal law, the Department of Justice continues to aggressively prosecute those within our society who attack others because of the victims' race, color, national origin, or religious beliefs, where the conduct satisfies the elements of a hate crime under federal criminal law. For example, from Fiscal Year 2001 to Fiscal Year 2007, the Department of Justice charged 62 defendants in 41 cross-burning cases.

In addition, the Department – including the Civil Rights Division, the U.S. Attorneys' Offices and the Federal Bureau of Investigation – recently began a racial threats initiative to aggressively investigate dozens of noose hangings and other recent racially motivated threats around the country that have occurred following incidents in Jena, Louisiana. In partnership with state and local law enforcement and civil rights organizations, the Department is examining each of the allegations, which will result in prosecution where the facts and law warrant. As part of this initiative, the Department prosecuted a case near Jena involving nooses hung from the back of a truck that slowly and repeatedly circled around a group of peaceful civil rights demonstrators who were waiting at a bus stop. On April 25, 2008, the defendant pled guilty to a federal hate crime.

Importantly, until last year, the FBI's crime statistics documented a decade-long decline in the number of hate crimes reported across the country. In 2005, the number of reported hate crimes was the lowest in a decade. Although the FBI's latest report reflected an eight percent increase in reported hate crimes for 2006, the overall downward trend is consistent with the number of matters reported to the Civil Rights Division's Criminal Section. In 1997, there were 799 allegations reported to the Criminal Section. In 2007, that number was 252 complaints, which is a decrease of 68% over ten years.

In the past five years, the Department has invested significant resources in investigating and prosecuting murders that occurred during the civil rights era. This "Cold Case Initiative" seeks to identify unresolved civil rights era murders for possible prosecution to the extent permitted by the available evidence and the limits of Federal

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law. The FBI already has identified approximately 100 such cases that merit additional review to determine whether Federal criminal charges can be brought. Just this past year, the Department secured a conviction in *United States v. Seale*, resulting in three life sentences for a former KKK member who was involved in the brutal 1964 murder of two African-American young men in Mississippi.

In addition, following the attacks on September 11, 2001, the Department began its 9/11 Backlash Initiative. Under this initiative, the Division investigates and prosecutes backlash crimes involving violence and threats aimed at individuals perceived to be Arab, Muslim, Sikh, or South Asian. The Department has investigated more than 800 bias-motivated incidents since September 11, 2001, has brought Federal charges against 41 defendants, and has obtained 35 convictions. With the help of the Justice Department in many cases, state and local authorities have brought more than 160 bias crime prosecutions since 9/11.

Kennedy 152 Is there a legal impediment to making that change, or can the Bureau take this step on its own?

ANSWER: Please see the response to Question 151.

Kennedy 155 California recently enacted a law to require microstamping technology on guns sold in the state after 2010. The measure was supported by Mayor Villaraigosa, Police Chief Bratton and Sheriff Baca in Los Angeles, and by Chiefs of Police from departments across California. Microstamping is an innovative technology that uses lasers to make precise, microscopic engravings of a gun's make, model and serial number on the firing pin and chamber. This information is transferred onto the cartridge casing when the handgun is fired. As a result, the casings can provide law enforcement with important and timely information, without the need to consult a database or imaging system that may or may not contain a match. Microstamping would in no way replace any of the methods currently used by ATF to conduct ballistics tests; it would enhance the work conducted by the agency. There's no doubt that the technology will substantially improve law enforcement's ability to quickly identify and link shell casings found at a crime scene to the particular handgun from which it was fired. An IACP Report recently called for greater investments in advanced technologies such as microstamping to improve officer and public safety. ATF is in the forefront of technology on firearms and ballistics research, and the ATF labs are vital for quickly and accurately identifying the sources of specific firearms and the types of ammunition used at a particular crime scene.Is a study of microstamping being conducted by ATF? Will you take steps to ensure that such as study begins immediately?

ANSWER: The National Institute of Justice (NIJ) has funded the National Research Council (NRC) of the National Academies to study the question of developing a National

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Ballistic Image Database. The NRC examined micro stamping for tracing point of sale as a part of this study. The results of this study are included in a new report entitled "Ballistic Imaging" (available at http://www.nap.edu/catalog.php?record_id=12162).

ATF laboratories have reviewed the above mentioned report, and based on published and non- published literature, ATF has concluded that further research is necessary to determine the viability of microstamping. ATF proposes a second phase of study which would involve partnering with other firearms laboratories (public and private) to study the scientific and practical feasibility of microstamping as it relates to firearms and ammunition. ATF believes it is in the best interest of the government to partner with other firearm experts to fully explore the feasibility of microstamping.

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QUESTIONS FROM SENATOR BIDEN

Biden 166 Are there comprehensive reports being prepared by the Department related to forensic sciences? If so, when can Congress expect to see these reports?

ANSWER: As noted in the response to question 162, NIJ has two studies underway that will examine forensic backlogs, including, but not limited to DNA cases. Both studies are scheduled for completion by the end of 2008.

One study includes a survey of law enforcement agencies to determine their existing backlogs of criminal cases and forensic evidence. This project will also identify challenges that contribute to the backlog. The project is scheduled to be completed by the end of 2008. The second study will identify crime laboratory policies and practices that influence the size and nature of backlogs in various forensic disciplines, including DNA. This study will provide a detailed view of emerging areas in forensic DNA, and how these areas may impact demand for DNA analysis.

As noted in the response to question 165, OJP has funded the National Academy of Sciences (NAS) to undertake a fundamental review of forensic practice in the United States. The award was made in response to a Congressional recommendation in the conference report that accompanied the Department of Justice Appropriations Act, 2006. The NAS is expected to issue its report in 2008. OJP believes that this report will address the important issues identified by Congress in forensic science improvement, including backlog reduction, professional and laboratory standards, governance of forensic disciplines, training and certification, validation of forensic disciplines, and related matters.

The Department of Justice is also drafting a Report to Congress on the implementation of Title II and Title III of the Justice for All Act and progress made by federal, state, and local entities. The report should be available by the end of 2008.

In addition, the Department's Bureau of Justice Statistics (BJS) issued a report, *Census of Publicly Funded Forensic Crime Laboratories, 2002*, that indicated that the nation's public forensic crime labs ended 2002 with more than 500,000 backlogged requests for forensic services. Of these, nearly 49,000 were for DNA analysis. The BJS study included 33 federal, 203 state or regional, 65 county and 50 municipal forensic crime laboratories. This report is available at: http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl02.pdf.

BJS expects to release findings from the *Census of Publicly Funded Forensic Crime Laboratories*, 2005 in summer 2008. The report will present findings from a survey of the Nation's nearly 400 publicly funded forensic crime laboratories. These agencies perform a variety of forensic services, including DNA testing and controlled substance identification, for federal, state, and local jurisdictions. The report will examine the number of forensic requests received by these labs and the resources needed to

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complete them. Data will also be presented on crime lab budgets, staffs, funding sources, and backlogged cases. The report will provide a comparative analysis with findings from the 2002 census.

Biden 173 On July 24, 2007, former Attorney General Gonzales was asked by this Committee about the Department's position on the current statutory structure of our cocaine sentencing laws—specifically, the 100-to-1 cocaine sentencing disparity whereby it takes 100 times more crack than powder cocaine to trigger the same sentence in federal court. To date, we have not been told where the Department stands on this issue. What is the Department's position with regard to the current cocaine sentencing laws in the United States Code?

ANSWER: We believe the current federal sentencing policy and guidelines for crack cocaine offenses reflected in the existing mandatory minimum statutes are reasonable, and we opposed the Sentencing Commission's amendment to reduce the penalties for crack cocaine offenders and the decision to make the amendment retroactive.

The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would reinvigorate the Sentencing Guidelines.

Biden 174 If you support the existing 100:1 disparity, what rationale—including specific, empirical evidence—can you point to that supports your position?

ANSWER: The Department's view that the 100:1 ratio is reasonable justified rests on the fact that crack cocaine is associated with much greater dangers than powder, including increased potential for addiction and increased violence, and that lowering crack penalties would signal a retreat from the battle against drug abuse.

As reflected in the U.S. Sentencing Commission's latest Special Report to Congress on Cocaine and Federal Sentencing Policy the method of administering crack makes it more addictive to typical users. Typically, crack cocaine is smoked whereas powder cocaine typically is snorted. Smoking crack cocaine produces quicker onset of shorter-lasting and more intense effects than snorting powder cocaine. These factors in turn result in a greater likelihood that the user will administer the drug more frequently to sustain these shorter "highs" and develop an addiction. United States Sentencing Commission 2007 Report to Congress: Cocaine and Federal Sentencing Policy (May 2007), at 62-63.

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NIDA studies show that smoking produces quicker and higher peak blood levels in the brain and therefore a faster euphoria. (Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the Senate Judiciary Committee Subcommittee on Crime and Drugs, February 12, 2008, at 2). They further show that smoking crack cocaine causes a much greater risk of addiction than does snorting cocaine. (Written statement by Nora D. Volkow, M.D., Director, National Institute on Drug Abuse (NIDA), to the U.S. Sentencing Commission, regarding Cocaine Sentencing Policy, November 14, 2006, at 163).

The Department believes that higher penalties for crack offenses are fully justified by its greater harm. In addition, crack cocaine offenders are generally more violent and have longer criminal histories than powder cocaine offenders. A review of the Sentencing Commission data shows that crack cocaine defendants possess or use weapons at about twice the rate as powder cocaine defendants. According to the Commission, in 2005, the percentage of crack cocaine offenders receiving statutory or guideline weapon enhancements was 26.5% as opposed to 13.0% for powder traffickers. Moreover, crack cocaine offenders have more extensive criminal histories than powder cocaine offenders. Only 22% of crack cocaine offenders are in Criminal History Category I (containing offenders with little or no criminal history) compared to 61.7% of powder cocaine offenders in that category. Further, 24.5% of crack cocaine offenders fell under to Criminal History Category VI (the most extensive criminal histories) compared to only 7.1% in that category.

Biden 175 If you don't have a position, when can I expect one from you?

ANSWER: The Department had stated it was open to addressing the quantity differential as part of an effort to address the Sentencing Commission's decision to apply new lower crack guidelines retroactively, but Congress chose to let the Sentencing Commission's decision stand. The Department recognizes that the quantity differential remains an important issue. Accordingly, and as we have indicated in the past, the Department remains open to addressing the quantity differential as part of an effort to obtain comprehensive sentencing reform that would invigorate the Sentencing Guidelines.

Biden 177 As the Mexican government has been waging war on drug trafficking organizations within its borders, violence just south of the U.S. border has exploded and there are reports that firearms—including assault weapons—are flowing freely from the United States into Mexico to fuel criminal conduct by these organizations. What is the Department doing to investigate this trafficking and stop this flow of guns?

ANSWER: ATF has long been committed to investigating and disrupting firearms trafficking along the U.S.-Mexican border. In April 2006, in response to the escalating violence along the south west border, ATF initiated Project Gunrunner. This ongoing

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southwest border strategy combats firearms-related violence perpetrated by warring drug trafficking organizations in border cities such as Laredo, Texas, and Nuevo Laredo, Mexico. It is a comprehensive investigative, enforcement and interdiction strategy, incorporating ATF's expertise, regulatory authority and investigative resources to attack the problem domestically and internationally. It includes approximately 100 Special Agents and 25 Industry Operations Investigators (IOIs) dedicated to the issue, as well as outreach efforts with the firearms industry and other law enforcement agencies to reinforce the importance of identifying and reporting suspected illegal purchases and other sources of firearms intended for Mexico.

Through bilateral forums, such as the annual Senior Law Enforcement Plenary sessions with Mexico, ATF and the Mexican Government jointly develop operational strategies and policies to minimize the firearms-related violence afflicting communities on both sides of the border. ATF's Mexico City Office has developed working partnerships with Mexican law enforcement counterparts, and in FY 2008, will provide needed training and other assets, such as ATF's eTrace system, to help the Mexican government effectively counteract the firearms-related violence caused by drug traffickers. Specifically, the deployment of eTrace in Mexico will be expanded to the nine U.S. Consulates and 31 Mexican States. From FY 2006 to FY 2007, ATF received approximately 1,000 more trace requests from Mexico.

In addition, ATF plans to add four intelligence research specialists (IRSs) and two additional analysts to the El Paso Intelligence Center (EPIC), along with additional analysts to each of its four border field divisions. Plans now underway include adding an additional thirty-five Special Agents and fifteen IOIs to be permanently assigned to the Southwest border to curb the illegal export of U.S. sourced firearms and ammunition to Mexico.

ATF is further collaborating with the Mexican government by deploying Special Agents to U.S. Consular offices in Hermosillo and Monterrey, with additional deployments planned for Baja California, Ciudad Juarez, and Tijuana in the near future, if funding is available. As a result, ATF will be able to work directly with their Mexican counterparts, taking advantage of real-time intelligence that will benefit drug-related firearms trafficking investigations on both sides of the Border. Intelligence sharing and transnational collaboration will provide valuable resources for ATF and its law enforcement partners.

Biden 178 Do you believe that renewing the assault weapons ban or closing the gun show loophole would help stop the flow of these dangerous weapons into Mexico?

ANSWER: Firearms traffickers employ both legal and illegal means to procure firearms in the U.S., and there is no way to determine definitively the reduction in firearms trafficking that would result from the two aforementioned legislative changes. Ultimately, reducing the illegal firearms trafficking into Mexico will require ATF Special

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Agents and Industry Operation Investigators (IOIs) working with our law enforcement partners as well as industry along the Southwest border.

Biden 180 Who would decide whether the value of the information that could be obtained would justify the use of waterboarding?

ANSWER: Waterboarding is not currently among those techniques authorized for use under the CIA program. As the Attorney General testified, however, there is a defined process by which a technique would be considered for possible addition to the CIA program. The CIA Director, with review by Director of National Intelligence and discussion with other National Security policymaking officials, would have to determine that the technique was necessary under the circumstances. The Attorney General then would have to analyze the lawfulness of the technique under the circumstances and limits proposed, under both the Detainee Treatment Act and the other applicable legal standards. Finally, even if the Attorney General deemed the proposed technique to be lawful, the President still would have to give his specific approval to its use.

Biden 181 What factors would be considered in making that determination?

ANSWER: Please see the response to Question 180.

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QUESTION FROM SENATOR KOHL

Kohl 185 When I asked you about court secrecy, you said that you think judges "should consider the effect on public safety of keeping any settlement secret." You also said that you did not know of a case where somebody was sweeping a public safety issue under the rug in a settlement and that you would not want any court to approve of that. As you may know, in 2005, Eli Lilly settled 8,000 cases related to harmful side effects of its drug Zyprexa. All of those settlements required plaintiffs to agree, "not to communicate, publish or cause to be published...any statement...concerning the specific events, facts or circumstances giving rise to [their] claims." In that case, the plaintiffs uncovered documents which showed that, through its own research, Lilly knew about the side effects as early as 1999. All were kept confidential through protective orders and the subsequent settlements. While the plaintiffs kept quiet, Lilly continued to sell Zyprexa and generated $4.2 billion in sales that year. More than a year later, information about the case was leaked to the New York Times and another 18,000 cases settled. Had the first settlement not included a secrecy agreement, consumers would have been able to make informed choices and decide for themselves whether they wanted to risk the harmful side effects which included enormous weight gain, dangerously elevated blood sugar levels and diabetes. As a former federal judge and now top law enforcement officer, would you support legislation that would require judges, in cases involving public health and safety, to weigh the public's interest in information about potential health and safety dangers with interests in confidentiality before issuing protective orders or approving sealed settlements?

ANSWER: The Department of Justice follows 28 C.F.R. Section 50.23 entitled "Policy against entering into final settlement agreements or consent decree[s] that are subject to confidentiality provisions and against seeking or concurring in the sealing of such documents." The regulation generally limits the ability of the Department to enter into such non-public settlements absent specific approval from the Assistant Attorney General or United States Attorney to depart from the policy. It is not clear whether the public policy rationale supporting the Department's regulation would apply equally in all instances to private settlements, but the Department of course stands ready to review any proposed legislation on this issue.

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QUESTION FROM SENATOR FEINSTEIN

Feinstein 197 What is the appropriate legal process for dealing with the Guantanamo detainees when the facility is closed and the detainees are detained in U.S. detention facilities?

ANSWER: The President has stated that it should be a goal of the United States to close the Guantanamo facility. He has made it clear, however, that our efforts to do so must be consistent with logistical realities and with our national security. Many of the Guantanamo detainees are dangerous and uncooperative prisoners. Any place of military detention in the United States would have to manage the risks posed by the detainees themselves and also the risk that the facility, lacking the geographic and security barriers present at Guantanamo, could itself become a target for terrorist attack. In addition, the United States would have to detain enemy combatants separate from common criminals. The Supreme Court's recent opinion in *Boumediene v. Bush*, which held that detainees at Guantanamo Bay have a constitutional right to challenge their detention as enemy combatants in habeas corpus proceedings, leaves unanswered several significant questions about the nature of these habeas proceedings.

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QUESTIONS FROM SENATOR FEINGOLD

Feingold 200 You testified that whether waterboarding was torture was an issue on which "people of equal intelligence and equal good faith and equal vehemence have differed and have differed within this chamber." That testimony obscures the fact that for decades, the United States has taken the unequivocal position that waterboarding is torture, even prosecuting people for engaging in the practice. The notion that this is a "close question," to my knowledge, has its origins in, and is held only by certain members of, this administration. The only evidence you cited to the contrary is the fact that the Senate voted in 2006 against an amendment that would have banned specific interrogation techniques rather than simply banning torture. But at the time, those Senators who opposed the amendment made very clear that their opposition to identifying specific techniques did not signify that they believed these techniques to be lawful, or that they believed it to be a "close question." In the words of Senator Warner, who voted against the amendment, "I don't want [the amendment's] rejection to be misconstrued by the world in any way as asserting that the techniques mentioned in the amendment are consistent with the Geneva Convention or that they could legitimately be employed against our troops our anyone else . . . The types of conduct described in this amendment, in my opinion, are in the category of grave breaches of Common Article Three of the Geneva Convention." Please identify all instances of which you are aware in which any government official, member of Congress, legal scholar, military officer, or other respected American, at any time in history, has opined that the specific practice of waterboarding is not or might not be torture under some circumstances.

ANSWER: Because waterboarding is not among the techniques currently authorized for use in the CIA program, the Attorney General has not had occasion to determine, as the Attorney General, whether the technique would be permissible under existing legal standards. The Department of Justice did advise the CIA in the past that the technique would be lawful under the anti-torture statute, and, as the Attorney General testified, reasonable people have differed as to whether the practice is lawful under that statute or under current law. For example, during the debate over the Military Commissions Act of 2006 ("MCA"), a number of Senators expressed the view that it was unclear whether the stricter standards of the MCA would prohibit waterboarding and other interrogation techniques. *See, e.g.*, 152 Cong. Rec. S10,416 at S10,381-82 (The MCA's ambiguity "suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged with war crimes.") (statement of Sen. Clinton). Other Senators have made statements suggesting that waterboarding or other acts may be permissible under certain circumstances. *See, e.g.*, 154 Cong. Rec. S805-07 (2008) ("I am glad the Attorney General has reviewed [the CIA techniques] carefully. I am glad he is able to say waterboarding was utilized only three times, that it had not been used in 5 years. But I am glad he also said he would not say it would never be done again. This would be unwise advice to the enemy we face.") (statement of Sen. Sessions).

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Outside of Congress, a number of commentators, including Alan Dershowitz and Stuart Taylor, have expressed similar views. *See, e.g.*, Stuart Taylor, *What to Do About Waterboarding*, Nat'l J., Mar. 3, 2008 ("It can at the very least be plausibly argued (as detailed below) that if waterboarding is limited in duration and carefully controlled, it does not meet the 1994 law's narrow definition of torture."); Alan Dershowitz, *Democrats and Waterboarding*, Wall. St. J., Nov. 7, 2007 ("Under prevailing precedents—some of which I disagree with—the court must examine the nature of the governmental interest at stake, and the degree to which the government actions at issue shock the conscience, and then decide on a case-by-case basis. In several cases involving actions at least as severe as waterboarding, courts have found no violations of due process."); Carol Rosenberg, *Detainee Wants Judges to Rule on Torture*, Miami Herald, Dec. 15, 2007 (quoting retired Lt. Col. Jeffrey F. Addicott as explaining that waterboarding "is not torture" because it is essentially trickery that takes seconds and "does not constitute severe physical or mental suffering"); Rich Lowry, *Circumstances Matter*, Nat'l Rev., Nov. 2, 2007 ("[C]ommon sense suggests that the practice [of waterboarding] belongs in a murky space short of unambiguous torture."); Mark Bowden, *In Defense of Waterboarding*, Philadelphia Inquirer, Dec. 23, 2007 ("There is a difference between gouging out a man's eyes and keeping him awake, and waterboarding falls somewhere in between.").

Feingold 212 Chairman Leahy asked you if John Durham would testify before the Judiciary Committee once he'd finished his investigation. You responded: "[W]e have never, I think, U.S. attorneys have not testified as to pending cases. I don't see any reason to make an exception here." But in fact, U.S. Attorneys have testified before the Committee about pending cases. Just last July, for example, the U.S. Attorney for the Western District of Texas, Johnny Sutton, testified about the criminal prosecutions of border agents Ignacio Ramos and Jose Compean, whose cases were then pending before a federal appeals court. Furthermore, if Mr. Durham's investigation does not result in a criminal prosecution or other legal action, the case will no longer be "pending." Will you reconsider your statement about whether Mr. Durham would testify before the Judiciary Committee after the conclusion of his investigation?

ANSWER: Because Mr. Durham's investigation is ongoing, it is premature for the Department to discuss whether it might be appropriate for Mr. Durham to testify before the Judiciary Committee at some point in the future. After Mr. Durham completes his investigation, we would be happy to respond to any specific request for his testimony.

Feingold 213 I commend the Department for its efforts to investigate the alleged killing of 17 Iraqi civilians in Baghdad in September. To date, however, there has not been a single conviction of any contractor for the misuse of force against civilians in the field, despite the fact that there are at least four statutes (including the Military Extraterritorial Jurisdiction Act) that create extraterritorial jurisdiction over contractors operating abroad. The U.S. government has more than

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20,000 private security contractors operating in Iraq. While many of them serve honorably, abuses can and do occur. Indeed, Secretary Gates has expressed concern that the failure of some contractors to show proper regard for civilian life is at odds with the military's mission in Iraq. It is clear that accountability needs to be strengthened in this area. How many prosecutions have been initiated against private security contractors for misuse of force in the field?

ANSWER: Under long-standing Departmental policy, we cannot comment on the number or scope of ongoing investigations or prosecutions of past misconduct by private security contractors. I can assure you that we take very seriously allegations related to misuse of force against civilians in the field and are committed to investigating and prosecuting such cases where we have jurisdiction and the evidence to do so. Indeed, we sent a team of FBI agents to investigate allegations regarding the shooting by Blackwater contract employees of Iraqi civilians in Nisoor Square. At the same time, we would note that investigations of extra-territorial crimes are among the toughest. Difficulties include the logistics of collecting and preserving evidence abroad, maintaining respect for the sovereign jurisdiction, and obtaining evidence from foreign countries. Layered upon these difficulties - in Iraq - we often face battle conditions in the course of our investigations. Field investigation in an active war zone can be dangerous and requires extensive security precautions. Notwithstanding these difficulties, we do and we must pursue these cases.

Feingold 215 In his confirmation hearing, Deputy Attorney General Paul McNulty testified that the Justice Department had opened 19 investigations by January 2006 of U.S. contractors who allegedly abused detainees in Iraq and Afghanistan after the cases were referred to the Department by the CIA and the Defense Department. No civilian has yet been prosecuted for abuse of any detainee in Iraq. Only one civilian – David Passaro – has been prosecuted for abuse of a detainee in Afghanistan. In contrast, the Defense Department has already concluded several prosecutions of U.S. military personnel alleged to have abused detainees. How many of the investigations described by Deputy Attorney General McNulty are still open, and how many are closed?

ANSWER: One investigation is still open and pending from the first group of 19 investigations referred to the United States Attorney's Office for the Eastern District of Virginia. That office has been designated as the primary point of referral for these cases. The other 18 referrals from that first group of referrals have been declined and closed. Since January 2006, one additional matter was referred later in 2006, four matters were referred in 2007, and three matters have been referred in 2008. There are four open investigations currently pending: one from the original group and three that were referred in 2008. All the other referrals have been declined.

The Department of Defense has charged a number of persons with offenses under the Uniform Code of Military Justice -- such as dereliction of duty -- that have no analog in Title 18, United States Code, or other provisions of law applicable to civilians.

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Moreover, under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), misdemeanor charges are not available to the Department of Justice. Some of the matters referred did not meet the standards for referral under MEJA. Under Defense Department guidelines, there should be a probable cause finding by a qualified legal officer (Staff Judge Advocate) before referral. That did not happen in every case. Nevertheless, the referrals were accepted by the Department because of the importance of investigating civilians who are alleged to have abused detainees in Iraq or Afghanistan. Upon further review, some of these referrals had to be later declined.

Feingold 216 For any cases that were closed, what was the basis for closing these cases?

ANSWER: A complete investigation by agents and a thorough review by prosecutors was conducted on all matters referred. Matters where no charges were brought were declined because the allegations could not be proven beyond a reasonable doubt, the alleged misconduct did not rise to a level warranting criminal prosecution, or both—or there was no jurisdiction over the person who was referred or the conduct in which the person was allegedly involved, or both. All of the decisions to decline prosecution were concurred in by the career investigators who referred the charges and the career prosecutors who reviewed the matters.

Feingold 217 How many additional detainee abuse cases have been referred to the Department since January 2006?

ANSWER: Please see the response to Question 215.

Feingold 218 The FBI is launching a $1 billion effort to build a computer database of Americans' biometric data, such as facial features, ear lobe shapes, and iris patterns. A major concern about this planned database is that the technology required to create, store, and match many of these kinds of biometrics is just not that advanced. Facial recognition technology, for example, is certainly not accurate enough to be relied upon for purposes of identification in a law enforcement context. I understand that the database is in the planning phase and that these technologies may become more accurate in the future, but using a biometrics database that generates significant numbers of false positive matches could result in massive disruption to innocent people's daily lives. Will you ensure that the FBI implements an appropriate accuracy requirement before relying on this database?

ANSWER: The FBI continues to invest in improving its biometric identification technologies in order to provide the most reliable information possible for use in law enforcement and counterterrorism efforts. Fingerprint identification is a highly reliable and widely accepted means of biometric identification, and will continue to be relied on by the FBI as an accurate means of identification. Although fingerprint data will remain

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the primary means of identification, the Next Generation Identification (NGI) initiative seeks to advance the collection of additional biometric information for investigative purposes. While there are no formal plans to incorporate ear lobe shapes as a biometric modality, the FBI will consider this and other technologies as they mature. The NGI development and integration contract includes a series of biometric search analysis studies that will assess biometric technology and provide recommendations for implementation. Issues identified through these studies will be addressed through the National Science and Technology Council (NSTC) National Biometric Challenge. The NGI will provide the framework for the fusion of these additional biometric modalities into a highly accurate identification system.

Recognizing that facial recognition technology is only one investigative tool along with other investigative aids and information, the FBI will use guidance from user community representatives to promulgate policies and procedures emphasizing the limits of this technology, making clear that photographic matches are not to be considered "positive" identifications and that photographs may be used only to develop potential candidate lists.

Feingold 219 The privacy and security implications of this database are significant. Identity theft, for example, becomes exponentially more problematic when dealing with the theft of iris scans and fingerprints, as opposed to credit cards and bank statements. A victim of identity theft can always change his or her credit card number, but it is impossible to change one's fingerprints.

a. What security measures will be in place for this database, and can you guarantee that they will work?

ANSWER: Title 28 U.S.C. § 534 and 28 CFR §§ 20.33 and 50.12 require that records be used only for authorized purposes and that the exchange of records is subject to cancellation if dissemination is made outside the receiving departments or related agencies. In addition, security and privacy protocols are addressed in the CJIS Division Security Policy, to which all users must adhere.

According to Federal Information Processing Standard (FIPS) 199, systems and information are to be assigned a security categorization according to the security objectives of confidentiality, integrity, and availability. FIPS 200 establishes the minimum security requirements covering seventeen different areas for these systems, and NIST 800 53 was developed to provide the minimum security controls and assurance requirements according to the impact level of the data it will be processing. This database meets these minimum requirements, sitting within a system architecture that has been specifically engineered to support the security of this particular system and the rest of the FBI's CJIS systems. In addition, numerous other controls have been instituted based on industry standards and best practices.

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Internally, an Information System Security Officer (ISSO), who is responsible for ensuring that operational security is maintained on a day-to-day basis, has been is assigned to the Integrated Automated Fingerprint Identification System (IAFIS). The roles and rules are tested as part of the security certification and accreditation process, and all users are required to acknowledge "Rules of Behavior" in writing annually as part of security awareness training. The CJIS Computer Security Incident Response Capability (CSIRC) also defines processes and procedures for responding to computer and data misuse concerns, and CJIS User Agreements and Outsourcing Standards provide for security and privacy to ensure compliance.

To ensure IAFIS security policies are fully implemented, the CJIS Division's Audit Unit visits authorized recipients on a recurring basis and reports deficiencies to the CJIS Division Advisory Policy Board's (APB) Sanction Subcommittee and the Compact Council's Sanctions Committee. Access may be terminated for improper access, use, or dissemination of records obtained from the system of records. The Audit Unit also conducts periodic external audits to assess and evaluate compliance with the terms of the applicable user agreements and contracts.

Finally, as discussed in response to Question 3, above, 28 CFR §§ 16.30-16.34 establish alternative procedures for the subject of an FBI identification record to obtain a copy of his or her own record for review and correction.

b. What would the FBI's course of action be in the case of a security breach, given that it's not possible for a person to simply replace a stolen biometric with new data?

ANSWER: OMB has provided clear direction and requirements for handling Personally Identifiable Information (PII) and responding to PII breaches. Memorandums M-06-16 (Protection of Sensitive Agency Information) and M-07-16 (Safeguarding Against and Responding to the Breach of Personally Identifiable Information) provide the required processes and procedures. DOJ has implemented these OMB guidelines for its component agencies in its own directive and the FBI has generated internal processes consistent with the Department's Incident Response Procedures for Data Breaches Involving Personally Identifiable Information. When a data breach occurs in the FBI, established policy requires the FBI's Security Division and Chief Privacy Officer to jointly assess the risk of the data's exposure, its sensitivity, and the presence or absence of mitigating factors (such as data encryption). Based on this assessment, a determination is made whether to take any of a list of corrective actions, including notice to affected individuals. In addition, lessons learned about system integrity and policy effectiveness are evaluated and changes are made if appropriate.

With respect to CJIS systems in particular, an FBI audit unit visits authorized recipients periodically and reports deficiencies to the CJIS APB's Sanctions Subcommittee and the Compact Council's Sanctions Committee. If recommended by the sanctioning body, such audits may include additional biometric data. Access may be

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terminated for the improper access, use, or dissemination of records obtained from the system of records.

Feingold 220 According to the Assistant Director of the FBI's Criminal Justice Information Services Division, the fingerprints that the FBI currently retains in its database are those belonging to people of law enforcement interest, such as criminals. When an entity or agency submits to the FBI a set of fingerprints that do not fall into that category, those prints are generally destroyed after being matched against the FBI's data. As I understand it, however, the FBI is working to implement a "rap-back" service, under which, at the request of an employer, the FBI would keep employees' fingerprints in the database so that if that employees are later arrested or charged with a crime, the employers could be notified. Needless to say, this would constitute a dramatic expansion in the degree and nature of the federal government's retention of biometric data. What evidence exists that undisclosed criminal conduct among employees is a sufficiently urgent problem to justify this step?

ANSWER: The NGI Rap Back Service was developed because states have identified a growing need for additional security and safety procedures for applicants who hold positions of trust. For example, many states have recently enacted statutes requiring fingerprints and criminal background checks for all school employees and others who have contact with children. About one million school employees are expected to provide fingerprints through 2011. The school-safety effort grew out of concerns related to teachers who had been arrested on suspicion of having inappropriate sexual contact with children. Because employees' aliases can thwart background checks based on names, fingerprints are widely viewed as the best means of identifying those who have incentives to falsify their identities. This danger was recently highlighted when school officials learned that a sex offender employed as a middle school custodian had passed a background check using a false name. Many states require fingerprints from new teachers, but this law does not address teachers who are already certified. Research of the 2004-05 school year indicated that in one state school system 66 teachers were registered sex offenders. In response, that state implemented a new law requiring all teachers to submit fingerprints and undergo criminal background checks. Since those checks began, state officials have advised that the records of almost 200 teachers and teaching candidates have included serious offenses, including sexual misconduct and crimes against children. Rap Back functionality will provide significant additional protection against those who violate their positions of public trust.

Feingold 226 Has the Justice Department evaluated the legality, as a general matter, of the CIA and Pentagon issuing NSLs to obtain information on Americans?

ANSWER: As noted in response to Question 224, agencies other than the FBI may use national security letters to obtain information. For example, 50 U.S.C. § 436, permits "[a]ny authorized investigative agency" to request particular categories of information

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under specified circumstances. *See* 50 U.S.C. § 436(a)(1). The response to Question 224 further notes the distinction in the compulsory nature of the FBI's NSLs in contrast to the voluntary nature of the other agencies' NSLs.

Feingold 228 In a recent Washington Post story, a White House official confirmed that the President has issued a new classified cyber-security directive. The Director of National Intelligence also has discussed publicly the new cyber-security initiative that the Intelligence Community is working on. The government should make it a priority to protect its computer networks against attack. But the news reports about this new initiative suggest that it may involve sweeping surveillance of domestic Internet communications, which could raise serious First and Fourth Amendment questions. What involvement has the Justice Department had in the development of this new directive? Has it reviewed it on legal grounds? If so, what conclusions has it drawn? If necessary, provide any classified portion of your response in a classified annex.

ANSWER: The Department of Justice has been involved in the interagency process with respect to the development and implementation of the classified directive discussed above and has provided informal legal and policy guidance, along with other interagency partners, on certain aspects of the directive. The Committee has been provided with briefings on the initiative generally, and a classified briefing on the directive. The Department is also available to provide the Committee with a classified briefing focused on legal issues associated with particular aspects of the directive if the Committee so desires.

Feingold 229 Cuts in federal funding for programs like COPS, Byrne Justice Assistance Grants, and juvenile delinquency prevention programming have coincided with increases in violent crime across the country, including in my home state of Wisconsin. These cuts also have contributed to the perception that the federal government has largely abandoned state and local law enforcement agencies in their fight to combat violent crime. The recently released Administration budget for fiscal year 2009 makes even deeper cuts to these programs, stripping law enforcement assistance to the bone. Will you support Congressional attempts to restore funding for these programs to effective and necessary levels?

ANSWER: The Department's core mission includes assisting our state, local and tribal partners to prevent and control crime. We carry out this mission through enhanced enforcement and prosecution initiatives, task force activity and grants, training and technical assistance.

Since 2001, the Bush Administration has committed over $2 billion to Project Safe Neighborhoods to hire more than 200 federal prosecutors to prosecute gun crime, make grants available to hire more than 550 new state and local gun crime prosecutors, train over 33,000 individuals in national and regional training events, and promote other

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strategies to reduce gun violence in our communities. Through PSN we have doubled the number of gun crime prosecutions over the last seven years compared to the preceding seven years. The cost of incarcerating these additional gun criminals is more than $1.5 billion – costs that would have otherwise been carried by the states in terms of prison beds or decreased public safety.

In addition to national initiatives such as PSN, the Department supports joint local and federal law enforcement task force activity. Examples led by federal law enforcement include the FBI Safe Streets task forces operated in 187 sites, 31 ATF Violent Crime Impact Teams, and 90 U.S. Marshals Service fugitive apprehension task forces (6 regional fugitive task forces and 84 full time district task forces). In addition, whenever criminal proceeds are recovered from joint federal-state/local law enforcement operation, we share the funds under the equitable sharing program. Last year, the Department returned a record $360 million to our partners. Together we leverage our collective strength to stop gangs, drug-related violent crime and illegal guns.

Finally, we also assist our partners through grants, training and technical assistance. The President's budget proposes to consolidate more than 70 of the Department's state and local grant programs in order to provide our partners with more flexibility in addressing our Nation's most critical criminal justice needs, especially targeting violent crime. Notable here is the Violent Crime Reduction Partnership Initiative for which the President seeks $200 million. Funding for this initiative will be used to help communities suffering from high rates of violent crime to tackle this problem by forming and developing effective multi-jurisdictional law enforcement partnerships between local, state, and federal law enforcement agencies. Through a competitive grant process, OJP will provide funding and technical assistance to communities seeking to establish partnerships to investigate and reduce violent crime, including efforts to address drug trafficking and criminal gang activity, which contribute to many violent offenses.

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QUESTIONS FROM SENATOR DURBIN

Durbin 260 The Justice Department's Inspector General and Office of Professional Responsibility are conducting a joint investigation into whether politicized prosecutions and hiring practices at the Justice Department under your predecessors involved violations of federal laws and policies. When will this report be released?

ANSWER: As the Committee is aware, the Office of Professional Responsibility and the Office of the Inspector General recently completed a report pertaining to the improper consideration of political or ideological affiliations in the hiring of career attorneys for the Department's Honors Program and Summer Law Intern Program. The OIG and OPR have indicated to the Attorney General that they are working expeditiously to complete the remaining aspects of this joint review.

Durbin 261 Will you pledge to implement all recommendations contained within this report after it is released?
ANSWER: The Attorney General has directed that the Department implement the recommendations contained in the report concerning the Department's Honors Program and summer intern hiring processes. The Department will evaluate any additional recommendations when and if they are provided.

Durbin 262 In response to a written question I sent you last October, you pledged that "selective prosecution of anyone for political purposes will not be tolerated. If confirmed, I will communicate additional clear guidance through appropriate channels." What "additional clear guidance" have you communicated on this issue, to whom has it been communicated, and which "appropriate channels" have you used to do so? Please submit a copy of any written guidance you have issued or statements you have made on this issue.

ANSWER: Attorney General Mukasey sent a memorandum to all Department employees reminding them that the Department is entrusted to enforce the law in an impartial and neutral manner. A copy of that memorandum is attached. In addition, the Attorney General has frequently and repeatedly said in speeches and meetings, including to Department employees, that cases are to be brought only on the facts and the law. In February, he delivered this message to all United States Attorneys. Most recently, the Attorney General gave a lengthy public speech on public corruption, in which he stated the following:

> "When the Department of Justice pursues [public corruption] cases . . . on behalf of the United States, the Department bears a solemn responsibility. Like the public officials we sometimes investigate and prosecute, we too are public servants, invested with a public trust that we are sworn to uphold. We thus have a

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duty to ensure that the Department's investigations of public corruption are conducted without fear or favor, and utterly without regard to the political affiliation of a particular public official. After all, a corruption investigation that is motivated by partisan politics is just corruption by another name.

"Let me be perfectly clear: Politics has no role in the investigation or prosecution of political corruption or any other criminal offense, and I have seen absolutely no evidence of any such impropriety in my time at the Department, and would not tolerate it.

"I consider it one of my paramount responsibilities to ensure that the Department continues to handle its public corruption investigations and prosecutions in a consistent, non-partisan, and appropriate manner throughout the nation."

Durbin 264 Is it your belief that there were no selective prosecutions brought by the Justice Department between 2001-2007? If your answer is not in the affirmative, please list all instances in which you believe a selective prosecution was or may have been brought.

ANSWER: Yes. We believe that no selective prosecutions for political purposes were brought by the Justice Department between 2001-2007. However, we are aware that OPR is currently investigating several allegations of politically-motivated prosecutions, including the prosecutions (1) in the Middle and Northern Districts of Alabama of former Democratic Governor Donald Siegelman; and (2) in the Eastern District of Wisconsin of Georgia Thompson, a state official accused of giving politically-motivated preferential treatment to contractors to curry favor with her Democratic superiors. In addition, OPR is reviewing the recent denial of a defense motion alleging improper political motivation in the prosecution of Democratic contributor Geoffrey Fieger in the Eastern District of Michigan.

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QUESTIONS FROM SENATOR GRASSLEY

Grassley 272 How are disclosures of classified material to cleared congressional staff by individuals acting outside the chain of command different than those authorized by the chain of command?

ANSWER: The President has the constitutional authority to decide, based upon the national interest, how, when, and under what circumstances particular classified information should be disclosed to Congress. Legislation permitting an individual to disclose classified national security information without receiving proper authorization to do so would deprive the President of his constitutional authority to control access to national security information and, in the case of employees and officers of the Executive Branch, would infringe upon the President's constitutional authority to supervise the Executive Branch. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). Indeed, in 1998 the Department testified that legislation similar to S. 274:

> Would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress. This is an impermissible encroachment on the President's ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress.

Id. By allowing any covered employee with access to classified information to go directly to Congress, section 1(b)(3) of S. 274 would implicate these same constitutional concerns. The President's constitutional authorities to protect national security information are meaningless if every covered employee of the Executive Branch is vested with the right to determine for himself or herself, without any official authorization, those disclosures of national security information to Congress that are appropriate.

Grassley 273 What is the remedy for a whistleblower who properly reports up the chain of command but the underlying violation continues?

ANSWER: Where proper reporting up the chain of command of an alleged violation of law is ineffective, the individual may report alleged violations of law to the Inspector General of an agency. *See* Inspector General Act of 1978, 5 U.S.C. App. § 3. In appropriate circumstances, an individual also may report retaliation for reporting alleged violations of law to the Office of Special Counsel. *See* 5 U.S.C. § 2302(b)(8)(B).

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Grassley 274 Why isn't it enough to require that whistleblowers report classified information to those with the necessary security clearances?
ANSWER: Please see the response to Question 272. A security clearance is an indicator that an individual is allowed to receive classified information. Merely having a security clearance is not sufficient; an individual with a clearance also must have a need to know the classified information. Otherwise, he is not permitted to access that classified information. An appropriate authorizing official within the Executive Branch must determine whether an individual to whom disclosure is to be made has a need to know; the whistleblower himself cannot make that determination.

Grassley 275 If S.274 is "not the way to do it" how do you propose to allow individuals, who have knowledge of wrongdoing in the Executive Branch related to classified or protected matters, to report improprieties when their supervisors will not correct the wrongdoing?

ANSWER: The current statutory and regulatory structure provides adequate remedies by permitting individuals to report up the chain of command within the Executive Branch, or to an agency Inspector General or to the Special Counsel, in appropriate circumstances.

Grassley 276 During the hearing, I asked whether the Justice Department is committed to actively pursing cases against employers who knowingly hire illegal aliens and whether this is an important priority for the Department. You responded clearly, "It is, we are, and I do." Could you please elaborate about the efforts of the Department in enforcing worksite immigration laws? Specifically, could you provide statistics on the type and number of prosecutions that have been completed or are ongoing? Further, would you please outline the resources devoted to worksite enforcement by the Department?

ANSWER: The Department of Justice does not keep a separate statistical database for worksite enforcement prosecutions. Rather, virtually all worksite enforcement prosecutions are reflected in our immigration program category case information, as are a number of other types of immigration-related prosecutions. Moreover, an enforcement action might be termed "worksite enforcement" if employers and corporate officials were prosecuted for knowingly hiring aliens illegally in the United States; or if aliens illegally in the United States were prosecuted for various immigration related offenses including, but not limited to, such offenses as re-entering the United States after removal (8 U.S.C. 1326), false statements (18 U.S.C. 1001), false claims to United States Citizenship (18 U.S.C. 911); fraudulent use of a social security card or number (42 U.S.C. 408), visa fraud (18 U.S.C. 1546), document fraud (18 U.S.C. 1028), or aggravated identity theft (18 U.S.C. 1028A); or if there was an administrative enforcement operation which did not result in any criminal prosecutions. This lack of a common definition of worksite

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enforcement makes it problematic to respond with specificity regarding how many prosecutions have been completed or are ongoing.

This is particularly the case when making reference to an administrative enforcement action which did not result in any criminal prosecutions. In those instances the Department of Justice would usually not be notified by the Department of Homeland Security nor have any statistical information to report to Congress. Because of legal and ethical considerations, we can neither confirm nor deny the existence of particular matters or investigations, nor can we discuss the status of any matter that may be pending in a United States Attorney's Office, other than facts on the public record.

The Department of Justice is committed to supporting the Department of Homeland Security and its Immigration and Customs Enforcement (ICE) arm, which is the principal investigative agency responsible for worksite enforcement. United States Attorneys work closely with their ICE counterparts in supporting ICE efforts in worksite enforcement.

Grassley 291 What are the benchmarks for determining success?

ANSWER: We are currently working with the State Department and the Government of Mexico to create benchmarks for determining the success of the many and diverse programs proposed for funding under the Merida Initiative. In fact, State Department employees traveled to Mexico during the week of March 17 for the sole purpose of creating and refining these benchmarks. At those discussions, there was general agreement on the goals and objectives we are pursuing, but recognition that further efforts would be needed to better refine the actual measurements that we will use to establish benchmarks for success. Those efforts are ongoing.

Grassley 293 The Merida Initiative is focused on combating drug trafficking within Mexico. What programs do you believe should be implemented on the U.S. side of the Southwest Border to help ensure the success of these programs?

ANSWER: The Merida Initiative is intended to combat drug trafficking as well as terrorism and other transnational crime, as well as promote regional security. The Initiative will build upon recent efforts by Mexico and Central American countries to combat the drug cartels and other organized crime within their countries. The United States will continue to wage its multi-faceted war against crimes along our common border using all the tools and strategies encompassed in our National Southwest Border Counter Narcotics Strategy. There are several areas where increased efforts on our side of the border could bolster the efforts demonstrated by law enforcement authorities in Mexico and other South American countries. The President's FY 2009 budget requests resources to support programs critical to our Southwest Border strategy. Additional funding provided in the President's Budget will support the hiring of additional border AUSAs to prosecute these gun smugglers.

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Grassley 298 I understand that the Justice Department has suspended debtor audits required by the bankruptcy reform law, Pub. L. No. 109-8. Why has the Justice Department stopped these audits? Can you tell me what the legal authority is for this decision?

ANSWER: As mandated in section 603(a) of Public Law 109-8, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the United States Trustee Program (USTP) established procedures for independent audit firms to audit petitions, schedules, and other information in consumer bankruptcy cases filed on or after October 20, 2006. Pursuant to 28 U.S.C. § 586(f), the USTP contracted with independent accounting firms to perform audits in cases designated by the USTP.

Funding is available to the Department and its components for purposes and in amounts according to the terms and conditions specified in annual Appropriations Acts. The President's FY 2007 budget request for the USTP included an enhancement of $4.7 million to fund debtor audits; however, the Congress did not approve the enhancement. In order to fund debtor audits in FY 2007, the USTP utilized FY 2006 carryover monies. In the FY 2008 Consolidated Appropriations Act, Public Law 110-161, Congress reduced the USTP's funding by more than $13 million from its FY 2007 level and used $20 million in prior year unobligated balances to fund the FY 2008 appropriation. Further, the Explanatory Statement accompanying Division B of the Appropriations Act directed agencies to inform the Appropriations Committees of any departure from budget plans presented in the agency's budget justification which formed the basis of the Act, and required the submission of agency operating plans within 60 days of the bill's enactment. As a result, the USTP temporarily suspended its designation of cases subject to audit, notified the independent accounting firms of the suspension of audits, and began working with the Department to find a means of funding the audits.

In accordance with directives accompanying the FY 2008 Consolidated Appropriations Act, the Department submitted on March 6, 2008, an Operating Plan for review by the Appropriations Committees of the Senate and the House of Representatives. This Operating Plan includes a notification to the Appropriations Committees of the USTP's intention to use $4.05 million in prior year unobligated balances for several operational purposes, including debtor audits. The USTP will resume a debtor audit program once the Operating Plan has been cleared by the Appropriations Committees.

Grassley 319 To what extent does the new Sentinel computer system include automatic red-flags for suspicious computer activity such as that in which Prouty engaged?

ANSWER: The FBI's ESOC will analyze Sentinel audit data and conduct insider threat analysis to detect unauthorized activity. The Sentinel system will employ auditing and monitoring capabilities that generate "silent hits" when users attempt unauthorized access to information, checking each search query and set of search results. When the system

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detects an unauthorized attempt to access information, notification will be sent to a designated entity without providing any indication to the user. In the event a user engages in suspicious activity or the ESOC discovers a security incident, Sentinel will have the auditing capability to reconstruct a user's activities to determine what queries were conducted and what information was obtained.

Grassley 320 Will such activity be investigated by the dedicated internal security unit being developed in response to the Inspector General's recent follow-up report on recommendations made in the wake of the Robert Hanssen case?

ANSWER: Yes, in response to the Webster Commission's report, the FBI established the Analysis and Investigations Unit, which is dedicated to handling internal security matters.

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SUBMISSIONS FOR THE RECORD

MAJOR GENERAL JOHN L. FUGH, USA (RET.)
REAR ADMIRAL DON GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL DAVID M. BRAHMS, USMC (RET.)

November 2, 2007

The Honorable Patrick J. Leahy, Chairman
United States Senate
Washington D.C. 20510

Dear Chairman Leahy:

In the course of the Senate Judiciary Committee's consideration of President Bush's nominee for the post of Attorney General, there has been much discussion, but little clarity, about the legality of "waterboarding" under United States and international law. We write because this issue above all demands clarity: Waterboarding is inhumane, it is torture, and it is illegal.

In 2006 the Senate Judiciary Committee held hearings on the authority to prosecute terrorists under the war crimes provisions of Title 18 of the U.S. Code. In connection with those hearings the sitting Judge Advocates General of the military services were asked to submit written responses to a series of questions regarding "the use of a wet towel and dripping water to induce the misperception of drowning (*i.e.*, waterboarding) . . . ." Major General Scott Black, U.S. Army Judge Advocate General, Major General Jack Rives, U.S. Air Force Judge Advocate General, Rear Admiral Bruce MacDonald, U.S. Navy Judge Advocate General, and Brigadier Gen. Kevin Sandkuhler, Staff Judge Advocate to the Commandant of the U.S. Marine Corps, unanimously and unambiguously agreed that such conduct is inhumane and illegal and would constitute a violation of international law, to include Common Article 3 of the 1949 Geneva Conventions.

We agree with our active duty colleagues. This is a critically important issue – but it is not, and never has been, a complex issue, and even to suggest otherwise does a terrible disservice to this nation. *All* U.S. Government agencies and personnel, and not just America's military forces, must abide by both the spirit and letter of the controlling provisions of international law. Cruelty and torture – no less than wanton killing – is neither justified nor legal in *any* circumstance. It is essential to be clear, specific and unambiguous about this fact – as in fact we have been throughout America's history, at least until the last few years. Abu Ghraib and other notorious examples of detainee abuse have been the product, at least in part, of a self-serving and destructive disregard for the well-established legal principles applicable to this issue. This must end.

The Rule of Law is fundamental to our existence as a civilized nation. The Rule of Law is not a goal which we merely aspire to achieve; it is the floor below which we must not sink. For the Rule of Law to function effectively, however, it must provide actual *rules* that can be followed.

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In this instance, the relevant rule – the *law* – has long been clear: Waterboarding detainees amounts to illegal torture *in all circumstances*. To suggest otherwise – or even to give credence to such a suggestion – represents both an affront to the law and to the core values of our nation.

We respectfully urge you to consider these principles in connection with the nomination of Judge Mukasey.

Sincerely,

Rear Admiral Donald J. Guter, United States Navy (Ret.)
Judge Advocate General of the Navy, 2000-02

Rear Admiral John D. Hutson, United States Navy (Ret.)
Judge Advocate General of the Navy, 1997-2000

Major General John L. Fugh, United States Army (Ret.)
Judge Advocate General of the Army, 1991-93

Brigadier General David M. Brahms, Unites States Marine Corps (Ret.)
Staff Judge Advocate to the Commandant, 1985-88

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Statement
United States Senate Committee on the Judiciary
Oversight of the U.S. Department of Justice
January 30, 2008

The Honorable Charles Grassley
United States Senator , Iowa

Prepared Statement of Senator Chuck Grassley of Iowa
Senate Committee on the Judiciary
Department of Justice Oversight Hearing
Attorney General Michael Mukasey
Wednesday, January 30, 2008

Chairman Leahy, thank you for calling this hearing today on Department of Justice oversight. It has only been three months since Attorney General Mukasey was last here for his confirmation hearings, but it is always good to hold oversight hearings and check in on the administration.

As a senior member of the Senate, I've always held great respect for the oversight function of Congress. The Constitution placed great power in the Legislative Branch and that is not limited to just writing laws. Instead, the Constitution requires that we ask tough questions of the Executive Branch. We need to make sure they are being faithful stewards of taxpayer dollars and that they are enforcing and implementing the laws as Congress intended. That said, I want to ask the Attorney General a number of questions today and follow-up on some responses he submitted following his confirmation hearing back in October.

One topic I'd like to discuss with the Attorney General is a letter he signed regarding the Federal Employee Protection Act (S.274). This bill provides some necessary revisions in the Whistleblower Protection Act and unanimously passed the Senate back in December. This legislation will ensure that whistleblowers are protected and not subject to retaliation. I have some concerns with the letter signed by the Attorney General and want to hear his rationale for raising objections to S.274.

Next, I have some follow-up questions related to oversight of the Federal Bureau of Investigation (FBI). These questions relate to the Counterterrorism Division of the FBI and allegations that have been made public by employees within the FBI. I also have questions regarding the FBI's use of "exigent letters" in relation to the investigation conducted by the Department of Justice Office of Inspector General on the FBI's use of National Security Letters. These questions are vitally important to ensuring that efforts to protect our homeland are accurate and in accordance with the law. I've been asking questions for some time and look forward to further dialogue and, more importantly, some answers on these matters.

I also would like to work with the Attorney General in the second session of the 110th Congress on two very important legislative initiatives, S.2041 the False Claims Act Correction Act of 2007, and S.473, the Combating Money Laundering and Terrorist Financing Act of 2007.

The False Claims Act Correction Act will clarify negative court interpretations of the False Claims Act which I amended in 1986. The FCA is the premier tool in the Government's toolbox for combating fraud. Since the 1986 amendments were signed into law by President Reagan, it has helped the government recover over $20 billion that would otherwise be lost to fraud, waste, or abuse. However, 20 years later the law needs a few tweaks to deal with court decisions that run contrary to the spirit and intent of the 1986 amendments. I look forward to working with the Justice Department

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to ensure that the FCA will continue to work as intended for the next 20 years.

The Combat Money Laundering and Terrorist Financing Act is an important bill that will ensure that our laws are up to date in combating the laundering of terrorist and criminal proceeds. I've long believed that to effectively combat terrorists and criminal organizations, we need to hit them where it hurts, right in the pocketbook. However, as the fight against terrorism continues, we need to make sure that our laws against money laundering keep pace with technological advances, such as the use of prepaid debit cards. In fact, there are additional loopholes in the law that have been pointed out that I also intend to address in this legislation. This is a testament to the ever-evolving world of money laundering, and we need to ensure that our laws are not outpaced by the creativity and unrelenting nature of terrorist and criminals around the world.

I hope the Attorney General, and members of this Committee, will work with me on these two legislative initiatives in the near future.

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PATRICK J. LEAHY, VERMONT, CHAIRMAN

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MITCH McCONNELL, KENTUCKY

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

December 6, 2001

The Honorable Larry Thompson
Deputy Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Deputy Attorney General:

As the Ranking Member of the Crime and Drugs Judiciary Subcommittee, I am writing to you to make further inquiries about an issue which is causing me increasing concern: the use of subpoenas by the Department of Justice to obtain information from, or about, members of the news media.

In particular, the tardy response on November 28, 2001 to my letters of September 4 and 6, 2001, raises more questions about subpoenas to the media in general and the specific case of Associated Press reporter John Solomon, whose home telephone records were subpoenaed earlier this year without his knowledge.

I emphasize that I am not inquiring about this subject to unearth the specifics of any grand jury investigation or the details of a criminal investigation. Rather, I simply wish to get to the bottom of what happened and why it did.

Thus far, the Justice Department has failed to demonstrate that it followed its own rules and regulations when it obtained a subpoena for Mr. Solomon's home telephone records without any notification or negotiation.

This is the heart of the matter for which I have written to you. The integrity of government agencies and the Justice Department in particular depends on its compliance with the spirit and the letter of established laws, rules and regulations. Please revisit your response to the

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September 4th letter in light of the comments above and respond again to the questions I raised.

This issue is even more troubling because a subpoena was issued for Mr. Solomon's home telephone records apparently in an attempt to identify the source of information he included in a May 4, 2001, article. As you know, a reporter's ability to promise anonymity to a source in sensitive matters is crucial to the news-gathering process and keeping government agencies accountable for their actions. Attempts to identify a reporter's sources create a chilling effect on whistleblowers and others who speak out and expose government action.

This raises doubts about how much caution the Department of Justice exercises when seeking information from, or about, members of the media – an action that no doubt should be rare and done only when the needs of justice are exigent and great.

In fact, your response states that the Justice Department in 17 cases sought information "that could lead to the identification of a reporter's source or implicated source material."

While your response provided a good deal of information, it is lacking in context.

Specifically, there is no way to match your information about the number of times Justice authorized subpoena requests without prior notification or negotiation (eight in total) with the types of crimes under investigation or prosecution. Thus, it is impossible to judge whether the Justice Department, in the case of Mr. Solomon, acted in accordance with its previous behavior.

Also, for the 17 approved subpoena requests seeking information that could identify a reporter's source, you do not provide information on the types of crimes under investigation for which these 17 subpoenas were approved.

I do appreciate the research and effort that went into an accounting of the Justice Department's historical use of subpoenas to the media. I'm also somewhat encouraged, however, to find in your response that the Justice Department engaged in prior notification and negotiation in 80 of the 88 authorized subpoena requests to the media from 1991 through September 6, 2001.

Your response warrants another series of questions. I request an answer by Tuesday, January 8, 2002.

1) You state that information sought in 17 authorized subpoena requests "could lead to the identification of a reporter's source or implicated source material." This reply to too vague to be of any use, and you must be more specific. For example, a subpoena for a reporter's notes could be authorized solely to discover a source (whose name is contained in the notes) or solely to gather more details about a published article without regard for a source.

More specifically, for how many authorized subpoena requests was the intent or purpose to discover a reporter's source? What were the crimes under investigation or prosecution for

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these authorized subpoena requests? How many of these were for documents, testimony, toll records, or some combination thereof? For each of those categories, how many were made with prior notification or negotiations?

2) On page three of your response, you list a category of crimes under investigation or prosecution for which the 88 subpoena requests were authorized. However, this information also is of very limited value because you provide no accounting for how they correspond to the type of information (documents, testimony or source identity) sought with the subpoena. In your reply, please match each specific crime with the information sought. For example, for the crime of arson, you should list seven entries and the type of information sought by the authorized subpoena request for those seven arson crimes.

To allay your potential concerns about grand jury secrecy, I am excluding from this specific request the following information: the names of suspects for these cases, any mention of when the crime, investigation or prosecution took place; any reference to the location or judicial district where the crime, investigation or prosecution took place.

3) On page four of your response, you state that in the five authorized subpoena requests for toll records that were carried out with no prior notification, the Justice Department delayed notification for another 45 days in only one case. By this, am I to presume you mean the case of Mr. Solomon earlier this year? Also, you state the request for the additional 45-day delay was approved by the "Assistant Attorney General for the Criminal Division." By this, am I to presume you mean Robert Mueller, who held the position at the time? Also, provide details of the four cases where authorized subpoena requests were authorized for toll records and no prior notification was given. Your descriptions of these cases should be comparable in detail to the 33 instances you explained in your November 28, 2001 letter.

4) Explain what prompted the investigation that led to the subpoena of the phone records, starting with the very initial causes, steps and decisions. Please explain the exact, first event that set this situation in motion. Was the impetus for the investigation and subsequent subpoena external or internal?

Regardless of whether the impetus for the investigation and subsequent subpoena was external or internal, what government official made the initial decision to move forward with an investigation that led to the subpoena?

If it was internal, was it from within Justice Department headquarters, the FBI or a U.S. Attorney's office? If the impetus for the investigation and subsequent subpoena was external, what form (verbal or written) did it take and to whom was it addressed? Did a complaint lodged with the Justice Department spark the investigation and subsequent subpoena? Was that complaint based in any way on a May 4, 2001 story by AP reporter John Solomon? Who made the complaint?

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Does the Justice Department have criteria to seriously consider complaints which lead to investigations and subpoenas of the media? If so, what are they? Provide documentation of the criteria and proof they were followed. Who has the status to lodge such a complaint? Must a complainant be an attorney representing a person under investigation by the FBI? What kind of records does the Justice Department make for complaints that lead to investigations and subpoenas? Please enclose those records, including the name of the complainant, in your response to me.

5) At the start of your investigation into disclosure of grand jury information to Mr. Solomon, did you, as a reasonable alternative, interview and/or polygraph the limited number of persons who had access to the information in question (contents of a 1996 wiretap of Sen. Robert Torricelli)?

6) Were there any contacts between Justice personnel and phone company personnel prior to the approval of the subpoena for Mr. Solomon's home telephone records? If so, provide details of that contact, such as the names of the personnel, the dates they communicated and the nature of the communication.

Again, let me emphasize that I am not seeking to have you disclose details of any grand jury proceedings or specifics of a criminal investigation. Rather, in accordance with my responsibilities as a senior member of the Judiciary Committee to conduct oversight, I wish to have a full accounting for why and how the Justice Department issued a subpoena for the home telephone records of Mr. Solomon -- and whether the Justice Department followed its own guidelines. I hope your next reply – which I anticipate receiving by Tuesday, January 8, 2002 – is even more informative than the first one.

Sincerely,

Chuck Grassley

Charles E. Grassley
Ranking Member
Subcommittee on Crime and Drugs

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 28, 2001

The Honorable Charles E. Grassley
United States Senate
Washington, D.C. 20510

Dear Senator Grassley:

This responds to your letters, dated September 4 and 6, 2001, which requested information about both a subpoena for the personal telephone records of John Solomon, a reporter for the Associated Press, and other subpoenas issued to journalists on behalf of the Department during the past ten years. Due to the constraints imposed by Federal Rule of Criminal Procedure 6(e) and the Department's policy regarding pending matters, we are unable to provide complete information in response to your questions regarding the subpoena to Mr. Solomon. We would like to clarify, however, that it was not an administrative subpoena.

Your September 4th letter also requested information regarding the technical procedures involved when the Department obtains phone records pursuant to a subpoena. Such subpoenas are issued to the relevant telecommunications carrier, which, in turn, provides the requested records to the Department. Queries as to what technology a carrier uses to gather the responsive data can best be answered by that carrier; the Department is not involved in that process and does not utilize independent technical methods to gather subpoenaed data itself.

Additionally, your September 4th letter inquired as to the Attorney General's views on when a subpoena should be issued to a member of the media. As you know, that question is addressed in Federal Regulations set forth at 28 C.F.R. § 50.10, which explain that they are "intended to provide protection for the news media" and that "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." The Attorney General's view is that these regulations are very clear in their purpose and intent.

Finally, your September 4th letter sought confirmation that the Attorney General and members of his staff have recused themselves from any investigation involving Senator Torricelli. As the Attorney General previously advised (see the attached letter to House Judiciary Committee Chairman Sensenbrenner), we can confirm that the Attorney General and some members of his staff are so recused.

In response to your September 4th and 6th letters, we have obtained information from the Department's Criminal Division, which is the Department component responsible for the majority of the subpoenas to news media recipients in the last ten years. The Criminal Division has provided information indicating, as of September 6, at least 88 instances in which subpoenas were authorized in connection with members of the news media since 1991, including 12 for telephone records.[1] This total reflects 15 subpoena requests in addition to those we informally disclosed to your staff in early September based on available information at that time. The enclosed chart sets forth additional information about the types of subpoenas and years that requests were authorized. The data pertains to the number of subpoena requests that were received by the Criminal Division and authorized during the relevant time period. While each request usually seeks authority for one subpoena, it is possible that a request could seek authority for more than one subpoena. A more precise total for the number of subpoenas authorized is not available as many of the requests do not seek authorization for a specific number of subpoenas but, instead, describe the information sought and the organization and/or individual who are believed to possess the information. Similarly, extensive resources would have been required to compile data regarding subpoena authority requested by other Department components, which were likely to total a small fraction of the number authorized by the Criminal Division.

The responses set out below are based upon information provided by the Criminal Division and are as specific as permissible under Federal Rule of Criminal Procedure 6(e) and applicable Departmental policy regarding disclosure of information concerning pending investigations.

1) How many of these subpoenas, by category, involved a reporter's source(s)?

Pursuant to 28 C.F.R. § 50.10(f)(4), subpoenas seeking unpublished information are authorized by the Department only after a determination has been made that the circumstances surrounding the request are exigent. Subpoenas seeking the name of a reporter's source, as well as information which may lead to the identification of a source (unpublished work product, material utilized in preparing a broadcast or publication, or testimony that is not limited to verification of published information) are all subject to the same stringent standards. Of the 88 subpoena requests authorized by the Attorney General in Criminal Division matters between 1991 and September 6, 2001, 17 sought information that could lead to the identification of a reporter's source or implicated source material.

2) How many of these subpoenas, particularly the subpoenas for toll records, were done without notifying the reporter?

The Department's press regulations, at 28 C.F.R. § 50.10(d), provide for prior

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[1]A chart previously released by the Department indicated that there were 13 subpoena requests authorized for toll records but, in fact, one of those pertained to a document other than a toll record. The correct number of requests authorized for toll records is 12.

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negotiations with, and prior notice to, the affected news media concerning subpoenas for telephone toll records only if the responsible Assistant Attorney General determines that prior negotiations with the affected news media would not pose a substantial threat to the integrity of the investigation for which the toll records are sought. Between 1991 and September 6, 2001, the Attorney General has authorized 12 subpoena requests for obtaining media telephone toll records. The Assistant Attorney General for the Criminal Division determined that prior negotiation was appropriate in seven cases. With respect to each of the remaining five, negotiations would have posed a threat to the integrity of the investigation and notice of the issuance of the subpoena was delayed.

In each of the remaining 76 subpoena requests, which did not seek toll records, the news media was served directly with the subpoena(s), which afforded advance notice of the materials or testimony that would be required.

3) How many of these subpoenas, by category, were administrative subpoenas?

None of the subpoenas authorized were administrative subpoenas.

4) What was the crime(s) in question for each subpoena?

In some instances, the underlying investigation or prosecution involved more than one crime. The following lists, by category, the crime(s) under investigation or prosecution in the matters pursuant to which the 88 subpoena requests by the Criminal Division were authorized:

Bombings (10), fraud (9), public corruption (8), arson (7), murder (5), securities fraud (5), child pornography (4), RICO (4), attempted bombing (3), narcotics trafficking (3), unlawful disclosure of tax information (3), terrorism (3), threatening a public official (3), violation of a court order (3), rioting (2), wire fraud (2), and one each of armed robbery, bank fraud, bomb threat, damage to USDA property, embezzlement, espionage conspiracy, extortion, fund-raising for a terrorist organization, interception and disclosure of wire communications, kidnapping, mail fraud, money laundering, murder conspiracy, perjury, price fixing, providing false information to the USDA, stalking a federal agent, and stealing part of airplane involved in a crash.

5) How many subpoenas of reporters have been requested, and then been denied, at either the administrative or judicial level for the past ten years?

The Criminal Division has identified seven instances in which requests by United States Attorneys' offices have been formally denied by the Department. More typically, requests for authorization to subpoena members of the news media that do not meet the requirements of 28 C.F.R. § 50.10 are withdrawn upon discussion with the Criminal Division prior to, or early in, the formal process for obtaining the approval of the Attorney General. We do not maintain records of the informal contacts in which Department attorneys and prosecutors in the field discuss subpoena requests and reasonable alternative means for obtaining the needed evidence or information are identified.

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6) How many subpoenas involved prior negotiations with the affected members of the news media as required by Justice Department regulations?

As required by 28 C.F.R. § 50.10(e), negotiations with affected news media or their representatives were pursued as a prerequisite for obtaining authorization of all subpoenas that were to be issued to the news media for documents or testimony, unless it was determined that the integrity of the investigation involved would be compromised. Such a determination was made regarding 3 of the 76 requests for permission to subpoena documents or testimony that were authorized since 1991.

With respect to subpoenas to service providers for telephone toll records, the Department's regulations require prior negotiations only "where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the investigation in connection with which the records are sought." 28 C.F.R. § 50.10(d). As noted in our response to question 2, such a determination was made, and negotiations with the affected news media were undertaken, in 7 of the 12 Criminal Division matters in which subpoenas for telephone toll records were authorized during the past ten years.

7) How many times has the news organization been notified only at the end of the 90-day period?

28 C.F.R. § 50.10(g)(3), which requires that the news media be notified within 45 days of the service of a subpoena for telephone toll records, permits the government, with the approval of the responsible Assistant Attorney General, to delay notification for one 45-day period. Of the five subpoenas for toll records where notification was delayed, our records reflect only one request from the United States Attorney's office for a 45-day extension of the notification requirement. That request was approved by the Assistant Attorney General for the Criminal Division.

8) Please provide a brief description of every subpoena, including affected parties, material or testimony requested, underlying crime any other related information and finally, what information or material was ultimately provided.

Below is a brief description of trial subpoenas that have been authorized by the Attorney General since 1991 to members of the news media. Due to the constraints imposed by Rule 6(e) of the Federal Rules of Criminal Procedure, information about matters occurring before federal grand juries, including authorizations for grand jury subpoenas to members of the news media, have not been included.

The United States Attorneys who request authorization for subpoenas to members of the news media do not routinely report to the Criminal Division regarding what information was produced in response to a press subpoena. Accordingly, the information below also does not

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include a description of the information or material that was ultimately obtained in response to the trial subpoenas.

1. A subpoena was authorized on September 9, 1996, for the testimony of an *Austin* (Texas) *American-Statesman* reporter to verify the contents of a published interview with a defendant, for use at the defendant's trial for the production and interstate transport of child pornography.

2. A subpoena was authorized on April 17, 1992, for an aired videotape in the possession of KJEO-TV in Fresno, California, of an interview with a defendant, containing a confession of his activities as a narcotics trafficker.

3. A subpoena was authorized on January 8, 1992, for a partially-aired videotape taken by NBC of the surveillance and arrest of a defendant for narcotics trafficking. Prosecutors sought the subpoena in response to the court's order that the government obtain the videotape and produce it to the defendant in discovery.

4. A subpoena was authorized on April 14, 1994, for a *Washington Post* reporter's testimony verifying the contents of his published interview with a defendant at his trial for murder.

5. A subpoena was authorized on January 19, 2001, for a Telemundo reporter's testimony authenticating a mostly-aired videotape of her interview with a fugitive defendant, for use at his co-conspirators' trial for conspiracy to commit espionage and murder.

6. A subpoena was authorized in August 1993, for an aired videotape and for the notes and authentication testimony of two *60 Minutes* reporters. The videotape contained an interview with a defendant, which was needed for his trial for bank fraud and receiving kickbacks.

7. A subpoena was authorized on December 4, 2000, for the testimony of CNN employees regarding the receipt of threats faxed to CNN and Ted Turner, for use at a defendant's trial for intent to extort by threat and transmission of a threat.

8. A subpoena was authorized on May 30, 2001, to the editor of the *Mattoon Journal Gazette* of Mattoon, Illinois, for a copy of a partially-published letter from a defendant, for use in his trial for conspiracy, fraud, and money laundering arising from a fraudulent loan scheme.

9. A subpoena was authorized on November 26, 1993, for the testimony of a *Worth* magazine reporter, verifying the contents of his published interview with two defendants, for use at their trial for stock manipulation.

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10. A subpoena was authorized on June 6, 1997, for an aired videotape in the hands of WFLD-TV, Chicago, Illinois, and for the testimony of a television reporter to verify the contents of his taped interview with a defendant, for use at his trial for extortion, fraud, and racketeering.

11. A subpoena was authorized on February 12, 1999, for the testimony of two reporters of suburban Chicago's *Daily Southtown*, to verify the contents of a published interview with a defendant at his trial for conspiracy to defraud.

12. A subpoena was authorized in February 1993, for the rebuttal testimony of two *Lexington* (Kentucky) *Herald Leader* reporters to establish that a defendant was not engaged in narcotics trafficking as a newspaper source.

13. A subpoena was authorized on July 12, 1994, for the testimony of a reporter for the *Advocate* in Baton Rouge, Louisiana, to verify statements made by a defendant in a published interview which established the defendant's obstruction and guilty knowledge, for use at his trial for wire fraud, obstruction, and perjury arising from a scheme to defraud investors.

14. A subpoena was authorized on July 12, 1994, for the testimony of two reporters for the *Times-Picayune* of New Orleans, Louisiana, needed to authenticate a published interview with a defendant, for use at his trial for public corruption and fraud against St. Tammany Parish.

15. A subpoena was authorized in May 1996, for an aired videotape and for the testimony of a reporter for WDSU-TV, New Orleans, Louisiana, verifying the contents of a taped interview with a defendant, for use at his arson trial. The district court's decision granting the television station's motion to quash the subpoena was overturned, and the subpoena was upheld, by the United States Court of Appeals for the Fifth Circuit.

16. A subpoena was authorized on November 2, 1999, for the testimony of a cameraman for WDSU-TV, New Orleans, Louisiana, about false exculpatory statements made by a defendant, for use at his arson trial.

17. A subpoena was authorized on September 20, 2000, for the testimony of an Associated Press reporter, authenticating a published interview with a defendant, for use at his trial for public corruption.

18. A subpoena was authorized in December 1997, for the testimony of a *Boston Globe* reporter, authenticating a published interview with two police detectives and a defense attorney, for use at their trial for police corruption and extortion.

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19. A subpoena was authorized in October 1998, for the partially-published notes of a *Boston Globe* reporter, for use as impeachment evidence at a defendant's trial for RICO offenses.

20. A subpoena was authorized on March 19, 1991, for the testimony of a *Detroit Free Press* reporter needed to verify published statements made in his interview with a defendant former state court judge at his trial for RICO offenses.

21. A subpoena was authorized on March 7, 1992, to WCCO-TV, Minneapolis, Minnesota, for videotapes and recordings of interviews with a defendant and for authentication of them, for use in his trial for creating, selling, and distributing child pornography.

22. A subpoena was authorized on November 22, 1999, for the testimony of a reporter for the *Columbus* (Nebraska) *Telegram* to verify false statements made in an interview with the defendant, an official with Hudson Foods, at his trial for providing false information to the United States Department of Agriculture regarding contaminated beef.

23. A subpoena was authorized on August 23, 1991, to a *Forbes* magazine reporter for testimony verifying statements made by a defendant in a published interview, for use in his trial for securities fraud.

24. A subpoena was authorized on March 23, 2000, to a *Village Voice* reporter for notes or tapes of interviews with a defendant, and for his testimony authenticating published articles concerning the interviews, for use in the defendant's perjury trial.

25. A subpoena was authorized on January 19, 2001, to WHNS-TV, Asheville, North Carolina, for a videotape of a partially-broadcast interview with a defendant, and for testimony authenticating the interview, for use in the defendant's trial for kidnapping and murder.

26. A subpoena was authorized on July 7, 1999, to an editorial writer for the *Youngstown Vindicator*, for testimony verifying false exculpatory statements made by a defendant public official, in a published interview, for use in his trial for RICO and Hobbs Act violations.

27. A subpoena was authorized on December 28, 1995, to KWTV, Oklahoma City, for a partially-aired videotape taken the day of the Oklahoma City bombing, for use in the prosecutions of Timothy McVeigh and Terry Nichols for bombing the Alfred P. Murrah Federal Building.

28. A subpoena was authorized on January 23, 1997, to a photojournalist and Channel 5 News, Oklahoma City, for a partially-aired videotape taken the day of the Oklahoma City bombing and for testimony authenticating the videotape, for use for use in the prosecution of Timothy McVeigh for bombing the Alfred P. Murrah Federal Building.

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29. A subpoena was authorized in 1991, to a reporter for the *News and Courier*, a Charleston, South Carolina, newspaper, for testimony verifying the contents of a published interview with a defendant public official, for use in his trial for violating the Hobbs Act.

30. A subpoena was authorized on November 7, 1991, to five reporters from various South Carolina newspapers for testimony verifying the contents of published interviews with a defendant public official, for use in his trial for violating the Hobbs Act.

31. A subpoena was authorized on April 16, 1991, to a *Pottsville* (Pennsylvania) *Republic* reporter for testimony describing the contents of her unpublished interview with a defendant, for use at his trial for murder.

32. A subpoena was authorized on April 25, 1991, to WRC-TV, Washington, DC, for testimony authenticating a partially-aired videotape of an interview with a defendant, for use at his murder trial.

33. A subpoena was authorized on February 16, 2001, to two reporters for *Wired* magazine, for testimony authenticating published statements made by a defendant, for use at his trial for the interstate stalking of a federal officer.

9) What petition rights are available for the media to refuse to comply with these subpoenas, with administrative subpoenas as well as situations where the media is not notified of the subpoena?

In all cases in which negotiations are undertaken, the affected news media has an opportunity to present its views to the requesting Federal official, and thereafter to the Department, until a determination has been made regarding authorization of the subpoena. To the extent that the nature of the case permits, the Department attempts to accommodate the interests of the trial or grand jury with the interests of the media. In all cases, the news media has the opportunity to petition the Federal District Court, by motion, to quash any subpoena as to which it is the responsive party.

Of course, subpoenas for toll records are directed to the telephone service provider; the affected news media is not the responsive party. Where the Assistant Attorney General responsible for the matter has determined that negotiations would not pose a substantial threat to the investigation in connection with which the toll records are sought, negotiations are pursued and the member is given reasonable and timely notice of the subpoena. Although the news media is not the party that would be compelled to produce the toll records, the District Court may determine that the news media has standing, as an affected party, to file a motion to quash the subpoena.

10) The regulations require that any information obtained as a result of a subpoena issued for toll records shall be closely held so as to prevent disclosure of the information to

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unauthorized persons or for improper purposes. 28 C.F.R. § 50.10(g)(4). Please describe how this is done and please inform us of any internal oversight and review of this process.

All United States Attorneys' Offices have procedures for maintaining secure information, including telephone toll records. In addition, telephone toll record subpoenas are generally issued pursuant to grand jury investigations and are protected from disclosure by Federal Rule of Criminal Procedure 6(e). We are unaware of any allegations that such records have been handled or disclosed improperly.

11) For how many of these subpoenas, were both reasonable alternatives pursued and were negotiations conducted? Please provide details of the alternatives pursued and negotiations conducted.

Reasonable alternatives were pursued in all cases where reasonable alternatives existed. As explained in the response to question 6, negotiations were conducted with respect to 73 of 76 requests for authorization to subpoena documents or testimony, and in 7 of the 12 matters in which subpoenas for telephone toll records were authorized.

After negotiations, the news media often has no objection to being served with a subpoena. In many instances, the member of the media agrees to comply with a subpoena when properly served, or objects to a subpoena but agrees that it will not move to quash the subpoena in court. In several instances, the media has consented to a press subpoena after the prosecutors narrowed the proposed subpoenas to address the media's concerns.

Some alternative investigative means that have been pursued prior to requesting authorization to subpoena a member of the news media include questioning individuals who are not members of the news media, issuing subpoenas to non-media individuals who may have the same information as a member of the news media, obtaining the telephone toll records of non-media individuals, attempting to obtain cooperation from one defendant against another, and generally looking for other evidence.

Authorization requests for press subpoenas often present situations where there are no reasonable alternative means to obtain the information. As detailed in the response to question 8, many subpoena requests involve an interview between a member of the news media and a defendant. In those cases, the only alternative source for the information is the defendant or target, whom we may not wish to alert and who has a privilege against self-incrimination. An investigation in which a member of the news media is suspected of committing a crime similarly may lack alternative means to obtain information, as his or her employer or another member of the news media may be the only witnesses with relevant information. In some investigations, obtaining the telephone toll records of thousands of individuals who may have communicated telephonically with a member of the news media is not a reasonable alternative to obtaining the toll records of the single member of the news media.

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Please be assured that the Department of Justice takes very seriously issues regarding freedom of the press. It is a critical component of our society that the media be allowed great leeway to investigate and report the news. We cannot, and should not, however, ignore our responsibility to investigate and prosecute crimes. The Department's policy with regard to the issuance of news media subpoenas is designed to balance our responsibilities to the fair administration of justice with the need to protect reporters from forms of compulsory process that might impair the news gathering function. We believe that the above information demonstrates that the Department has performed this balancing act very well.

Please do not hesitate to contact me if you have additional questions or would like additional assistance regarding this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

Attachment

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Subpoenas to Members of the News Media
Ten-Year Breakdown 1991-2001

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	Totals
Documents and Testimony	0	3	1	0	2	1	2	0	1	2	0	12
Documents Only	2	8	3	2	7	2	4	1	2	0	3	34
Testimony Only	6	2	3	4	0	1	3	2	4	2	3	30
Toll Records	0	3	1	0	2	1	3	0	1	0	1	12
Totals*	8	16	8	6	11	5	12	3	8	4	7	88

* This chart sets forth the numbers of requests to subpoena the news media that were processed by the Criminal Division and approved by the Attorney General between January 1, 1991, and September 6, 2001.

Office of the Attorney General
Washington, D.C. 20530

June 21, 2001

The Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Sensenbrenner,

During my recent testimony before your Committee regarding Department of Justice Reauthorization legislation, Ranking Member John Conyers inquired about any involvement of mine with the Department's investigation of Senator Robert Torricelli. I thought it would be helpful to provide you with the following information.

As has been publicly reported, the Justice Department under the prior administration began investigating allegations of fund raising misconduct by Senator Torricelli. Shortly after assuming the office of Attorney General, I voluntarily recused myself from involvement in all matters arising out of allegations of fund raising misconduct by Senator Torricelli. Several members of my staff similarly recused themselves from these matters. Consequently, the Deputy Attorney General has and will continue to exercise the Attorney General's responsibilities in this case.

I take my responsibilities as Attorney General very seriously. Accordingly, I have never been briefed by anyone at the Justice Department about any aspect of the Torricelli investigation, other than on issues related to my recusal. I know nothing about the investigation except what I have learned in public media accounts. As Attorney General, I have never discussed substantively the Torricelli investigation with anyone, nor tried to exercise influence over that investigation. At all times I have acted consistently with the responsibilities that accompany my recusal in this matter. My staff members who are recused on this matter have assured me that they have handled this matter in the same manner.

Ranking Member Conyers also raised concerns about allegations of Justice Department leaks to the media regarding the Torricelli investigation. As Attorney General, I have a broad concern about any leaks involving pending investigations and cases, and will work vigorously in cases over which I retain authority to uphold the standards of integrity which Department

personnel are required to maintain. The Deputy Attorney General has responsibility for addressing any allegations of leaks by Department officials in the Torricelli matter, and I am confident he will treat such allegations with the appropriate seriousness.

I hope this is helpful. Thank you for your interest in this matter.

Sincerely,

John Ashcroft
Attorney General

cc: Congressman John Conyers
Senator Patrick Leahy
Senator Orrin Hatch
Deputy Attorney General Larry Thompson

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October 11, 2007

URGENT MATTER
Via E-mail

Hon. Peter D. Keisler
Attorney General (Acting)
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
Via Hand Service and email

Hon. Michael B. Mukasey
Nominee for Attorney General
c/o
Patterson, Belknap, Webb and Tyler, LLP
1133 Avenue of the Americas
New York, N.Y. 10036
Via email mbmukasey@pbwt.com

Dear Acting Attorney General Keisler and Judge Mukasey:

My law firm represents Special Agent Bassem Youssef, a Unit Chief in the Federal Bureau of Investigation's ("FBI") Counterterrorism Division's ("CTD") Communications Analysis Unit ("CAU").

In accordance with Section 101(k) of Executive Order 12731, as implemented by 5 C.F.R. § 2635.101 and 57 *Federal Register* 35006, other applicable laws, and regulations as further set forth in this letter, FBI Special Agent Bassem Youssef, by and through counsel, hereby makes the following disclosures.[1]

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[1] The Attorney General of the United States is an "appropriate authority," as set forth in the April 28, 1997 Memorandum of the President of the United States, 62 *Federal Register* 23123. In accordance with this authority, this letter is directed to the Acting Attorney General (and Judge Mukasey, in his capacity as the nominee for the position of Attorney General). This letter should not be interpreted as a complaint under the Whistleblower Protection Act. Instead, it is a report of misconduct filed directly with the Attorney General, and a request that the Attorney General act on the authority delegated by the President of the United States, to establish a mechanism to ensure a credible and independent review of the matters set forth herein. This letter may also be filed with the Congress of the United States under the authority set forth in 5 U.S.C. § 7211.

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This letter directly concerns the effectiveness and competency of the U.S. Department of Justice ("DOJ") and FBI Middle Eastern counterterrorism programs. Special Agent Youssef is currently the Unit Chief of the FBI's Communications Analysis Unit ("CAU") with responsibility for a variety of programs. One of which includes the servicing of National Security Letters ("NSL") for telephone toll records and the servicing of a highly sensitive compartmented program. This program according to my conversation with an agent of the DOJ Office of Inspector General ("OIG"), relates to his supervisory duties concerning the National Security Agency's terrorist surveillance program.

Prior to his assignment as the CAU Unit Chief, Mr. Youssef had a distinguished career within the FBI primarily related to operational Middle Eastern counterterrorism, liaison duties with Middle Eastern countries and as head of the Damage Assessment Branch at the National Counterintelligence Executive ("NCIX") formerly housed at the CIA headquarters in Langley, Virginia. In these capacities he served as the FBI coordinator for counterterrorism (as opposed to the criminal) investigation of *al-gamaa al-islamiyah* between January 1993 and December 1996. Notably, in 1995 Mr. Youssef was the recipient of the Director of Central Intelligence ("DCI") award based on his undercover work (counterterrorism, not criminal related) work on *al-gamaa al-islamiyah*. (*See Attachment 1*, DCI Award, *linked via email).*

Even before his work on *al-gamaa al-aslamiya,* he worked other Middle Eastern counterterrorism cases, including investigations of Abu Nidal Organization (1988-1992). In 1996 he was appointed by former FBI Director Louis Freeh as the first FBI Legal Attaché in Riyadh, Saudi Arabia, with regional responsibility for all of the seven Gulf States (Kuwait, Qatar, Bahrain, United Arab Emirates, Oman and Yemen). With the unanimous consent of the responsible FBI managers, Mr. Youssef was appointed to a second term as Legal Attaché in Riyadh, and served in that capacity between 1996-2000. Upon returning to the United States he was appointed the Chief of the Executive Secretariat Office for the National Counterintelligence Center ("NACIC") and worked in Virginia for two years. In the most recent inspection of his work as the CAU Unit Chief he was rated "effective and efficient" and in his most recent performance rating he was rated "exceptional," a rating he has received numerous times in the past (*See Attachment 2*, 2006 Performance Review, *linked via email).*

Unfortunately, based on his ethnic background and past protected disclosures (including disclosures made directly to the current Director of the FBI), Mr. Youssef has faced discrimination in the FBI despite the fact that Mr. Youssef is the highest ranking Arab American agent employed by the FBI and the highest ranking fluent Arabic speaking (Level 4, oral, written and comprehension) agent employed by the FBI. In this regard, at the request of the then Chairman, Ranking Member and a Senior Member of the Senate Judiciary Committee (i.e. Senators Arlen Specter, Patrick Leahy and Charles Grassley) *(See Attachment 3,* 2/15/06 Letter, *linked via email*), the DOJ Office of Professional Responsibility ("OPR") conducted a formal review of allegations related to illegal FBI retaliation against Mr. Youssef. OPR determined that Mr. Youssef was in fact retaliated against by the FBI for making protected disclosures. Despite these findings,

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neither the DOJ nor the FBI has taken any action whatsoever to correct these matters. The OPR report is provided as *Attachment 4,* DOJ OPR Report, *linked via email.*

More recently, Senator Charles Grassley sent another letter to the Director of the FBI forwarding additional information of new retaliatory conduct (*See, Attachment 5,* Letter from Senator Grassley, *linked via email).* Currently, we are unaware of any action being taken by the FBI or DOJ to properly address these matters. Mr. Youssef has also attempted to utilize the EEO process to have some of his concerns addressed. Some of these EEO matters are before the U.S. District Court for the District of Columbia and others are now pending before the FBI's internal EEO office. (*See, Attachment 5A,* Letter to FBI EEO (10/9/07), *linked via email*).

Unfortunately, the EEO process only concerns matters related to his employment and cannot address the public safety issues or the threat(s) to national security caused by the FBI misconduct and ill-advised policies. Likewise, the retaliation decision issued by OPR related to employment discrimination, and could not address the substantive public safety concerns raised by Mr. Youssef.

Mr. Youssef has exhausted every internal avenue to redress his serious public safety related concerns. Thus, this letter is an act of last resort.

As set forth below, Mr. Youssef hereby files a formal complaint with the Attorney General of the United States setting forth his concerns that the FBI's counterterrorism program is not managed in a manner necessary to fully protect the United States from another catastrophic and direct attack from Middle Eastern terrorists. Given Mr. Youssef's current position, and his extensive background and expertise in Middle Eastern terrorism cases, his concerns are extremely serious and warrant immediate attention directly from the Attorney General.

MATTERS RELATED TO MR. YOUSSEF'S RETALATION IMPACT ON NATIONAL SECURITY AND PUBLIC SAFETY

Mr. Youssef constitutes a unique human asset in the war on terror. He was involved in major Middle Eastern-based counterterrorism investigations almost immediately upon graduation from the FBI Academy. The Washington Field Office of the FBI actually requested Mr. Youssef's services on one major Middle Eastern case while he was still a student in the Academy. The manner in which the FBI utilized Mr. Youssef's skills after the 9/11 attacks provides specific insight into some of the major weaknesses and vulnerabilities in the FBI's post-9/11 counterterrorism program. For example:

1. *Failure of the FBI to obtain "Recruitment-in-Place:"* Prior to being the subject of retaliation, Mr. Youssef was perhaps the FBI's most successful Middle Eastern counterterrorism expert. In the 1990s, he successfully identified and developed a major source with whom he operated as a "recruitment in place" within the *Al-Gama'a Al-Islamiyah* (the blind Sheikh's group). This recruitment provided invaluable intelligence to the United

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States. Mr. Youssef was nominated for and received the Director of Central Intelligence ("DCI") Award in 1995. Unfortunately, however, after the retaliation, the FBI has refused to permit Mr. Youssef to utilize his skills in identifying, recruiting, and operating sources to be targeted against Middle Eastern terrorist organizations - a crucial tool to ensure our nation's success in our war on terror. Further, he was also blocked from teaching recruitment tactics at the FBI Academy. The failure to utilize Mr. Youssef's proven skills in conducting and/or assisting in obtaining "recruitments in place" has damaged vital U.S. national security interests. Additionally, when other FBI field offices, Homeland Security organizations, and other intelligence agencies that were aware of Mr. Youssef's successes as a field agent asked the FBI to allow him to conduct training seminars and provide input on their on-going recruitment operations, the FBI willfully blocked Mr. Youssef from providing the requested assistance.

2. *Failure to Facilitate Liaison with Critical Middle Eastern Intelligence Agencies*: In 1996, former Director, Louis Freeh, selected Mr. Youssef to establish the FBI's Legal Attaché office in Riyadh, Kingdom of Saudi Arabia. This office had regional responsibility for all FBI matters in the Gulf region which included the following countries: Saudi Arabia, Kuwait, Qatar, Bahrain, United Arab Emirates, Oman and Yemen. Mr. Youssef served as the first Legal Attaché in Riyadh for four years, and established a track record of highly successful liaison with our Middle Eastern partners unparalleled in *any* of our intelligence agencies. For example, the FBI's internal review of Mr. Youssef's work in Riyadh found that "In addition to establishing an excellent relationship with the Saudi Mabahith, LEGAT Youssef developed an impressive liaison base of prominent law enforcement officials in the LEGAT territory" (*See Attachment 6,* Riyadh Inspection Report, *linked via email).* The inspection report also stated "U.S. Ambassador to Saudi Arabia called Youssef a superior representative for the FBI and noted that he was just the right man for the position". Deputy Chief of Mission Albert Thibault Jr., stated that LEGAT Youssef had done a great job, possessed excellent interpersonal skills, and is very reasonable. Sheikh Mishal Al-Sabah, Director of the Kuwaiti State Security (KSS), described LEGAT Youssef to the inspectors as "one of his closest U.S. advisers." This exceptional liaison paid huge tangible dividends evidenced by the increase in the Saudi lead response from 15% to nearly 95% during Mr. Youssef's tenure as LEGAT Riyadh. Despite having established spectacular liaison with His Royal Highness, Prince Naif bin Abdel Aziz, Saudi Arabia's Minister of Interior, and his counter-parts in the Mabahith, after the retaliation Mr. Youssef was blocked from performing any liaison work with our Middle Eastern partners. The failure to utilize Mr. Youssef's skills and services in performing critical liaison activities has undermined vital U.S. security interests.

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3. Mr. Youssef is the highest ranking FBI official fluent in Arabic; however, since the retaliation against him commenced, he has been prohibited from using his language skills at work. The failure of the FBI to assign Mr. Youssef to any positions for which he was able to utilize his Arabic skills interfered with the ability of the FBI to protect the American people.

4. It is worth noting that the *Al-Gama'a Al-Islamiyah* Group is comprised of primarily of Egyptian operatives who had ties to the Egyptian Islamic Jihad. The leader of which at the time was Ayman Al-Zawahiri (currently the second highest ranking man in Al-Qaeda). Additionally, Al-Qaeda's operatives who perpetrated the 9/11 attacks, were of Egyptian and Saudi descent. It is worth noting that prior to Al-Qaeda's vicious attack on September 11, 2001, Mr. Youssef was designated coordinator of the *Al-Gama'a Al-Islamiyah Group* investigation and was the first LEGAT to Saudi Arabia. His success in both Egyptian and Saudi terrorism matters made him uniquely qualified to lead the FBI's efforts in combating Al-Qaeda. However, the FBI willfully blocked him from being involved in our nation's effort to fight this threat.

5. Mr. Youssef is the only FBI Agent qualified to conduct polygraph exams in Arabic. Using a translator as a surrogate to conduct such polygraphs undermines the effectiveness of the examination and increases the chance of false-positive and false-negative results. Prior to the retaliation, Mr. Youssef was regularly requested to conduct highly significant polygraph exams. He has been effectively barred from using these skills in defense of the United States. The effective use of polygraph can play an instrumental role in vetting potential sources and in identifying potential "recruitments in place" within Middle Eastern terrorist organizations as well as assist Agents in conducting more successful interrogations of Arabic speaking subjects.

6. Over a year before the recent Inspector General investigation into the FBI's use of National Security Letters ("NSL"), Mr. Youssef identified serious problems with the FBI's handling of such letters. Because of the hostile atmosphere within the FBI and the profound lack of subject matter expertise within the FBI's Counterterrorism Division, the Bureau could not properly respond to Mr. Youssef's inquiries and requests. The FBI refused to take necessary corrective actions until the OIG published its own critique of the program.

The FBI's attempt to justify its failure to assign Mr. Youssef to any positions which could utilize his proven background, experience and expertise in successfully recruiting strategic sources from within Middle Eastern terrorist groups, successfully conducting polygraph exams in Arabic, successfully conducting critical liaison with Middle Eastern intelligence agencies, and successfully utilizing his Arabic language skills and years of experience in Middle Eastern counterterrorism simply does not make any logical sense. Further, FBI announced formally that its agents did *not* need subject matter expertise in Middle Eastern counterterrorism to lead the counterterrorism efforts of the United States. In other words, since Mr. Youssef first raised his concerns after the

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9/11 attacks, the FBI, in word and deed, implemented a *policy* that excluded any consideration of the following factors in hiring managers within its Middle Eastern counterterrorism program:

1. Knowledge of Arabic was not needed.

2. Knowledge of Middle Eastern culture and history was not needed.

3. Experience in any counterterrorism programs was not needed.

4. Subject matter expertise Middle Eastern counterterrorism was not needed.

(See, Attachments 7, 6/17/05 Letter from Steve Kohn, *and 8,* 6/20/05 Follow-up letter, *email links to letters from Stephen Kohn to Senators Specter, Leahy, and Grassley, which include excerpts from the testimony of FBI Director Mueller, former EAD Gary Bald, former EAD Dale Watson, FBI representative on post-9/11 promotional requirements for CTD (Pikus), and former DAD John Lewis).*

Although this type of policy may seem unbelievable in a post- 9/11 intelligence environment, it was *publicly* endorsed by the FBI. After this policy became publicly known, it was the subject of ridicule in Congress and the press. For example, the news-comedy program, *"The Daily Show with Jon Stewart"* actually featured the Youssef case and played clips of a video tape of a leading former FBI counterterrorism manager (who held a vital counterterrorism position on 9/11/01) admitted under oath that he did not know the difference between a Shi'ite and a Sunni Muslim (*See Attachment 9,* Clip from *"The Daily Show with Jon Stewart", email Link to "The Daily Show with Jon Stewart" segment).*

The public admission by the top FBI counterterrorism managers that they were completely ignorant of Middle Eastern culture, language and history, and that they lacked any counterterrorism expertise is no subject for comedy. Further, policies that downplay and marginalize the importance of these skills undercut the ability of the FBI to recruit other Arab Americans to work with the Bureau. The choice to pursue a career in an institution which has an official policy stating that highly marketable skills such as fluency in Arabic, extensive experience in the Middle East and knowledge of the history, religion and culture upon which key terrorist groups are based will have no impact on your ability to advance into senior management simply does not seem logical.

FBI MISTAKES WITHIN ITS MIDDLE EASTERN COUNTERTERRORISM PROGRAM WHICH DIRECTLY HARM OR THREATEN NATIONAL SECURITY OR THE PUBIC SAFETY

The lack of subject matter expertise within the FBI's counterterrorism program as well as the FBI policy which promotes and endorses high-level ignorance on critical terrorism related matters constitutes a real threat to civil liberties and national security. Mr. Youssef is prepared to testify to the following matters which would fully document this threat. The following concerns are in addition to those outlined above:

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1. The FBI *currently* recruits supervisors into the critical ITOS unit who had no experience in counterterrorism and did not want to work in these positions;

2. The FBI policy to promote individuals to its upper management positions who have no comprehension of the Arabic language has resulted in the agency's failure to have a management capable of responding to real time potential threats or opportunities. The over-dependency on translators can (and does) delay responses to situations which are time critical.

3. The over-reliance upon translators within the counterterrorism program has undermined the ability of agents to properly understand, monitor, and evaluate threats. In other words, subtle messages and information not capable of ready translation or that which would be obvious to a native speaker who is simultaneously involved in operational activities are regularly lost.

4. The FBI is not capable of properly exploiting its potential to develop strategic source recruitment. As referenced above, Mr. Youssef had unique background and experience (with a high degree of success) in the recruitment of highly valuable sources for targeting against Middle Eastern terrorist groups. These recruitments should constitute the backbone of a successful counterterrorism program. The FBI not only lacks the expertise to exploit these opportunities, but also has no policy whatsoever to put into place agents capable of performing this critical function. The failure to recruit well placed sources into terrorist organizations is perhaps the single largest threat to national security. Mr. Youssef is prepared to testify to these matters as well as testify as to how the failure of the FBI to understand the importance of such human sources resulted in the loss of critical intelligence needed to win the war on terror.

5. Misidentification of threats: Mr. Youssef is prepared to testify about the FBI's irresponsible misidentification of threats and provide testimony concerning the root causes of these misidentifications.

6. Over-reliance upon technology: Because of the lack of human sources, the FBI depends almost solely on technologies which have the potential of undermining American civil liberties. Agents have simply adopted electronic surveillance practices from the criminal side of the Bureau into the counterterrorism side, without first having a solid intelligence base. Without having a management and agent cadre with *extensive* expertise and skills (including language skills and knowledge of cultural mores), the Bureau will continue to fall back on an overuse of technology.

7. Failure to properly analyze information obtained: Specifically, Mr. Youssef can testify to incidents related to agents not properly trained in counterterrorism that overlooked critical facts related to the identification of a potential threat.

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8. Continuous promotion of individuals who lack the qualifications to effectively manage the Middle Eastern counterterrorism program.

9. Failure to establish an internal mechanism to audit the effectiveness of the counterterrorism program. For example, Mr. Youssef's Division was audited this year by the FBI's Inspection Division. This Division has not demonstrated its ability to properly inspect the Middle Eastern counterterrorism program, as it has not assigned inspectors qualified to properly assess the deficiencies of that program. The FBI regularly assigns inspectors within non-counterterrorism backgrounds (such as inspectors who work in public affairs and the Criminal Division) to review Middle Eastern counterterrorism programs. A serious counterterrorism program must be the subject of inspection by highly qualified and skilled counterterrorism experts. However, the FBI's policy that such expertise is not needed within its management ranks has also undermined its view of the inspection program, its recruitment, training and promotion of inspectors qualified to understand the subtle (or not so subtle) deficiencies which can undermine the effectiveness of a program.

10. Failure to reach the proper staffing numbers for the FBI's alleged number one priority program -- the Counterterrorism Division.

11. Failure to comprehend or properly process the Arabic language after translation. FBI managers rely exclusively on translation services to comprehend communications made by targets in Middle Eastern terrorist operations in their native language. The agents and managers continue to make major mistakes based on their lack of expertise in Arabic language. This is highlighted by *basic* errors, such as the failure to understand *names*. Middle Easterners often have multiple names. Thus, the FBI has continuously misidentified persons due to this fundamental error. Names can also have geographic and religious implications. These issues are often completely missed within the FBI due to the prejudice of investigations. The fact that FBI managers misidentify persons with Arabic sounding names is illustrated by the Bureau's own treatment of Mr. Youssef. Based on prejudice and ignorance, high ranking managers within the FBI confused Mr. Youssef with another FBI agent with an Arabic sounding name, Mr. Gamal Abdel Hafiz (*See, Attachment 10,* Excerpt from the Affidavit of former FBI SSA Paul Vick). This confusion not only constitutes a window into the depth to the problems facing the FBI in efforts to conduct effective operations against Middle Eastern subjects (i.e. the failure to keep basic names straight), but it directly harmed Mr. Youssef. Mr. Youssef, whose service to the nation was recognized by the Director of the CIA, and directly praised by former FBI Director Louis Freeh -- was confused with another agent who had refused to conduct a terrorism operation due to his Muslim religion. Mr. Youssef (a Christian, not a Muslim), *never* refused to participate in a terrorism related operation, and regularly placed himself in harm's way conducting undercover operations. No high ranking official was ever held accountable for these

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confusions, nor have proper steps been taken to educate agents involved in Middle Eastern issues related to name identification and the potential harmful impact of confusing a name or not understanding the potential relationship of the name of other factors.

12. *Failure to recruit sufficient numbers of Arab-American agents into the FBI.* The FBI's discriminatory policies have undercut its ability to recruit Arab-American agents into the FBI. For example, Mr. Youssef was *twice* approached by managers responsible for new agent recruitment and asked to assist in the recruitment of Arab-American agents. On both occasions Mr. Youssef agreed to assist in these recruitment agents; however, because of the ongoing EEO it appears as if the FBI's ability to utilize Mr. Youssef's services was lost.

PRIOR PRECEDENT FOR INDEPENDENT EXPERT REVIEW

There are striking parallels between the current case of Mr. Youssef and the prior case of Dr. Frederic Whitehurst. Dr. Whitehurst, who had a PhD in Chemistry from Duke University, was a subject matter expert in explosives. Unfortunately, the FBI laboratory was managed by persons with no expertise in science. Further, major issues which were raised by Dr. Whitehurst from contamination to the lack of quality control went unresolved for years. After Dr. Whitehurst's concerns became more widely known within the DOJ, the FBI and DOJ/IG agreed to conduct a joint review of the crime laboratory. However, the Attorney General stepped in and made sure that the FBI was disqualified from any involvement in the laboratory investigation. The DOJ OIG was granted exclusive jurisdiction over the review and the DOJ hired five subject matter experts in science to consult and approve the OIG's findings. The result was real and effective reform: The FBI was required to hire a subject matter expert as Director of the Lab, the Lab was required to undergo an outside accreditation process, and numerous scientific reforms were implemented.

The same process must occur within the FBI's Counterterrorism Division. Currently, the OIG is conducting a *joint* investigation with the FBI of the FBI's use of National Security Letters. This investigation could become a critical tool in reforming the FBI's counterterrorism program. However, if the FBI remains involved in the review and the review fails to focus on identifying the root causes of the problems within the FBI's entire counterterrorism program, an opportunity to truly reform the counterterrorism program will be lost. As Mr. Youssef has pointed out like the crime lab, the managers responsible for the counterterrorism program had a profound ignorance of counterterrorism, more specifically Middle Eastern counterterrorism, the ability to identify problems, and respond to issues or take effective corrective action because of the profound ignorance of the subject matter.

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REQUEST FOR DISQUALIFICATION AND INDEPENDENDENT INVESTIGATION

Based on these concerns on behalf of my client Mr. Bassem Youssef we hereby request the following:

1. That the FBI be prohibited from any involvement whatsoever in the current OIG investigation into the NSL matter and any further DOJ-related investigation into the conduct and actions of the FBI's CTD.

2. That the current OIG investigation be expanded to include a root cause analysis of the role the FBI's questionable policy (that subject matter expertise is not necessary in managing its counterterrorism program) had in the NSL matter and how that policy has impacted other program areas within the CTD.

3. That the FBI retain outside and nationally respected subject matter experts in the area of Middle Eastern counterterrorism, conduct an extensive internal review of the FBI's counterterrorism program including a review of the concerns identified above. In addition to reviewing the root cause(s) of the NSL matter the FBI should also review the viability of the FBI's policy that subject matter expertise is not necessary within the management chain of command of the FBI's counterterrorism program. This review should fully investigate the numerous examples of how the current FBI policy is harming national security and should make concrete recommendations concerning the proper role of subject matter expertise in the future of the FBI's program.

Finally, it is very important to state that the vast majority of FBI agents employed in the counterterrorism areas are dedicated, honest, and hard working civil servants. But their ability to serve and protect the United States is undermined by policies which lead to major errors in the war on terror; thus, resulting in the failure of the FBI to detect and correct both systemic deficiencies and specific failures within the counterterrorism program.

Mr. Youssef hereby requests a personal meeting with you to fully brief the appropriate Department of Justice officials on these critical matters. Thank you very much for your careful attention to the matters raised in this letter. If you have any questions, please do not hesitate to contact our office.

Respectfully submitted,

/s/

Stephen M. Kohn
Michael D. Kohn
David K. Colapinto

Attorneys for Mr. Youssef

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Enclosures (electronically filed through the email filing of this letter):

Attachment 1: DCI Award
Attachment 2: 2006 Performance Review
Attachment 3: 2/15/06 Letter from Senators Arlen Specter, Patrick Leahy and Charles Grassley dated , Re: Youssef Retaliation
Attachment 4: DOJ OPR Report
Attachment 5: Letter from Senator Grassley, Re: Additional Youssef Retaliation
Attachment 5A: Letter to FBI EEO (10/9/07)
Attachment 6: Riyadh Inspection Report
Attachment 7: 6/17/05 Letter from Steve Kohn to Senators Specter, Leahy, and Grassley
Attachment 8: 6/20/05 Follow-up letter from Steve Kohn to Senators Specter, Leahy, and Grassley
Attachment 9: Clip from "*The Daily Show with Jon Stewart*"
Attachment 10: Excerpt from the Affidavit of former FBI SSA Paul Vick

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Senators Jon Kyl and Jeff Sessions
30 January 2008
On Department of Justice Oversight

Today is the first time that Michael Mukasey has come before this committee since his confirmation hearing on October 17 and 18 of last year. At that hearing, and in the weeks after, we were dismayed by the partisanship that gripped so many of our Senate colleagues and nearly derailed the Attorney General's confirmation. Of particular note was the Chairman's opening statement at this Committee's executive business meeting on November 6, 2007.

In response to the Chairman's remarks at that meeting, Senator Kyl submitted a statement for the record emphasizing the need to "tone down the partisanship" and exercise independent judgment when addressing matters before this Committee. Unfortunately, having listened to the Chairman's statement this morning, it would appear that those recommendations fell on deaf ears. Much as then, the Chairman has used his opening statement today to lodge partisan accusations against the President and former administration officials.

For instance, the Chairman claims that "[t]he Bush-Cheney administration . . . created the unnecessary impasse we face today over the Foreign Intelligence Surveillance Act" because of its decision to "ram through the deeply flawed Protect America Act." This, however, could not be further from the truth, as the legislative record on efforts to close critical gaps in FISA is lengthy and deep in substance.

In 2006, there were extensive hearings and meetings on the issue of FISA modernization in the House and Senate, including an open hearing before the Senate Judiciary Committee entitled "FISA for the 21st Century," at which the Directors of the Central Intelligence Agency and the National Security Agency testified. On April 3, 2007, the Office of the Director of National Intelligence and the Department of Justice, "following over a year of coordinated effort," submitted to Congress a legislative proposal to bring FISA up to date "while continuing to protect the privacy interests of persons located in the United States." Director of National Intelligence Mike McConnell followed this up on May 1, 2007, when he testified at an open hearing before the Senate Committee on Intelligence on the Administration's proposed FISA update.

The House and Senate had ample opportunity to debate the merits of FISA reauthorization before passage of the Protect America Act; and, as Director McConnell pointed out, on the issue of reforming FISA, "leaders of the Intelligence Community went far further in open discussions than in any other time" he could recall in his 40-year intelligence career. The Protect America Act passed the Senate on August 3, 2007 after months of substantive debate, and was supported by 15 members of the Majority party, including members of the Intelligence and Judiciary Committees.

The Chairman also claims that "this administration has so twisted America's role, law and values" that the Attorney General has been "instructed by the White House not to

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say that waterboarding is torture or illegal." There is no evidence that this is true, and it is a misrepresentation of the Attorney General's position, which was laid out in a letter to Chairman Leahy and other members of this Committee dated January 29.

Among other things, the Attorney General explained that "as a general matter, I do not believe that it is advisable to address difficult legal questions . . . in the absence of concrete facts and circumstances."

He further explained, "any answer . . . could have the effect of articulating publicly — and to our Adversaries — the limits and contours of generally worded laws that define the limits of a highly classified interrogation program."

If our adversaries in the war against radical Islamists know of the interrogative techniques our intelligence community has at its disposal, they will be better able to prepare for their capture, potentially denying our intelligence officers vital information that could save American lives. The Attorney General went so far as to declare that waterboarding "is not, and may not be, used" in the CIA's current interrogation program, and pointed out that extensive safeguards exist to ensure that no interrogative method is used without first determining its legality under the conditions and circumstances it is proposed.

We would also note that the Senate has already addressed the legality of waterboarding. In 2006, Senator Kennedy offered an amendment to the Military Commissions Act that would have implicitly required the prosecution of any American for his participation in an act of "waterboarding" under Common Article 3 of the Geneva Conventions. The Senate rejected the amendment, 46 to 53.

Beyond the issues of FISA and waterboarding, the Chairman's statement is littered with unfounded, unexplained, and inflammatory statements. For example:

- "[t]he damage done over the last seven years to our constitutional democracy and our civil liberties rivals" the Watergate scandal.
- "[t]his President's administration has repeatedly ignored the checks and balances wisely placed on executive power by the Founders."
- the Department of Justice through "secret legal memoranda" has "sought to define torture down to meaninglessness" and "sought to excuse warrantless spying on Americans contrary to our laws."
- "[t]his President and this administration have, through signing statements and self-centeredness, decided that they are above the law and can unilaterally decide what parts of what laws they will follow."
- this administration and the Department of Justice engaged in "the practice . . . of cloaking misguided policies in a veil of secrecy."
- "[t]his White House continues to stonewall the legitimate needs for information articulated by this Committee and others in the Congress, and to contemptuously refuse to appear when summoned by congressional subpoena."

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The newly confirmed Attorney General's first appearance before this committee is an opportunity to start anew in developing a good working relationship between the Committee and Attorney General Mukasey. It does not advance this cause to assert that this administration is engaged in a conspiracy against the American people and their civil liberties. For the Chairman to set the tone of this hearing with such attacks is inappropriate, and will only detract from this Committee's future efforts.

Attorney General Mukasey has expressed a willingness to work with this Committee on a number of controversial issues in good faith, and we would encourage our colleagues to work to find common ground to address the many challenges currently facing our nation.

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Statement
United States Senate Committee on the Judiciary
Oversight of the U.S. Department of Justice
January 30, 2008

The Honorable Patrick Leahy
United States Senator , Vermont

STATEMENT OF CHAIRMAN PATRICK LEAHY
SENATE JUDICIARY COMMITTEE
OVERSIGHT HEARING WITH ATTORNEY GENERAL MUKASEY
JANUARY 30, 2008

Today, we welcome Michael Mukasey back before us for our first oversight hearing with the new Attorney General. And today we continue our work to restore the Department of Justice to its vital role of ensuring the fair and impartial administration of justice.

I first came to the Senate 33 years ago, when the Nation and the Department of Justice were reeling from Watergate and the trust of the American people in their government had been shaken. The damage done over the last seven years to our constitutional democracy and our civil liberties rivals the worst of those dark days. This President's administration has repeatedly ignored the checks and balances wisely placed on executive power by the Founders, who were concerned that they not replace the tyranny of George III with an American king.

Among the most disturbing aspects of these years has been the complicity of the Justice Department, which has provided cover for the worst of these practices. Its secret legal memoranda have sought to define torture down to meaninglessness, sought to excuse warrantless spying on Americans contrary to our laws and made what Jack Goldsmith, a conservative former head of the Office of Legal Counsel, has rightly called a "legal mess" of it all. This President and this administration have, through signing statements and self-centeredness, decided that they are above the law and can unilaterally decide what parts of what laws they will follow. The costs have been enormous, to our core American ideals, the rule of law, and the principle that in America, no one – not even a President – is above the law.

A little more than a year ago, Attorney General Gonzales sat in the chair now occupied by Attorney General Mukasey as we began our oversight efforts for the 110th Congress. Over the next nine months, our efforts revealed a Department of Justice gone awry. The leadership crisis came more and more into view as Senator Specter and I led a bipartisan group of concerned Senators to consider the United States Attorney firing scandal, a confrontation over the legality of the administration's warrantless wiretapping program, the untoward political influence of the White House at the Department of Justice, and the secret legal memos excusing all manner of excess.

This crisis of leadership has taken a heavy toll on the tradition of independence that has long guided the Justice Department and provided it with safe harbor from political interference. It shook the confidence of the American people. Through bipartisan efforts among those from both sides of the aisle who care about federal law enforcement and the Department of Justice, we joined together to press for accountability that resulted in a change in leadership at the Department.

Today we continue the restoration of the Department through our oversight. I trust that today, Attorney General Mukasey will answer our questions and speak not as merely the legal representative of this President, but as the Attorney General for all Americans. I hope that he avoids the practice all

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too common in this administration and the old leadership at the Department of cloaking misguided policies under a veil of secrecy, leaving Congress, the courts, and the American people in the dark.

As we begin the final year of the Bush-Cheney administration, we continue to face more questions and shifting answers on issues ranging from the destruction of White House emails required by law to be preserved; to questions about the CIA's destruction of videotapes of detainee interrogations not shared with the 9/11 Commission, Congress or the courts; and more demands for immunity and unaccountability among those in the administration. This White House continues to stonewall the legitimate needs for information articulated by this Committee and others in the Congress, and to contemptuously refuse to appear when summoned by congressional subpoena.

The Bush-Cheney administration also created the unnecessary impasse we face today over the Foreign Intelligence Surveillance Act by breaking agreements it reached last summer with Congressional leaders in order to make cheap political points and ram through the deeply flawed Protect America Act. Instead of following through on its commitments and passing a bill that leaders in Congress and the administration agreed would protect both America's interests and the civil rights and liberties of individual Americans, this administration chose to renege on those agreements to grab sweeping new powers to spy on Americans without the necessary checks, balances, or accountability. Today we will get some indication whether the new Attorney General will help us restore checks and balances to our government and recapture American ideals. We will learn whether we have begun a new chapter at the Department or whether we are just finishing the last one.

It is not enough to say that waterboarding is not currently authorized. Torture and illegality have no place in America. We should not delay beginning the process of restoring America's role in the struggle for liberty and human dignity. Tragically, this administration has so twisted America's role, law and values that our own State Department, our military officers and, apparently, America's top law enforcement officer, are now instructed by the White House not to say that waterboarding is torture and illegal. Never mind that waterboarding has been recognized as torture for the last 500 years. Never mind that President Teddy Roosevelt properly prosecuted Americans soldiers for this more than 100 years ago. Never mind that we prosecuted Japanese soldiers for waterboarding Americans during World War II. Never mind that this is the practice of repressive regimes around the world. That is not America.

This session I have joined with Senators Kennedy and Specter to cosponsor legislation to reign in this administration's abuse of the "state secrets" defense. I expect that will likewise be raised at this hearing along with torture, rendition, executive privilege and other key matters.

This Committee has a special stewardship role to protect our most cherished rights and liberties as Americans and to make sure that our fundamental freedoms are preserved for future generations. No one is more eager than I to see Attorney General Mukasey succeed in restoring strong leadership and independence to the Department of Justice. I hope that today we take a step forward to work together to repair the damage inflicted on our Constitution and civil liberties during the last seven years.

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Closing Statement of Chairman Patrick Leahy
Senate Judiciary Committee
Department of Justice Oversight Hearing with Attorney General Mukasey
January 30, 2008

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I had hoped today would provide more clarity on so many critical issues. Instead, we heard references to legal opinions, justifications, and facts that remain hidden from Congress and the American people.

It is a hallmark of our democracy that we say publicly what the laws are and what conduct they prohibit. We have seen what happens when hidden decisions rendered in secret memos are withheld from the people's elected representatives and from the American people. It erodes our civil liberties and undermines our values as a nation of laws.

As I said when opening this hearing, it is not enough just to say that waterboarding is not currently authorized. The Attorney General of the United States should be able to declare that it is wrong, it is illegal, and it is beyond the pale. It has been for over a century.

Earlier today, I put in the record a letter I received from Major General John Fugh, Rear Admiral Don Guter, Rear Admiral John Hutson and Brigadier General David Brahms. They write with absolute clarity: "Waterboarding is inhumane, it is torture, and it is illegal." They also quote the sitting Judge Advocates General of the military services from our Committee's hearing last year in which they unanimously and unambiguously agreed that waterboarding is inhumane, illegal and a violation of law.

By not declaring that waterboarding is off limits, this administration undercuts the moral authority of the United States. Repressive regimes around the world are saying that whether they waterboard or torture will depend on the circumstances as they see them and whether they think they need to. This endangers American citizens and military personnel around the world and lowers the standards of human rights everywhere.

If an American were waterboarded anywhere in the world, no Senator and no other American would have to know the "circumstances" and purported justifications for it before condemning it. Tragically, this Administration has so twisted America's role, law and values that our own Attorney General cannot say that waterboarding of an American is illegal. That is how far from our moorings we have strayed.

Oversight helps make government work better, and hearings like this are accountability moments. The answers we have heard today leave the American people considerably short of what they deserve and what they should expect from the government that acts in their name.

This Committee wants to help you repair the damage that has been done to the Justice Department. I look forward to working closely with Attorney General Mukasey, and I hope that together we can find ways to restore strong leadership and independence to the Department of Justice.

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

December 19, 2007

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Mukasey:

Department of Justice witnesses have failed to answer hundreds of written questions submitted by Members of the Senate Judiciary Committee. I am writing to ask you to expeditiously rectify this problem.

It is imperative that witnesses provide complete, accurate and timely responses, as provided by law, to questions posed to them by members of the Committee. The Committee provides a two-week period after a hearing for witnesses to submit responses to questions not answered during the hearing. Witnesses may seek extensions for good cause beyond the two-week period, but the majority of the outstanding questions submitted to Justice Department witnesses have been pending for more than six months. The details of the outstanding questions are set out in the attached chart. Please let me know by the end of the year when the Committee can expect to receive answers to these questions.

I trust that you understand how these unanswered questions compromise this Committee's oversight responsibilities. It is my hope that, going forward, the Department, under new leadership, will do a better job of responding in a timely matter to the Committee.

Sincerely,

PATRICK LEAHY
Chairman

cc: The Honorable Arlen Specter

Senate Committee on the Judiciary Overdue Questions Submitted to the Department of Justice as of December 19, 2007

Date	Name of Hearing	DOJ Witness	Unanswered Questions
03/27/07	Oversight of the Federal Bureau of Investigation	Honorable Robert S. Mueller, III Director, Federal Bureau of Investigation Department of Justice	181
07/24/07	Oversight of the U.S. Department of Justice	Honorable Alberto Gonzales Attorney General of the United States Department of Justice	390
09/18/07	Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum	Karin Immergut United States Attorney District of Oregon Department of Justice	5
10/4/07	Justice Denied? Implementation of the Hometown Heroes Survivors Benefits Act	Honorable Domingo S. Herraiz Director Bureau of Justice Assistance Office of Justice Programs Department of Justice	6
10/31/07	FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability	Kenneth L. Wainstein Assistant Attorney General National Security Division Department of Justice	42

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Department of Justice

STATEMENT OF

THE HONORABLE MICHAEL B. MUKASEY
ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"

PRESENTED

JANUARY 30, 2008

Good morning, Chairman Leahy, Senator Specter, and Members of the Committee. Thank you for the opportunity to testify before you today about the important work being carried out by the men and women of the Department of Justice.

I would like to highlight some of the Department's significant accomplishments this past year, and address issues of interest to the Committee. I will also discuss legislative priorities for the Department, most pressingly, the urgent need to make permanent reforms in the area of foreign intelligence surveillance before such provisions expire two days from now. I am ready to answer your questions, and I look forward to a productive discussion.

My tenure at the Department began less than three months ago. Even in this short time, Mr. Chairman, I have confirmed what I had hoped and expected to find at the Department: men and women who are talented, committed, and dedicated to fulfilling its historic mission. This mission is to defend the interests of the United States according to the law; to ensure public safety against threats both foreign and domestic; to seek just punishment for lawbreakers; to assist our State and local partners; and to ensure fair and impartial administration of justice for all Americans. The Department's employees pursue this mission every day. In my view, the Justice Department is the finest group of lawyers anywhere. For that, I can and do take absolutely no credit. They were at the Department, doing an outstanding job, before I arrived, and they will continue to serve the American people superbly long after I am gone.

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As you know, Mr. Chairman, I am new to Washington, and my education in the ways of this city – which began during the confirmation process – has continued since I took the oath of office. I have tried to live up to the commitment I made to look for opportunities to work with the Congress, and to keep the Congress informed about the Department's activities and policy positions where possible. I have had constructive discussions with many members of this Committee over the past two months, on topics ranging from reform of the Foreign Intelligence Surveillance Act, to the Department's new policy governing contacts with White House officials about pending cases.

Of course, we will not always agree. There are policy initiatives that the Department supports that some members of this Committee vigorously oppose, and vice-versa. There also are situations where the interests of the Executive Branch and the Legislature will be in some tension – for example, when Congress seeks to initiate an inquiry related to a matter under criminal investigation, or when Congress seeks information in which the Executive Branch has a legitimate confidentiality interest. These institutional tensions and disagreements are not, as some view it, signs of a broken or flawed political system; they are part of the genius of the Framers' constitutional design, which envisioned a robust separation of powers that would prevent the disproportionate accumulation of power in any one branch of government, and thus help ensure the liberties of the American people. Although these tensions will never disappear, there are many areas of agreement where we can work together on behalf of our common clients, the people of the United States. When we do disagree, these

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disagreements should be openly and honestly discussed. I have tried to work with the Congress in this spirit.

Before I turn to some of the Department's accomplishments in the past year, there is one area where I need your help. As you know, many key positions in the Justice Department, including most prominently the positions of Deputy and Associate Attorney General—the number two and three officials in the Department, respectively—are vacant. These positions, and others in the Department, are being filled admirably by people of great talent serving in acting capacities; but the absence of Senate-confirmed officials in these key leadership positions creates a tentative atmosphere that is not in the interest of the Department or the American people. Mr. Chairman, I appreciate the steps the Committee has taken in the past two months to schedule and hold hearings for several of the Department's pending nominees, including Judge Mark Filip and Kevin O'Connor, the President's nominees to serve as Deputy Attorney General and Associate Attorney General. I hope you will work to ensure that they are confirmed quickly, so that I can have my permanent leadership team in place.

I would like to use the remainder of my statement to highlight the Department's efforts and accomplishments in recent months in five critical areas: national security, violent crime, civil rights, immigration and border security, and public corruption. I then will turn to some of the high-priority legislative issues currently before the Congress.

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National Security

I will tell you that the process of becoming familiar with the intelligence detailing the threats facing this country has been a stark and sobering one for me. There is much that I did not expect, and no shortage of troubling reports. Even unclassified reporting makes clear that America remains a primary target for Islamic terrorists. We have had substantial successes, but our enemy remains dedicated, persistent, and patient. According to the National Intelligence Estimate released last summer, al Qaeda has "protected or regenerated key elements of its Homeland attack capability, including: a safe haven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership." What al Qaeda is looking for, in the words of the NIE, are, "prominent....targets with the goal of producing mass casualties...." That there has been no attack on American soil since 9/11 should not conceal a fundamental truth: we must remain vigilant in our efforts against al Qaeda.

As with other departments and agencies with national security responsibilities, much is now asked of the Department of Justice. All aspects of what we do, from budget, to allocation of resources, to policies and legislative priorities, must continue to reflect this aspect of our mission and the reality of the world in which we live.

As you well know, since the terrorist attacks of September 11, 2001, the first priority of the Justice Department has been to protect Americans from the threat of international terrorism. As the Attorney General, I plan to continue these efforts, working aggressively to investigate and prosecute terrorists while ensuring that the

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Department acts with scrupulous regard for the civil liberties and privacy of all Americans.

The Department has enjoyed important national security successes in recent months. For example, on August 16, 2007, a jury in the Southern District of Florida convicted Jose Padilla, an American citizen, and two co-defendants of conspiracy to murder, kidnap, and maim individuals in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists. This prosecution highlights the important role that the material support statutes play in the Department's effort to address terrorism and preparation for terrorist attacks across the spectrum of threats.

The Department has also taken groundbreaking steps to pursue those who would threaten our national security. For example, in 2006, Adam Gadhan, also known as Azzam Al Amriki, was indicted on charges of treason and providing material support to terrorists for making a series of propaganda videotapes for al Qaeda – an effort that he has continued in recent weeks. We have also recently obtained convictions and guilty pleas from, among others, a former engineer with a United States Navy contractor involved in a scheme to obtain and illegally export technical data about the United States Navy's current and future warship technology to China, and a leading manufacturer of night vision technology for illegally exporting restricted data to China, Singapore, and the United Kingdom. We also recently obtained a guilty plea from an individual who installed on a Chinese Navy site a commercial product used for military training. The

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Department continues to do excellent work in obtaining authorization under FISA to conduct electronic surveillance and searches related to suspected terrorists and spies.

In addition, the Department announced a significant new national security oversight and compliance effort last year. The implementation of a dedicated Oversight Section within the Department's National Security Division and the establishment of an Office of Integrity and Compliance within the Federal Bureau of Investigation involve important innovations in the way the Department conducts business. These efforts reflect a new level of internal oversight designed to ensure that our national security investigations are conducted in a manner consistent with all laws, regulations, and policies, in particular those designed to protect the civil liberties and privacy of Americans. National Security Division lawyers, working with the FBI, conducted 15 national security reviews in field offices across the country and a headquarters component since April 2007 and we plan to conduct a similar number in 2008. These reviews 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 already have been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

In October, the Department also launched a nationwide export enforcement initiative that includes the formation of Counter-Proliferation Task Forces across the country, the expansion of export control training for investigators and prosecutors, and the appointment of a National Export Control Coordinator. This effort is designed to

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leverage the counter-proliferation assets of U.S. law enforcement, export control, and intelligence agencies to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations.

Violent Crime

Violent crime remains near historic lows in the United States, in large part because of the hard work of our State and local partners, but also through federal law enforcement and initiatives like Project Safe Neighborhoods. Under Project Safe Neighborhoods, federal prosecutors and law enforcement focus their resources on the most serious violent offenders, taking them off the streets and placing them behind bars where they cannot re-offend. Since that project's inception, the number of federal firearms prosecutions has increased significantly, and defendants earn substantial sentences in federal prison. From FY 2001 to 2007, the Department filed 68,543 cases against 83,106 federal firearms offenders – more than a 100% increase over the prior seven-year period. Project Safe Neighborhoods' deterrence and prevention efforts complement this focus on enforcement. Last year new television and radio Public Service Announcements that were developed in partnership with the Ad Council and Mullen Agency debuted. The television announcement, entitled "Babies," demonstrates how the loss of a child to gun violence – whether to injury, death, arrest or jail time – deeply affects the family. The radio announcements similarly show the genuine pain inflicted upon real families when a family member is involved in a gun crime. Since 2001, Project Safe Neighborhoods has committed approximately $2 billion to federal,

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state, and local efforts to fight gun and gang violence. These funds have been used to hire more than 700 federal, state, and local prosecutors; provide nationally sponsored training for more than 33,000 task force members, hire research and community outreach support, and develop and promote effective prevention and deterrence efforts. This past year, the Department awarded over $50 million in grants among the 94 federal judicial districts in support of their Project Safe Neighborhoods programs to combat gangs and gang violence and to reduce and prevent criminal misuse of firearms.

In 2006, the Project Safe Neighborhoods program expanded to combat gangs and gang violence. The Department has taken a number of significant steps to address this problem both domestically and internationally. First, the Department established the Attorney General's Anti-Gang Coordination Committee, to bring all of the Department's wide-ranging efforts to bear in the focus on gangs. Second, each U.S. Attorney appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. Third, the Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, developed and are implementing comprehensive, district-wide strategies to address the gang problems in each of America's districts. We are working closely with our international partners, particularly in Central America, to prevent violent gangs in those regions from infiltrating our communities.

Last year, the Department announced the expansion of our "Comprehensive Anti-Gang Initiative" from six to ten sites nationwide. The initiative originally provided a total of $15 million ($2.5 million per site) to six jurisdictions experiencing significant

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gang problems: Los Angeles, Tampa, Cleveland, Dallas/Ft. Worth, Milwaukee, and the Eastern District of Pennsylvania's "222 Corridor", which stretches from Easton to Lancaster. Four additional sites will each receive $2.5 million in targeted grant funding: Rochester, Oklahoma City, Indianapolis, and Raleigh-Durham. Through the new anti-gang initiative, each of the ten jurisdictions incorporates prevention, enforcement, and reentry efforts to reduce and prevent gang membership and violence in their communities. Focused enforcement efforts under the Comprehensive Anti-Gang Initiative are showing strong early results. In Cleveland, one of the most violent gangs and their associates, operating in and around the target area, has been dismantled through both federal and state investigations and prosecutions. These tough actions have resulted in more than 169 federal and state indictments. Through vigorous prosecutions, 168 defendants have been convicted and one awaits trial. In Cleveland's target area, violent crime is down by more than 15 percent.

In November, in one of my first acts as Attorney General, it was my honor to personally help lead the opening of the new, joint headquarters of the Department's two national anti-gang centers: the National Gang Targeting, Enforcement & Coordination Center (GangTECC) and the National Gang Intelligence Center (NGIC). GangTECC is the national, multi-agency, anti-gang task force created by the Department in 2006. NGIC is an inter-agency law enforcement center, staffed by analysts and created by Congress in 2005, that focuses on information sharing and collaboration in support of the goal of reducing gang membership and violence. Together GangTECC and NGIC work in a unified, national effort to help disrupt and dismantle the most significant and violent

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gangs in the United States. The agents are supported in this mission by prosecutors across the country in the United States Attorneys Offices and the Criminal Division's new Gang Squad created in 2006, a specialized group of federal prosecutors charged with developing and implementing strategies to target, attack and dismantle the most significant national and transnational gangs operating in the United States. Last year, in the four major GangTECC coordinated takedowns (Baltimore, MD; Dallas, TX; Gadsden, Alabama; Trenton/Newark/Jersey City, NJ), which involved agents from DEA, USMS, FBI, ATF, and ICE, more than 1,480 defendants were arrested and more than 259 of them were documented gang members.

Building on Project Safe Neighborhoods, the anti-gang program and other efforts, in May 2007, the Department launched a series of new and comprehensive initiatives designed to expand and enhance federal law enforcement efforts aimed at reducing violent crime, providing assistance to state and local law enforcement, strengthening laws, and increasing funding. Through these initiatives, the Department, working with state and local law enforcement, has identified cases that focus on the "worst of the worst" offenders. The Department has conducted coordinated fugitive sweeps and takedowns in cities such as Cleveland, Ohio; Modesto/Bakersfield, California; Trenton/Newark/Jersey City, New Jersey; Dallas, Texas; Gadsden, Alabama; and Los Angeles, California; and conducted Fugitive Safe Surrender operations in Akron, Ohio; Nashville and Memphis, Tennessee; and Washington, DC. Further, ATF expanded its violent crime impact teams to five additional cities, and the FBI has increased the number of safe streets task forces to 182. This fall the Department also awarded, on a

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competitive basis, $75 million to local law enforcement task forces to target specific violent crime challenges; this is a down payment of sorts on the President's request for $200 million in FY 2009 to support task force efforts in communities that need it the most. As I speak, in Chapel Hill, North Carolina, the Department is launching the Department's comprehensive anti-gang training for state and local law enforcement and other partners from across the country. This training will focus on prevention, enforcement and prisoner re-entry strategies. Besides the Chapel Hill training, the Department will conduct eleven additional training sessions which will take place regionally throughout the United States. These are just some of our efforts in the violent crime arena.

Civil Rights

Recent initiatives have furthered the work of the Civil Rights Division in areas involving religious liberties, human trafficking, and housing discrimination. Launched last year, *The First Freedom Project* advances the Division's work in protecting against discrimination on the basis of religion through the creation of a Department-wide Religious Liberty Task Force, a series of regional seminars, and a public education campaign. A First Freedom Seminar is being held today in Washington, D.C.

Overall, the Criminal Section of the Civil Rights Division has convicted a record number of defendants for the second year in a row, including *United States v. Seale*, where a former KKK member received three life sentences for his involvement in the brutal 1964 murder of two African-American young men in Mississippi.

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The President has made human trafficking, which is a form of modern day slavery, a priority for the Administration. A new Human Trafficking Prosecution Unit was created last year within the Criminal Section of the Civil Rights Division. The unit is staffed by the Section's most seasoned human trafficking prosecutors, who 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. In the last seven years, the Civil Rights Division has increased human trafficking prosecutions by 700 percent and has obtained four straight years of record high convictions. In addition, the Innocence Lost Initiative, in which the Criminal Division is deeply involved, focuses on child victims of interstate sex trafficking in the United States. Since 2003, 238 convictions have been obtained in the federal and state systems. Of those convictions, 106 were in Fiscal Year 2007.

The Department announced Operation Home Sweet Home – an initiative designed to expose and eliminate housing discrimination in America – in 2006. It has resulted in a record number of undercover housing discrimination investigations in fiscal year 2007 – surpassing the previous record by twenty percent. In addition, the Housing and Civil Enforcement Section filed 30 lawsuits alleging unlawful housing discrimination and obtained settlements and judgments requiring the payment of over $5 million in monetary damages to victims of discrimination and civil penalties.

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The Disability Rights Section of the Division continues its important work under Project Civic Access – a wide-ranging initiative to ensure that people with disabilities have an equal chance to participate in civic life. To date, the Division has reached 155 agreements with 144 communities to make public programs and facilities accessible, improving the lives of more than 3 million Americans with disabilities.

In addition to supporting reauthorization of the Voting Rights Act, the Administration is currently defending the statute's constitutionality in federal court. Further, this Administration has initiated approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act. Moreover, the 18 new lawsuits filed by the Voting Section of the Civil Rights Division in CY 2006 is more than twice the average number of lawsuits filed by the Division annually during the preceding 30 years. For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access, coordinating the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

The Division also has sought proactively to provide information to members of the military about their civil rights, launching a website for service members explaining their rights under the Uniformed Service Employment and Reemployment Rights Act of

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1994, the Uniformed and Overseas Citizen Absentee Voting Act, and the Servicemembers Civil Relief Act.

Public Corruption

Public corruption prosecutions remain a high priority for the Department. Our citizens are entitled to honest services from all public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests. The Department's achievements during the past year in this area show a steady commitment to fighting public corruption wherever it is found and on a non-partisan basis. The Department has devoted substantial resources to its efforts in this area. The FBI, for example, now has 639 agents dedicated to corruption matters, as compared to 358 in 2002.

The Department continues its vigorous pursuit of corruption within the Executive Branch. Those cases have ranged from a former Deputy Secretary of the Interior, J. Steven Griles, who obstructed a congressional investigation, to other executive branch officials, such as former Department of Health and Human Services Special Agent Scott Gompert, who stole $1.1 million.

The Department has also devoted significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related endeavors. To date,

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these efforts have resulted in criminal charges against 40 individuals and two corporations for public corruption and government fraud involving government contracts valued at over $269 million. This effort includes cases against U.S. military officials, such as Major John Rivard, who pled guilty to accepting $400,000 in bribes; Major John Cockerham, charged in August, 2007 for accepting $9.6 million in bribes; and Captain Austin Key, charged in August, 2007 for accepting $50,000 to steer contracts.

Additionally, in order to more effectively investigate and prosecute procurement fraud generally, the Department formed the National Procurement Fraud Task Force in October 2006. These efforts are just the latest manifestation of the Department's longstanding commitment to combating corruption both at home and abroad. The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law. In 2007, we brought 16 FCPA enforcement actions against individuals and corporations who violated the statute, including filed charges against seven individuals. These 16 enforcement actions represent a 100 percent increase over the 8 enforcement actions brought in 2006, which was itself the largest total in the FCPA's 30 year history.

Of course, public corruption is not limited by political party, or to Executive Branch officials. This Committee is well-aware of the Department's efforts to prosecute public corruption by Members of Congress and their staffs. You have my commitment

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that, where warranted, these investigations and prosecutions will continue without regard to politics or political affiliation.

The Department has also pursued corruption investigations at the state and local level. For example, the Department convicted three former Alaska state legislators in separate trials (the most recent occurring in November) as part of its Operation Polar Pen; two former state senators in Rhode Island have pled guilty as part of Operation Dollar Bill; and 16 defendants, including a state legislator, were indicted for extortion and other charges in Dallas, Texas.

In the area of election crimes, the Department continued its national educational and training programs for both prosecutors and FBI agents in the area of election law in 2007. Where willful violations of our election and campaign finance laws have occurred, the Department has brought charges.

Immigration and the Southwest Border

Enforcing the Nation's immigration laws remains an important priority for the Department. Earlier this month, I visited the Southwest Border and met with some of the prosecutors and law enforcement officers who serve on the front lines of the effort to secure our borders. They have a tough job to do, and they are doing it well. In the last seven years we've increased the total number of prosecutors in that region by 29 percent, leading to a dramatic increase in case filings and convictions. Nationwide, we've seen more than a 43 percent increase in immigration filings between 2001 and 2007. Our U.S.

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Attorneys' Offices have pursued not only immigration violations, but also serious immigration-related offenses such as aggravated identity theft and passport fraud.

With the $7 million Congress appropriated last month to support our federal prosecutors on the Southwest Border we will be able to do more. We expect to use this funding to deploy up to 40 new prosecutors and 20 much-needed support staff, based upon the needs of the district. In addition, through funding provided by the Department of Homeland Security, 10 attorney positions and 10 contract support staff are being sent to the border offices in order to respond to civil litigation related to the border fence project. In total, up to 50 attorneys and 30 support positions will be deployed by December 2008.

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In addition to overseeing the Department's efforts in these and other priority areas, I have worked with the Committee on several legislative issues since my confirmation. I would like to address three of these issues today.

FISA Reform

First, in the area of national security, I urge you to work with me to pass legislation making permanent the authorities provided by the Protect America Act, which is set to expire in just two days. Since Congress passed the Protect America Act last year, officials from the Justice Department and the Intelligence Community have testified before Congress on many occasions about the needed authorities; we have held briefings on our implementation of the Act and oversight of our use of these authorities; and we

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have met with Members and staff on these issues, including providing substantial technical advice and comments on the text of the legislation. Permanent reauthorization of the Protect America Act's authorities allowing our intelligence professionals to surveil targets overseas without individual court orders is the top legislative priority of the Department of Justice.

I also want to make clear why it is our top priority. We have all seen what happens when terrorists go undetected. We must do everything possible, within the law, to prevent terrorists from translating their warped beliefs into action. To stop them, we must know their intentions, and one of the best ways to do that is by intercepting their communications. Modernization of FISA is a critical part of that effort.

The Department would have grave concerns about any legislative proposal taking a short-term approach to modernizing FISA. Sunset provisions create uncertainty in the Intelligence Community regarding the rules governing critical intelligence collection practices. Intelligence professionals cannot focus on their work in protecting America from terrorist attacks while concentrating on learning new procedures and policies that may change in a few years. A sunset provision also burdens our private sector partners by requiring them to invest their limited resources in complying with a legal framework that is in constant flux. We need the help of these private partners to use these authorities effectively to keep the country safe. We should not be discouraging them from assisting us by burdening them with an ever-changing legal regime. The threat of terrorism to this country is persistent and ongoing, and we should strive for long-term institutional changes that increase our ability to meet that threat.

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It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill. First, this is the fair and just thing to do. After reviewing the relevant correspondence between the Executive Branch and the companies that assisted with communications intelligence activities after the September 11th attacks, the Senate Select Committee on Intelligence found that these companies acted on a good faith belief that their assistance was lawful. Second, retroactive immunity serves our national security interests. As the Senate Intelligence Committee determined, "without retroactive immunity, the private sector might be unwilling to cooperate with lawful Government requests in the future," resulting in a "possible reduction in intelligence" that the committee concluded is "simply unacceptable for the safety of our Nation."

The liability protection offered in the Intelligence Committee bill is not blanket immunity, as it only applies in the limited circumstances where the Attorney General certifies to a court that the company either (1) did not provide the alleged assistance, or (2) did provide assistance between September 2001 and January 2007 with communications intelligence activities designed to detect and prevent a terrorist attack, and only after receiving a written request from a high-level Government official indicating that the activity was authorized by the President and determined to be lawful. A court must review this certification before an action may be dismissed, and the immunity does not extend to the Government, Government officials, or any criminal conduct. In short, the provision in the Intelligence Committee's bill would provide protection only in circumstances where such protection is appropriate.

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A proposal that would allow lawsuits to continue by substituting the Government as a defendant in place of the telecommunications company is an unsatisfactory solution. Even if the Government is substituted for the company in the lawsuit, the company remains vulnerable to third party discovery requests, litigation costs, and reputational harm that could deter its future cooperation with the Intelligence Community. The information that comes to light through litigation—whether certain companies provided assistance, and, if they did, what that assistance entailed—would not only hurt the companies, it would threaten national security.

I also want to address a recent proposal that offers an alternative to the Congress deciding on the issue of immunity. This proposal would grant authority to the FISA Court to decide, under a multi-part test, whether the provider's assistance was appropriate. I know that some members of this Committee have expressed an interest in this proposal, and I have spoken personally with them about it. Respectfully, I think it is the wrong approach to the problem we face. Such a proposal would simply shift likely protracted litigation on these matters to another venue, with the companies still subject to the burdens of litigation to determine how and why they assisted the Government.

Transferring those cases to the FISA Court after the Congress's extensive review of the underlying facts could be read as sending a signal that Congress doubts the actions of the companies who are believed to have assisted us—the very sort of companies the Intelligence Committee recognized that we rely on to help us protect the Nation. The new proposal could also lead companies to feel compelled to make an independent finding that before complying with a lawful Government request for assistance, they have

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to conduct their own investigation. That could cause dangerous delays in critical intelligence operations and put the companies in the impossible position of making the legal determination without access to the highly classified facts that they would need to do so.

I urge Congress, and the Members of this Committee, to reauthorize those authorities set forth in the Protect America Act—a prime example of Congress, the Executive, and the Judiciary working together—with liability protection for deserving companies.

Media Shield

Also in the area of national security, I would like to discuss the Department's position on the proposed media shield legislation, the Free Flow of Information Act of 2007. I was asked about this bill during my confirmation hearings, and my instinct was that this bill could cause great mischief. Having been a journalist, and having represented media entities in civil litigation, I understand the critical role that the media plays in our society. Nevertheless, the Department of Justice joins the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, and others in strongly opposing the Free Flow of Information Act.

First, in practical effect the bill would eliminate our ability to prosecute leaks of classified information to the media. Certainly, throughout the last several years we have seen significant leaks of classified information that have had a detrimental impact on

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national security. Particularly given the threats we face, and what seems to be a constant shrinkage in our inventory of useful techniques that remain useful because they remain secret, now is not the time to give license to those who leak classified information in violation of our laws, and place at risk our military and intelligence professionals.

Second, this bill would dramatically alter the appropriate balance between the prosecution of criminals and the needs of a free press that has been the standard in the Federal courts at least since 1972 when the Supreme Court decided *Branzburg v. Hayes*. Under the current system, DOJ guidelines determine in any specific case whether it is appropriate to issue a subpoena to a reporter. These internal guidelines provide a series of standards and checklists, including my specific approval, before any reporter is subpoenaed. As a result, since 1991, the Department has authorized the issuance of fewer than two dozen subpoenas seeking source-related information—an average of less than two per year. By contrast, under the Media Shield bill, even in an investigation of a past terrorist attack the bill would have a judge decide whether the Department's need for the information to the investigation outweighs the "public interest" in the free flow of information. No standard for decision is provided in the bill. But even if one views these factors as capable of being balanced, this is not a determination that can reasonably be asked of a judge, particularly in cases involving national security. The case law applying *Branzburg* is still evolving to a degree, but we ought to think carefully before we discard it wholesale. Respectfully, that is what this bill appears to do.

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Finally, although much of the discussion has centered on a few high-profile subpoenas to journalists, by its terms the Free Flow of Information Act of 2007 has a much broader reach. Its impact is not limited to subpoenas, but instead applies to core national security authorities, including FISA. I fear that the bill, rather than striking an appropriate balance between the interest of prosecutors and that of the press, would lead to unintended consequences, for example, impeding investigations of terrorists.

I am not alone in my concerns. I believe that this Committee recently received a letter signed by 12 key members of the Intelligence Community. Each signed on because of the concerns about what this bill could do to our ability to safeguard critical information and the American people. I would urge that Members of this Committee carefully consider the concerns set forth in that letter, as well as concerns that the Department has expressed.

In the end, we believe that this bill is not just deeply problematic, but unnecessary. Please do not let a focus on a few cases blind this Committee to the damage that this bill could do.

McNulty Memorandum/Waiver of Attorney-Client Privilege

I would also like to take this opportunity to reaffirm the Department's endorsement of the McNulty memorandum on attorney-client communications and the principles it embodies. Having been a prosecutor, a defense attorney, and a judge, I can see the debate over corporate prosecutions from many different sides. With that

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experience, I believe the McNulty memorandum strikes the appropriate balance, and that legislation could do serious harm to our ability to prosecute corporate wrongdoers—privileging those defendants over the host of defendants with which this Department deals on a daily basis, from drug dealers to fraudsters. We feel confident that the additional procedures set forth in the memo will be effective in supporting the sanctity of the attorney-client privilege.

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Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today, and I look forward to working with you to advance the priorities and mission of the Department of Justice.

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NRCAT | National Religious Campaign Against Torture

www.nrcat.org
campaign@nrcat.org

November 1, 2007

The Honorable Patrick Leahy, Chairman
U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Leahy:

The National Religious Campaign Against Torture (NRCAT), a campaign of over 130 religious organizations working together to abolish U.S.-sponsored torture and cruel, inhuman or degrading treatment of anyone, without exception, is deeply concerned about the responses Judge Michael Mukasey gave both at his nomination hearing and in his most recent written response on the subject of torture. We believe his answers leave open the door to the use of techniques by the U.S. government that would be cruel, inhuman and degrading and that could amount to torture. This is true not only for waterboarding, which is clearly illegal and a form of torture, but also for a number of other techniques we understand the CIA has used and may continue to use.

Our country already knows what happens when we have an Attorney General who countenances torture and cruel, inhuman or degrading treatment. We lose our moral compass; decent Americans are called upon on our behalf to commit acts that damage their souls; our soldiers who may be captured are placed in greater jeopardy; we are shamed in the eyes of the world.

It is time to turn a new page; the confirmation of a new Attorney General is such an opportunity. It would be tragic to allow an individual who has not clearly rejected the illegal and immoral practices of torture and cruel, inhuman and degrading treatment to become the leading law enforcement officer of our nation.

NRCAT members, who include representatives from the Catholic, evangelical Christian, mainline Protestant, Orthodox Christian, Unitarian Universalist, Jewish, Quaker, Muslim, and Sikh communities, believe that torture violates the basic dignity of the human person that all religions, in their highest ideals, hold dear. It degrades everyone involved – policy-makers, perpetrators and victims – and it contradicts our nation's most cherished values. We believe that any policies that permit torture and inhuman treatment are shocking and morally intolerable.

We urge you to approve a nominee as Attorney General who is unequivocal in his or her stance against the use of torture and cruel, inhuman or degrading treatment.

Sincerely,

L. Gustitus

Linda Gustitus
President

Richard Killmer

Rev. Richard Killmer
Executive Director

National Religious Campaign Against Torture
316 F Street NE, Suite 200, Washington, DC 20002

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MICHAEL VINCENT KOSTIW, REPUBLICAN STAFF DIRECTOR

United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

October 31, 2007

The Honorable Michael B. Mukasey
Patterson Belknap Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036

Dear Judge Mukasey:

We welcome your acknowledgement in yesterday's letter that the interrogation technique known as waterboarding is "over the line" and "repugnant," and we appreciate your recognition that Congress possesses the authority to ban interrogation techniques. These are important statements, and we expect that they will inform your views as Attorney General. We also expect that, in that role, you will not permit the use of such a practice by any agency of the United States Government.

You have declined to comment specifically on the legality of waterboarding, deeming it a hypothetical scenario about which it would be imprudent to opine. Should you be confirmed, however, you will soon be required to make determinations regarding the legality of interrogation techniques that are anything but hypothetical. Should this technique come before you for review, we urge that you take that opportunity to declare waterboarding illegal.

Waterboarding, under any circumstances, represents a clear violation of U.S. law. In 2005, the President signed into law a prohibition on cruel, inhuman, and degrading treatment as those terms are understood under the standards of the U.S. Constitution. There was at that time a debate over the way in which the Administration was likely to interpret these prohibitions. We stated then our strong belief that a fair reading of the "McCain Amendment" outlaws waterboarding and other extreme techniques. It is, or should be, beyond dispute that waterboarding "shocks the conscience."

It is also incontestable that waterboarding is outlawed by the 2006 Military Commissions Act (MCA), and it was the clear intent of Congress to prohibit the practice. As the authors of the statute, we would note that the MCA enumerates grave breaches of Common Article 3 of the Geneva Conventions that constitute offenses under the War Crimes Act. Among these is an explicit prohibition on acts that inflict "serious and non-transitory mental harm," which the MCA states (but your letter omits) "need not be prolonged." Staging a mock execution by inducing the misperception of drowning is a clear violation of this standard. Indeed, during the negotiations, we were personally

assured by Administration officials that this language, which applies to all agencies of the U.S. Government, prohibited waterboarding.

We share your revulsion at the use of waterboarding and welcome your commitment to review existing legal memoranda covering interrogations and their consistency with current law. It is vital that you do so, as anyone who engages in this practice, on behalf of any U.S. government agency, puts himself at risk of criminal prosecution, including under the War Crimes Act, and opens himself to civil liability as well.

We must wage and win the war on terror, but doing so is fully compatible with fidelity to our laws and deepest values. Once you are confirmed and fully briefed on the relevant programs and legal analyses, we urge you to publicly make clear that waterboarding can never be employed.

Sincerely,

John McCain
United States Senator

John Warner
United States Senator

Lindsey Graham
United States Senator

The Washington Post

Waterboarding Used to Be a Crime

By Evan Wallach
Sunday, November 4, 2007; B01

As a JAG in the Nevada National Guard, I used to lecture the soldiers of the 72nd Military Police Company every year about their legal obligations when they guarded prisoners. I'd always conclude by saying, "I know you won't remember everything I told you today, but just remember what your mom told you: Do unto others as you would have others do unto you." That's a pretty good standard for life and for the law, and even though I left the unit in 1995, I like to think that some of my teaching had carried over when the 72nd refused to participate in misconduct at Iraq's Abu Ghraib prison.

Sometimes, though, the questions we face about detainees and interrogation get more specific. One such set of questions relates to "waterboarding."

That term is used to describe several interrogation techniques. The victim may be immersed in water, have water forced into the nose and mouth, or have water poured onto material placed over the face so that the liquid is inhaled or swallowed. The media usually characterize the practice as "simulated drowning." That's incorrect. To be effective, waterboarding is usually *real* drowning that simulates death. That is, the victim experiences the sensations of drowning: struggle, panic, breath-holding, swallowing, vomiting, taking water into the lungs and, eventually, the same feeling of not being able to breathe that one experiences after being punched in the gut. The main difference is that the drowning process is halted. According to those who have studied waterboarding's effects, it can cause severe psychological trauma, such as panic attacks, for years.

The United States knows quite a bit about waterboarding. The U.S. government -- whether acting alone before domestic courts, commissions and courts-martial or as part of the world community -- has not only condemned the use of water torture but has severely punished those who applied it.

After World War II, we convicted several Japanese soldiers for waterboarding American and Allied prisoners of war. At the trial of his captors, then-Lt. Chase J. Nielsen, one of the 1942 Army Air Forces officers who flew in the Doolittle Raid and was captured by the Japanese, testified: "I was given several types of torture. . . . I was given what they call the water cure." He was asked what he felt when the Japanese soldiers poured the water. "Well, I felt more or less like I was drowning," he replied, "just gasping between life and death."

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Nielsen's experience was not unique. Nor was the prosecution of his captors. After Japan surrendered, the United States organized and participated in the International Military Tribunal for the Far East, generally called the Tokyo War Crimes Trials. Leading members of Japan's military and government elite were charged, among their many other crimes, with torturing Allied military personnel and civilians. The principal proof upon which their torture convictions were based was conduct that we would now call waterboarding.

In this case from the tribunal's records, the victim was a prisoner in the Japanese-occupied Dutch East Indies:

A towel was fixed under the chin and down over the face. Then many buckets of water were poured into the towel so that the water gradually reached the mouth and rising further eventually also the nostrils, which resulted in his becoming unconscious and collapsing like a person drowned. This procedure was sometimes repeated 5-6 times in succession.

The United States (like Britain, Australia and other Allies) pursued lower-ranking Japanese war criminals in trials before their own tribunals. As a general rule, the testimony was similar to Nielsen's. Consider this account from a Filipino waterboarding victim:

Q: Was it painful?

A: Not so painful, but one becomes unconscious. Like drowning in the water.

Q: Like you were drowning?

A: Drowning -- you could hardly breathe.

Here's the testimony of two Americans imprisoned by the Japanese:

They would lash me to a stretcher then prop me up against a table with my head down. They would then pour about two gallons of water from a pitcher into my nose and mouth until I lost consciousness.

And from the second prisoner: *They laid me out on a stretcher and strapped me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. . . . They then began pouring water over my face and at times it was almost impossible for me to breathe without sucking in water.*

As a result of such accounts, a number of Japanese prison-camp officers and guards were convicted of torture that clearly violated the laws of war. They were not the only defendants convicted in such cases. As far back as the U.S. occupation of the Philippines after the 1898 Spanish-American War, U.S. soldiers were court-martialed for using the "water cure" to question Filipino guerrillas.

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More recently, waterboarding cases have appeared in U.S. district courts. One was a civil action brought by several Filipinos seeking damages against the estate of former Philippine president Ferdinand Marcos. The plaintiffs claimed they had been subjected to torture, including water torture. The court awarded $766 million in damages, noting in its findings that "the plaintiffs experienced human rights violations including, but not limited to . . . the water cure, where a cloth was placed over the detainee's mouth and nose, and water producing a drowning sensation."

In 1983, federal prosecutors charged a Texas sheriff and three of his deputies with violating prisoners' civil rights by forcing confessions. The complaint alleged that the officers conspired to "subject prisoners to a suffocating water torture ordeal in order to coerce confessions. This generally included the placement of a towel over the nose and mouth of the prisoner and the pouring of water in the towel until the prisoner began to move, jerk, or otherwise indicate that he was suffocating and/or drowning."

The four defendants were convicted, and the sheriff was sentenced to 10 years in prison.

We know that U.S. military tribunals and U.S. judges have examined certain types of water-based interrogation and found that they constituted torture. That's a lesson worth learning. The study of law is, after all, largely the study of history. The law of war is no different. This history should be of value to those who seek to understand what the law is -- as well as what it ought to be.

Evan Wallach, a judge at the U.S. Court of International Trade in New York, teaches the law of war as an adjunct professor at Brooklyn Law School and New York Law School

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THE WHITE HOUSE

WASHINGTON

January 22, 2008

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, D.C. 20515

Re: Whistleblower Legislation — H.R. 985 and S. 274 as amended by S.A. 3801

Dear Madam Speaker:

The Administration understands the important public interest in protecting whistleblowers and supports accountability and transparency in the implementation of Federal programs. However, the Administration strongly opposes H.R. 985 and S. 274 (hereafter "the Whistleblower Disclosure Bills") because they threaten national security, are unconstitutional, and would create precisely the negative consequences Congress pledged to avoid in the Whistleblower Protection Act. These bills would unconstitutionally jeopardize national security programs and personnel by limiting the President's ability to protect against the unauthorized disclosure of classified information through personnel actions (*see* subsection 1(d) of S. 274 and section 10 of H.R. 985) and nondisclosure agreements (*see* subsection 1(k) of S. 274). The bills would also permit employees to litigate the merits of security clearance determinations in courts across the country, and for this reason and others would threaten the Government's ability to protect classified information as well as provide a legal shield for unsatisfactory performance and behavior by Federal employees. If H.R. 985 or S. 274 were presented to the President, his senior advisors would recommend that he veto the bill.

The Whistleblower Disclosure Bills would permit Federal employees to decide for themselves – without further review and perhaps without all relevant information – to disclose classified information to a broad universe of covered individuals far beyond that allowed by current law, and would prevent the President or his designees from taking appropriate steps to prevent such disclosures through personnel actions or non-disclosure agreements. In so doing, the bills authorize disclosures that threaten not only the integrity of national security programs, but also the security of the people involved in such programs. Legislation that purports to authorize such disclosures in derogation of the President's constitutional authority is unconstitutional. As the Clinton Administration explained in a 1998 Statement of Administration Policy ("SAP") and testimony before Congress, and as this Administration has reiterated in a SAP and two separate Justice Department letters, such legislation infringes upon the President's constitutional authority to protect against the unauthorized disclosure of classified information by Executive Branch personnel, and specifically to ensure that individuals who receive classified

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information do not disclose or use it in a way that would jeopardize national security. By vesting subordinate Executive branch officials with a right to disclose classified information outside the Executive branch without specific authorization from the President or his designees, and by attempting to prevent the President and his designees from preventing unauthorized disclosures of classified information, the bills violate the Constitution and threaten national security.

The provisions in the bills that would allow administrative and judicial review of Executive branch security clearance determinations also interfere with the President's constitutional authority over national security information, and would upset the delicate balance between whistleblower protection and the ability of Federal managers to manage the workforce by permitting employees to bring a whistleblower complaint in response to almost every adverse employment action. The existing guarantees in the Whistleblower Protection Act are sufficient to promote and protect genuine disclosures of matters of public concern by offering protection from adverse personnel actions to employees who report government wrongdoing to those in a position to remedy the problem. The vast expansion of protected disclosures proposed in the current bills threatens to convert any disagreement between employees over an issue or contrary interpretation of a law, no matter how trivial or frivolous, into a whistleblower disclosure. The bills would also permit employees to impede legitimate investigations (even those by Inspectors General) by arguing that the investigations themselves are "adverse actions" against the whistleblowers. Instead of providing further protection to those with legitimate claims, the bills threaten to increase the number of frivolous claims of whistleblower reprisal, compromise legitimate investigations into wrongdoing, and create protections for disgruntled employees whose jobs would not otherwise be secure.

Finally, the bills would permit employees to engage in judicial forum shopping in having their claims resolved. Whistleblowers already have the right to seek corrective action for an unlawful personnel action from the Merit Systems Protection Board, and are afforded judicial review before the Federal Circuit. The current bills would allow employees to have their claims heard in Federal courts across the country, a system that could result in divergent interpretations of critical legal and national security questions.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised that from the perspective of the Administration's policy program, there is no objection to the submission of this letter.

Sincerely,

Mike McConnell

Mike McConnell
Director of National Intelligence

Robert M. Gates
Secretary
United States Department of Defense

Michael Chertoff
Secretary
U.S. Department of Homeland Security

Michael Mukasey
Attorney General
U.S. Department of Justice

cc: The Honorable John A. Boehner
Minority Leader
United States House of Representatives

The Honorable Richard B. Cheney
President
United States Senate

The Honorable Harry Reid
Majority Leader
United States Senate

The Honorable Mitch McConnell
Minority Leader
United States Senate

The Honorable Joseph I. Lieberman
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Susan M. Collins
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs