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U.S. DEPARTMENT OF JUSTICE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

JULY 23, 2008

Serial No. 110–197

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

43–681 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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U.S. DEPARTMENT OF JUSTICE

WEDNESDAY, JULY 23, 2008

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:24 a.m., in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Delahunt, Wexler, Sánchez, Cohen, Sutton, Sherman, Schiff, Davis, Wasserman Schultz, Ellison, Smith, Coble, Gallegly, Goodlatte, Lungren, Cannon, Keller, Issa, Pence, Forbes, King, Feeney, Franks, and Gohmert.

Staff Present: Elliot Mincberg, Majority Chief Oversight Counsel; Robert Reed, Majority Oversight Counsel; Renata Strause, Majority Staff Assistant; and Crystal Jezierski, Minority Counsel.

Mr. CONYERS. The Committee will come to order. We have before us the Attorney General of the United States, and perhaps for the last time in the 110th session. His responsibility is that of enforcing our Federal criminal laws, protecting voting rights, protecting us against foreign and domestic terrorism, enforcing the antitrust laws, the bankruptcy laws, the intellectual property laws, and immigration laws, as well as representing the Government in civil cases.

First, and perhaps most important, I believe we have not seen enough cooperation concerning voting rights. The regular meetings on voting rights that I thought would happen between the Judiciary staff, bipartisan in nature, and the Department of Justice staff, have not happened and have not been effected.

As we sit here today, probably a hundred days before the election, we don't know specifically how our Government will respond to the practices that made the elections of 2000 and 2004 so problematical and so controversial, how we will respond to deceptive electioneering practices. Now this is the highest order of responsibility between the Department of Justice and the Judiciary Committee because we are going to be responsible, not just the outgoing Attorney General and the Department of Justice, but the House Judiciary Committee is going to be held accountable for what we did or didn't do in trying to make sure that many of the deceptive electioneering practices are stopped and not just punished after the fact but that we do something about it preemptively. How can we ensure voting machines are fairly allocated, how monitors will be

deployed, how we will respond to voter caging schemes, and avoid some of the terrible mishaps of 2000 and 2004.

In addition to the serious problems in those elections, we have seen numerous other voting problems, the approval of troubling redistricting plans in Texas and Georgia.

This Committee and everyone on it has responsibility for these 2008 elections. We have a hearing on voter rights and the 2008 election tomorrow. The Department of Justice, to this moment, doesn't have anybody committed to coming to that hearing. Chris Coates, the head of the Voting Section, hasn't agreed to come before us. We are hoping that that can be remedied between now and tomorrow.

Now we have been trying to get key members of the Bush administration before us. They have refused. Harriet Miers and Josh Bolton have refused to cooperate in the contempt proceedings. And why? Because the Department of Justice publicly has said they are not going to enforce a subpoena against these, the President's lawyer and the President's Chief of Staff.

This Department, Department of Justice, continues to validate the unprecedented concept of total immunity for high ranking officials. For example, Karl Rove. Last week, they oddly argued that non-grand jury statements given to Federal prosecutors were somehow privileged when it came to Congress.

We have been waiting months and months to obtain critical documents relating to the selective prosecution, obstruction of justice, the secret OLC opinions advocating expansive theories of presidential power that strike at the very core of our constitutional freedoms. With less than a hundred or so days remaining before the election and 6 months before the Administration ends, this delay is unacceptable.

I am sorry to say that the Attorney General has continued the unfortunate tradition of refusing to appoint a single special prosecutor for any of the evidences of misconduct that would require the Department of Justice to bring in outside counsel.

Every Member of this Committee wants the Attorney General and this Department to perform its mission fully, and it is more important now than ever before with the world getting smaller, the global considerations, the military actions that still go on. I hope that we are going to be able to conclude our relationship, Mr. Attorney General, in a way that we get some of these matters resolved and not that they were left hanging as we brought the 110th session to an end.

We have got a big need for a lot of information, and I am hoping that today will lay the groundwork for us to begin to accomplish as much of this as is possible.

I now recognize the Ranking Member, Lamar Smith, for his comments.

Mr. SMITH. Thank you, Mr. Chairman. Attorney General Mukasey, thank you for appearing before the Committee for the second time, perhaps for the last time in this Administration, to discuss the important work of the Department of Justice. We appreciate your doing so.

Mr. Chairman, there are many important subjects the Committee could focus on in its oversight efforts today. For example, we

could make this a very productive hearing by having this Committee take immediate action to address habeas corpus concerns following the Supreme Court's recent ruling of *Boumediene v. Bush.* On Monday, the Attorney General outlined the significant problems law enforcement officials now face as a result of that ruling. It is now the responsibility of this Committee to act.

In its decision, the Supreme Court opened a Pandora's Box and the Attorney General has made it clear that only Congress can close the lid by enacting clear rules regarding the detention of known terrorists. If this Committee fails to act, Federal courts may order the Government to release known terrorists. There are more than 200 detainees remaining at Guantanamo Bay, and many of them wish to kill as many innocent Americans as possible. If this Committee fails to act, sensitive intelligence on terrorists may be disclosed and terrorists will know better how to evade detection and conceal future plots. If this Committee fails to act, known foreign terrorists will be able to forum shop in the most favorable places to bring their claims, both in the Federal district courts and in the Court of Appeals for the D.C. Circuit, in a way even domestic American criminals cannot.

The Attorney General has told us what common sense tells us, we must commit ourselves to the development of a legislative proposal that provides clear guidance on the detention of known terrorists. We must act. We must act responsibly, and we must act quickly.

Another area where Congress can assist the Department is in protecting America's children from sexual predators and cyber criminals. Nameless, faceless criminals use the World Wide Web as their virtual hunting ground. Child exploitation, child pornography and cyber bullying are just a few of the 21st century crimes threatening our children today.

A simple step Congress can take to enhance our crime fighting efforts is to require the retention of certain subscriber records by Internet providers. This Committee must pursue this and other innovations if we have any hope of keeping pace with crime in the cyber age.

One of the areas where there already is bipartisan agreement is in confronting and deterring criminal activity in the arena of intellectual property theft. We should help advance the legislative efforts of this Committee, including the Prioritizing and Organization for Intellectual Property Act of 2008, which passed the House overwhelmingly in May, to enhance IP enforcement efforts.

Also, I am pleased with the Department's recent work to support DHS immigration enforcement efforts by increasing prosecutions and available prison bed space. For too many years, illegal immigrants knew that they faced absolutely no penalty if they were apprehended along the southern border, other than a quick bus ride back across that border. They had every reason to try to enter again and again until they eventually succeeded, as 90 percent of them did.

The Justice Department's Operation Streamline for the first time has put an end to this revolving door. We have too much at stake to shy away from enforcing the law and ensuring that individuals entering the U.S. do so illegally.

Mr. Attorney General, I appreciate the tireless dedication to the men and women of the Justice Department, and look forward to working together with you to keeping Americans safer in the future.

I yield back.

Mr. KING. Mr. Chairman, would you yield to a brief colloquy?

Mr. CONYERS. Absolutely not.

The Attorney General brings a long, distinguished background to the Department of Justice. He has been a practicing attorney, a Federal prosecutor, a member of the firm of Patterson, et al., a trial judge since 1988, and was appointed by President Reagan as a trial judge for 18 years; 6 of those were as Chief Judge of the District. He retired in 2006, was called back by President Bush, confirmed as the Attorney General in the fall of 2007.

We have your statement, sir, and it will be put in the record in its entirety, and all the Members will have an opportunity to add their own opening statements to welcome you here. Thank you so much.

TESTIMONY OF THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE

Mr. MUKASEY. Chairman Conyers, Ranking Member Smith, and Members of the Committee, I thank you for the opportunity to testify here today. Since I appeared before this Committee almost 6 months ago, I have become even better acquainted with the talented and dedicated professionals at the Justice Department and with the work that they do, and have come to appreciate that much more deeply, their service to our Nation.

I have now been Attorney General for slightly more than 8 months. During that time, there have been moments of disagreement with Members of the Committee, as there always will be. There are policy initiatives that the Department supports, that some Members vigorously oppose, and policy initiatives that some of you support, that the Department opposes.

There are also situations where the interests of the executive branch and of the legislature are on tension. This is not, as some people have suggested, evidence of a broken or a flawed political system. It is part of the genius of the design of our Constitution, which embodies a robust separation of powers. Although these tensions will never disappear, there are many areas of agreement in which we can work together on behalf of our common clients, the American people.

I would like to outline briefly two areas that I will focus on during the 6 months remaining in this Administration. First, with the first post-2001 transition looming, we must take every step to ensure that custody and responsibility for our Nation's security is transferred smoothly to a new set of caretakers. That means putting national security measures on a sound institutional footing so that the next Attorney General and the new Administration will have in place what they need to continue to assure the Nation's safety.

Two weeks ago, Congress took a vital step in passing the FISA Amendments Act of 2008, bipartisan legislation that will give our

intelligence professionals critical long-term authorities to monitor foreign intelligence targets located overseas.

Earlier this week, I called upon Congress to take another step by passing legislation to address the questions about detainees unresolved by the Supreme Court's recent decision in *Boumediene v. Bush*. Congress and the executive branch are in a far better position than the courts to create practical procedures and rules to govern the habeas hearings required by the Supreme Court, procedures and rules that would both give the detainees what they are due, what process they are due, and accommodate the grave national security concerns involved.

In my speech earlier this week I outlined six principles that should guide such legislation, and I look forward to working with you and your colleagues on both sides of the aisle and in both Houses of Congress to address these important issues promptly.

Second, as everyone knows, the election season is upon us. Although State and local governments have primary responsibility for administering elections, the Justice Department must make every effort to help assure that the elections run as smoothly as possible and, equally important, that the American people have confidence in the electoral process.

The Department will maintain a significant presence throughout the election season through both outreach and monitoring. We will work closely with civil rights group and State and local officials to identify and solve problems. We will publicize telephone numbers and Web sites through which people can bring potential issues to our attention, and on election day we will deploy hundreds of observers and monitors around the country.

These steps will supplement our ongoing efforts both to enforce laws, including the Voting Rights Act, designed to guarantee access of all Americans to the ballot, and to enforce laws, including those prohibiting voter fraud and campaign finance abuse intended to safeguard the integrity of the voting process.

All these efforts are essential in ensuring elections reflect the will of the people and in maintaining the confidence of all Americans in our system of Government. In all of this we will be driven by what the law and the facts require, and only by that.

In fact, I have said many times both to members of the public and to Department employees, that we must pursue all of our cases in that manner. I have also said many times that we must hire our career people without regard for improper political considerations. I have acted and I will continue to act to ensure that those words are translated into reality.

I am well aware of the allegations that politics has played an inappropriate role at the Justice Department. Too many of those allegations were borne out in a recent report by the Department's Offices of Inspector General and Professional Responsibility on hiring for the Honors Program and for the Summer Law Intern Program. Even before I became Attorney General last fall, however, the Justice Department had taken many significant steps to remedy the problems that existed. I have since taken several additional steps, and we will continue to take any and all steps that are warranted. It is absolutely crucial that the American people have complete

confidence in the propriety of what we do, and I will work to make certain that they can have such confidence.

Mr. Chairman and Members of the Committee, I thank you for the opportunity to make these remarks and I look forward to answering your questions. Thank you very much.

[The prepared statement of Mr. Mukasey follows:]

PREPARED STATEMENT OF THE HONORABLE MICHAEL B. MUKASEY

Department of Justice

STATEMENT OF

THE HONORABLE MICHAEL B. MUKASEY
ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"

PRESENTED

July 23, 2008

I appreciate the opportunity to come before you today to talk about the work of the men and women of the Department of Justice.

I have now been Attorney General for more than eight months, and there is slightly less than seven months remaining in this Administration. As I move into the second half of my service, I would like to outline my priorities during the time I have left and to review our progress in the five areas on which I have primarily focused so far.

As I indicated six months ago to this Committee, I am confident in relying on the talented, committed, and dedicated professionals at the Justice Department and I take great pride in them. During the last six months, I have been privileged to become better acquainted with these fine men and women and with the great work that they do. I deeply appreciate their resolute service to our Nation.

At the outset, I would like to outline two areas where I plan to focus my attention during my remaining time at the Department of Justice. First, the election season is upon us, and it is critical that the Department make every effort to assist state and local governments in ensuring that the November elections run as smoothly as possible and that the American people have the utmost confidence in our electoral process. The Department is providing training to the lawyers and investigators who will be most responsible for those efforts. Just a few weeks ago, for example, the Department held its seventh annual Ballot Access and Voting Integrity conference at the National Advocacy Center in Columbia, South Carolina. I spoke to the lawyers and agents in attendance

about the importance of their work—of safeguarding the voting rights of all who are entitled to vote and of ensuring that those votes are not undermined or diluted by fraud or corruption. And I stressed the necessity of pursuing these cases according to what the law and facts require, and not based on partisan or political considerations.

The Department has primary responsibility for safeguarding the voting rights of all who are entitled to participate in elections. Through vigorous enforcement of the Voting Rights Act—one of the most important and most successful pieces of civil rights legislation in our history—the Department ensures that Americans of all races and colors as well as language minorities are able to participate effectively in the political process. Through other statutes—like the Uniformed and Overseas Citizens Absentee Voting Act, the Help America Vote Act and the National Voter Registration Act—the Department protects the vote of others in our society whose needs deserve particular attention.

The Department also helps guarantee the integrity of our elections through criminal laws combating voter fraud. In recent years, some have tried to suggest a conflict between protecting voting rights and combating voter fraud. But those are really two sides of the same coin. If some of our citizens are denied their right to vote, that is a form of voter fraud, in the sense that the outcome of the election will not accurately reflect the popular will. If some voters engage in fraud, and either vote when they are not entitled to, or vote more than once, that dilutes the voting rights of all legitimate voters. Both protecting voting rights and combating voter fraud are essential to maintaining the confidence of all Americans in our system of government.

Through outreach and monitoring, the Department intends to maintain a significant presence throughout the election season. We will work closely with civil rights groups and state and local elections officials to identify and solve problems in a timely and appropriate fashion. We will publicize telephone numbers, websites and other means through which interested citizens can bring potential issues to our attention. The Department, in conjunction with the Office of Personnel Management, has already deployed hundreds of federal observers and monitors to locations around the country in 2008. We will continue our monitoring efforts on Election Day, focusing on areas where there are potential civil rights violations and jurisdictions where we have ongoing consent decrees. Our goal is to make sure that any complaints are dealt with promptly and appropriately, and to make our presence felt so that the American people can continue to have confidence in our system of government.

Second, once the November elections are over, there will be the vitally important task of ensuring an orderly and safe transition to a new Administration. As part of that transition, we will take every step to ensure a smooth transfer of custody and responsibility for our Nation's security to a new set of caretakers. One of my most solemn duties is to turn over responsibility for running the Department of Justice to the next Attorney General and to be able to say to him or to her that we have in place the tools necessary to keep the country safe.

This will be the first transition to a new Administration since September 11, 2001, and we know that those who helped perpetrate the outrage committed against us that day, and those who support and sympathize with their cause, will be watching for division within our country and for opportunities to attack. In the same way that some of the hijackers took practice flights prior to September 11th to assess airline security measures, so too others will be evaluating the strength of our national security during the transition to a new Administration. I am committed to making sure that, on January 20th, their analysis will be that our system is too strong to give them reason for hope.

This commitment will take effort and focus by everyone at the Department of Justice. Ensuring a smooth transition will require not only serious thought about the big picture, but also a serious focus on the details that make up that big picture. We must ensure that all of our country's security measures are attuned to the increased risk we face during this time of transition, and that we respond and adjust appropriately. We also must emphasize to the Department's employees that, although these months are a time of great anticipation, all of their considerable talents must be focused on the task at hand. And finally, we will have to make sure that the right personnel are in the right positions at the right times. In short, we must focus on every task, no matter how large or how small, if we are going to show that, although we have a two-party political system in the United States, we are one nation. And that this Nation stands together when needed, especially in times of transition or times of crisis.

We are also working to complete the post-September 11th transformation of the Department's institutional structure. After the September 11th attacks, and on the recommendation of two commissions that looked into the matter, the Department undertook two major reorganizations. One was the creation of the National Security Division, which placed within one division, and in a single chain of command, the Department's counterterrorism and counterespionage prosecutors and the intelligence lawyers who represent the government before the Foreign Intelligence Surveillance Court. The second was the establishment of the National Security Branch within the Federal Bureau of Investigation, which was created to provide an organizational structure to help manage the Bureau's transformation from solely an elite law enforcement agency, into an agency with a principal mission to detect and prevent terrorist attacks.

The National Security Division and the National Security Branch are each less than three years old, and, as you would expect, the transformation of the Department's national security structure requires more than a change on an organizational chart; it requires sustained commitment to developing the management, personnel, and processes necessary to make these reorganizations successful. This effort is particularly important at the Federal Bureau of Investigation, which has worked hard to become a world-class intelligence agency. That goal involves developing new ways to recruit, train, and provide career paths for those who wish to devote their careers in the Bureau to intelligence collection and analysis, as opposed to the Bureau's more traditional law enforcement activities. The Director is committed to continuing this progress, and I have been doing what I can to support him in this effort.

One project the Department has been working on is consolidating and harmonizing the various sets of Attorney General guidelines governing the FBI's domestic investigative activities, so that the Bureau's employees have clearer and more consistent rules governing domestic investigative activity. We are not revising the Attorney General's guidelines on the use of race, nor will we alter our traditional respect for First Amendment activities, as reflected in our current guidelines and practices. Moreover, these guidelines could not, and would not purport to, circumvent constitutional limitations on the use of race, religion, or other protected classes in all manners of investigations. At the end of the day, the FBI cannot and will not predicate an investigation simply on the basis of race, ethnicity, or religion.

It is also important that we do everything we can to give our national security professionals, who will be confronting the al-Qaeda threat in this Administration and the next one, the tools they need to keep us safe. I am pleased Members of Congress came together in a bipartisan manner to pass legislation that will ensure that our ability to acquire foreign intelligence information using the Foreign Intelligence Surveillance Act will keep pace with the technologies and the threats of the 21st century. The ability to intercept and evaluate the electronic communications of our country's enemies is the most important defensive weapon we have, and I am pleased that the next Administration will have the long-term tools that they will need to continue to secure the homeland. This bill also provides that our critical relationships with private partners will continue into the future, by providing limited retroactive immunity. For all of this, I thank the Members of this Committee and your colleagues in the Senate.

It would be of grave concern, however, if Congress were to provide the next Administration with updated tools on the one hand, while with the other hand jeopardizing that Administration's ability to fulfill its constitutional responsibility to safeguard classified information. I refer here to proposals to create a special statutory privilege for journalists. Both the House and Senate versions of the Free Flow of Information Act would endanger national security by making it nearly impossible for us to investigate leaks of even the most sensitive national security information; by essentially providing a roadmap for leaking classified information; by implicating core national security tools such as the newly amended FISA; and by allowing individual judges to decide, even in the face of a showing by the government that information from a reporter would assist in preventing specific and articulable harm to the national security, that an undefined benefit to public disclosure nonetheless outweighs that showing. The Department takes very seriously the importance of the free flow of information, as our record demonstrates. We cannot support, however, these proposed reporters' shields.

I would like to devote the remainder of my statement to providing updates on the Department's efforts and accomplishments in the last six months in the five critical areas I identified in January 2008: national security, violent crime, civil rights, public corruption, and immigration and border security.

National Security

Although I believe we have made progress in each of these areas, national security stands apart as an area of particular focus for me. Continuing to work to improve the effectiveness of our national security capabilities—particularly as we approach our Nation's first post-9/11 transition—will be one of the most important tasks I have going forward.

Each morning, I receive a classified briefing on all of the terrorist threats our Nation faces around the globe. These briefings are simultaneously sobering and alarming, and the plots we hear about each day are both creative and deadly. We face an enemy with a presence, literally, in every part of the globe; yet an enemy who, in many places, is virtually undetectable. Because of that, it is critical that we get timely intelligence of our adversaries' capabilities and intentions.

The Department has had important national security successes in recent months. For example, on June 13, 2008, a jury in the Northern District of Ohio convicted three Ohio residents, Mohammad Amawi, Marwan El-Hindi, and Wassim Mazloum, of conspiracy to provide material support to terrorists and conspiracy to commit terrorist acts against Americans overseas, including U.S. soldiers in Iraq. On June 3, 2008, another Ohio resident, Christopher Paul, pleaded guilty in the Southern District of Ohio to conspiracy to use explosive devices against targets in the United States and Europe. At his plea hearing, Paul admitted that he joined al-Qaeda in the early 1990s, later fought in Afghanistan and Bosnia, and ultimately conspired with a German terror cell to bomb

targets in the United States and abroad. These prosecutions highlight 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.

In recent months, I have spent considerable time maintaining and building upon our law enforcement and counterterrorism relationships with our overseas partners and allies. Because these efforts are of great importance, I would like to elaborate on what the Department has been doing in this area. In March 2008, I participated in the Justice and Home Affairs Ministerial between officials from the European Union and the United States. We discussed issues ranging from terrorist recruitment and radicalization, to plans to share information to combat terrorists, to an increased focus on international organized crime. We also discussed ways to share best practices and further benefit from the work of our respective law enforcement and disaster response agencies, by, for example, exchanging information on how we might respond to potential chemical or biological attacks.

Also in March 2008, I met with German officials in Berlin for the initialing of a bilateral agreement between Germany and the United States that permits access to biometric data and spontaneous sharing of data about known and suspected terrorists. This is a great achievement, both for its practical benefits and for what it symbolizes. This agreement gives us an important new tool to combat terrorism and to fight transnational crime. Each of our countries will have access to the criminal fingerprint databases of the other—in the first instance simply to determine on a yes or no basis if

there is evidence in those databases that could be helpful in criminal investigations and prosecutions. If such evidence is located, the agreement also sets forth procedures for obtaining it through lawful processes that also ensure appropriate protection for personal data. In addition, the agreement provides a mechanism for sharing information about known and suspected terrorists, so we can prevent them from entering our countries and attacking our people. But beyond the important practical value of this agreement, it symbolizes the joint resolve of Germany and the United States to fight terrorism and transnational crime.

In addition to building on established law enforcement relationships, the Department has focused on our efforts to build the law enforcement capacity of emerging overseas partners. Recently I was in Asia—Thailand, Indonesia, and finally in Japan, which hosted the G8 Justice and Home Affairs Ministerial—meeting with representatives of law enforcement and with the American officials working to maintain the cooperation between our countries on legal matters. I had the opportunity to see first-hand the highly successful capacity-building programs the Justice Department has underway in Indonesia. With vital funding and programmatic and policy support from the State Department, and with the active cooperation of State Department personnel, we have placed an experienced U.S. federal prosecutor in Jakarta to work with the Indonesian Attorney General's Terrorism and Transnational Crime Task Force, and to develop a new Anti-Corruption Task Force; and we have in place a Senior Law Enforcement Advisor, who—with 44 staff members—leads more than a dozen law enforcement programs with the Indonesian National Police, on topics ranging from national training reform, to forensic

analysis, to specialized investigative techniques for combating human trafficking, intellectual property violations, and maritime crime.

The results of this law enforcement partnership with Indonesia have been remarkable: among other accomplishments, the units we have worked with have secured more than 40 convictions of terrorists, made one of the largest single seizures of counterfeit pharmaceuticals ever, and helped secure the strategic waters surrounding Indonesia, which were plagued by piracy and smuggling.

Indonesia is only one of more than 60 countries in which the Department of Justice is engaged in overseas rule of law work. We are working with foreign governments around the world to develop professional and accountable law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism. We do this both through the overseas work of our law enforcement agencies – including the FBI, DEA, USMS, and ATF – and through our specialized international prosecutorial and police development offices, the Office of Overseas Prosecutorial Development, Assistance and Training, known by its acronym OPDAT, and the International Criminal Investigative Training Assistance Program, known as ICITAP.

With funding from and in coordination with the State Department, those two programs place federal prosecutorial and police experts in host countries for long-term assignments designed to focus on the comprehensive development of all pillars of the

criminal justice system. Having had the chance myself to see these programs in action in Indonesia, Iraq, Turkey, and Thailand, and having met with my counterparts from Colombia and other countries where these programs are in place, I can tell you that this is some of the most important work the Department does. By building the capacity of our overseas law enforcement partners to fight terrorism and transnational crime within the rule of law, we increase the safety not only of their citizens, but of our own as well.

When I appeared before the Senate Judiciary Committee two weeks ago, I noted that the Executive Branch was considering how best to handle some of the significant challenges posed by the Supreme Court's recent decision in *Boumediene v. Bush*, which held that the detainees at Guantanamo Bay have a constitutional right to challenge their detention through habeas corpus proceedings. Earlier this week, I gave a speech urging Congress to pass legislation to address the questions left unresolved by the decision. In my judgment, Congress and the Executive Branch are in a better position than the courts to create practical procedures and rules to govern the habeas corpus hearings required by the Supreme Court, procedures and rules that would both give the detainees what process they are due and accommodate the grave national security concerns involved. In my speech, which I have attached to my statement, I outlined six principles that I believe should guide such legislation, and I look forward to working with you and your colleagues on both sides of the aisle to address these important issues promptly.

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 as a result of federal, state, and local law enforcement partnerships developed through initiatives such as 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.

At the end of January 2008, the Department launched the Project Safe Neighborhoods Anti-Gang Training in Chapel Hill, North Carolina. The training program was attended by more than 550 participants from North Carolina and South Carolina, including law enforcement officers, prosecutors, and prevention and re-entry representatives. The goal of the program is to increase the level of knowledge, communication, and collaboration involved in addressing the criminal gangs preying upon communities throughout the nation.

The training program's courses are comprehensive and include gang-related prevention, enforcement, prison re-entry programs, and an executive session designed for law enforcement executives. The training assists state and local jurisdictions in the collection, analysis, and exchange of information on gang-related demographics, legislation, literature, research, and promising program strategies. The training helps state and local law enforcement and criminal justice agencies learn how to recognize and identify gang presence in a community.

This training will be offered regionally throughout the United States in 2008 and 2009. Besides Chapel Hill, the program has been held thus far in Nashville, Tennessee; Oklahoma City, Oklahoma; Birmingham, Alabama; and Salt Lake City, Utah. Future training sites include Chicago, Illinois; Spokane, Washington; Rochester, New York; Sacramento, California; and Mesa, Arizona.

The Department is also making great strides in combating gangs with international operations. In June 2008, a federal grand jury in Charlotte, North Carolina, indicted 26 members of the violent gang known as MS-13 on charges of federal racketeering and related crimes in the United States and El Salvador. The indictment alleges, among other things, that the gang members formed a drug trafficking conspiracy, distributed narcotics, committed robberies, illegally possessed firearms, committed acts of violence and extortion, and intimidated witnesses and obstructed justice.

This indictment results, in part, from a series of comprehensive anti-gang initiatives undertaken jointly by the Justice Department and national police of El Salvador, known as the PNC. For example, last year we created a joint FBI and PNC Transnational Anti-Gang center – the so-called "TAG" center – posting experienced anti-gang FBI agents in El Salvador alongside PNC officers, analysts, and prosecutors to combat transnational gang activity.

Supplementing the TAG center, the FBI's Central American Fingerprint Exchange initiative operates to assist El Salvador and other Central American countries in identifying, tracking, and apprehending gang members. And through the International Law Enforcement Academy in El Salvador, we have provided crucial anti-gang training to law enforcement officers and prosecutors from El Salvador and from other countries throughout the region.

This high-level international commitment to fighting back against transnational gangs was also evident in the meeting I presided at two months ago in Washington, D.C., of the justice ministers of Central America and Mexico. Combating gangs was a significant focus of that meeting. And following on that meeting, we are looking for ways to expand further our partnerships and efforts throughout the region.

These international initiatives benefit from the efforts of our Criminal Division's Gang Squad, federal prosecutors in our U.S. Attorneys' offices, and the FBI's MS-13 National Gang Task Force. They also benefit from the pair of anti-gang centers that recently opened their new joint headquarters in Virginia: the National Gang Intelligence Center and the National Gang Targeting, Enforcement & Coordination Center, the task force known as "GangTECC."

The Department is also responding to the threat of international organized crime, a hybrid criminal problem that implicates three of the Department's national priorities: national security, violent crime, and public corruption. It needs a coordinated response

and an openness to new ways of doing business. It also demands that we work closely with our foreign colleagues in order to dismantle global criminal syndicates. In short, this is about more than the Department of Justice. It involves our law enforcement and non-law enforcement colleagues at the Departments of Homeland Security, State, Treasury, and Labor, the U.S. Postal Service, as well as the intelligence community.

The Attorney General's Organized Crime Council, which met in March 2008 for the first time since 1993, will have a leading role in coordinating that effort. It is actively engaged in identifying the most serious threats, and in developing strategies to combat them. In April, I met with the Council and approved a Law Enforcement Strategy to Combat International Organized Crime. The strategy is an important part of this Administration's ongoing coordinated commitment to safeguard our national security from transnational threats. The strategy places its highest priority on those groups that threaten our national security, the stability of our economy, and the integrity of government institutions, infrastructure, and systems in the United States. Let me describe the strategy, which we've already begun to implement; the threats we face; and some of the recent successes we have had against international organized crime outfits.

First, we have to target the biggest organized crime threats, just as we've done successfully in targeting the worst transnational drug cartels. We will develop a high-priority list of people and organizations that pose the greatest threat, and then focus our resources on them.

Second, we have to marshal information from all available sources—law enforcement, the intelligence community, foreign partners, and the private sector—so we can identify and draw connections among the groups.

Third, we have to use every means and agency at our disposal—whether it is the Secret Service to identify counterfeit currency, the IRS to locate financial assets, or the Bureau of Alcohol, Tobacco, Firearms and Explosives to find contraband weapons. That means we will be increasing the information we provide to the State Department to support their programs to deny visas to criminals, and to the Treasury Department to support their sanctions programs that target money laundering. It also means we will step up what we are already doing with our international partners to get these criminals wherever they hide. Criminals have no regard for international borders, so we're making sure those borders do not pose an obstacle to effective enforcement.

Fourth, we have to develop aggressive strategies for dismantling entire criminal organizations and removing their leadership. We have more than 120 prosecutors, and the FBI has more than 500 agents and analysts, dedicated to fighting organized crime. These professionals are skilled in using techniques originally developed to fight La Cosa Nostra and other domestic threats. We are going to capitalize on that expertise in our global fight.

As I said earlier, the assessment contained in the Law Enforcement Strategy describes the most important threats in the global battle against organized crime. The

first threat we identified was that international organized criminals control significant positions in the global energy and strategic materials markets. They are expanding their holdings in these sectors, which corrupts the normal functioning of these markets and may have a destabilizing effect on U.S. geopolitical interests. A prime example of an international organized criminal in this area is Semion Mogilevich—also known as the "Brainy Don"—and several members of his criminal organization whom the United States charged in a 45-count racketeering indictment in 2003. According to published reports, even after the indictment, Mogilevich continued to expand his criminal empire in a new direction. He was said to exert influence over large portions of the natural gas industry in parts of what used to be the Soviet Union. The arrest of Mogilevich by Russian police in January 2008 is a positive sign. But we continue to monitor the growth of organized crime and its penetration into some of these markets with great concern.

When I use the term "international organized criminal," I do not mean to suggest that these are only foreign citizens, or to place blame for the problem on other nations. I am referring to the globalization of crime and to groups with members and associates around the world, including here in the United States.

A second threat we identified was the logistical and other support that organized crime provides to terrorists, foreign intelligence services, and foreign governments that may be targeting the United States or otherwise acting against our interests. In March 2008, a complaint was unsealed against Viktor Bout, a notorious international arms trafficker. Bout, who has since been indicted, is charged with conspiring to sell millions

of dollars worth of weapons to the Revolutionary Armed Forces of Colombia, known as FARC – a designated foreign terrorist organization. The complaint alleges that Bout, along with an accomplice, agreed to sell the FARC 100 surface-to-air missiles, as well as launchers for armor-piercing rockets. Luckily, in this instance, the individuals holding themselves out to be members of the FARC were actually confidential sources working with the Justice Department. As this example makes clear, although these criminals are not motivated by ideology, when the price is right, they are more than willing to help the people who are motivated by ideology.

Another set of recent cases illustrates a third threat—from international organized criminals who smuggle and traffic people and contraband into the country. Together, Operation Royal Charm in New Jersey and Operation Smoking Dragon in Los Angeles uncovered an extensive Asian criminal enterprise that was smuggling nearly every form of contraband imaginable. These investigations resulted in the indictment of 87 people who smuggled goods into the United States by using shipping containers with bills of lading that falsely identified the contents as toys and furniture from China. Instead of toys, the smugglers were bringing in millions of dollars worth of high quality counterfeit $100 bills as well as counterfeit pharmaceuticals and cigarettes, and illicit drugs including ecstasy and methamphetamine. Two of the defendants entered into a deal with undercover agents to provide various weapons, including hundreds of shoulder-fired rockets capable of shooting down airplanes.

A fourth threat involves the ways organized crime exploits the U.S. and international financial systems to move illicit funds. These groups are run like global corporations; they use sophisticated financial operations. They may exploit legitimate banking systems here and abroad to launder money, or engage in other financial crimes like insurance fraud. And over the past several years we have seen cases where U.S. shell companies were established and used for global money laundering schemes in Russia, Latvia, the U.S., and other countries. The criminals operating these schemes are willing to move money for anyone who needs to hide the source, ownership, or destination of the funds—no questions asked. They utilize corrupt banking officials and exploit lax anti-money-laundering protections around the world to inject illicit funds into the global money stream. By all estimates, such schemes move billions of dollars every year through U.S. financial institutions.

A good example is the case of Garri Grigorian, a Russian national living in the United States who helped launder more than $130 million on behalf of the Moscow-based Intellect Bank and its customers, through bank accounts in Sandy, Utah. Grigorian and his co-conspirators set up three U.S. shell companies, and then set up bank accounts for those companies in Utah and New York. The companies never did any business; they existed only to create the illusion that transactions to and from their bank accounts were legitimate trade. Once those accounts were set up, Intellect Bank could use them for U.S. dollar wire transfers on behalf of their clients. In total there were more than 5,000 of

these wire transfers in a little more than two years. For his crimes, Grigorian was sentenced to 51 months in prison and ordered to pay $17 million in restitution.

As we tighten up our banking regulations to fight this type of crime, criminals have developed more complex schemes and turned increasingly to offshore jurisdictions with less rigorous requirements, but with the same access to our banking systems. Identifying the danger is crucial. Yet another threat is the way international organized criminals use cyberspace to target U.S. victims and infrastructure. The internet is a boon to organized crime—it's anonymous, largely untraceable, and can provide instant communication for a far-flung network of crooks.

Criminals need only sit back and wait for entrepreneurs to come up with legitimate new uses for the internet, which they can then corrupt. For instance, technology in the past few years has created brand new avenues for money laundering with the proliferation of so-called "virtual-world" games like Second Life, and with mobile payment systems.

A number of recent cyber investigations in the United States—involving everything from fraudulent eBay auctions to so-called phishing schemes responsible for large-scale identity theft—have traced the perpetrators back to Romania, long considered to be a main source of electronic crime. Close cooperation between the Department, the FBI, the U.S. Secret Service, and Romanian authorities has revealed a troubling phenomenon.

Traditional Romanian organized crime figures—who previously were involved in offenses like drug smuggling, human trafficking, and extortion—have joined forces with other criminals to bring some young computer hackers under their control, and have organized them into cells based on their cyber-crime specialty.

Fortunately, Romanian officials are taking these developments seriously, and last November they arrested eleven of their citizens who were part of a ring that perpetrated these phishing schemes. The criminals got personal data from computer users, imprinted credit and debit card information onto counterfeit cards, and then used those cards to obtain cash from ATMs and Western Union locations. Romanian police executed 21 search warrants and seized computers, card reading and writing devices, blank cards, and other equipment.

Other threats identified in our assessment include manipulation of securities markets; corruption of public officials, globally; and use of violence as a basis for power. These are the hallmarks of international organized crime in the 21st century. That is what we are up against. As you can see, organized crime has become a lot more complex and diversified since the days of Robert Kennedy.

The Department has likewise made great strides to combat the online abuse and exploitation of children, especially child pornography, through Project Safe Childhood (PSC). Let there be no mistake, child pornography—an inapt term to describe images of child sexual abuse—is a violent crime. This crime violates not just the bodies of

children, it takes a piece of their soul; even where the abuse has ended, the images continue to be exchanged like trading cards among those who harbor sexual interest in children. Through PSC, the Department has effectively marshaled federal law enforcement and our state and local partners, with the assistance of non-governmental organizations like the National Center for Missing and Exploited Children, to dramatically increase the number of investigations and prosecutions.

In early May 2008, Deputy Attorney General Filip announced the distribution of $5 million in new funds to support Project Safe Childhood. The money was used to fund 43 new Assistant U.S. Attorney positions across the nation to prosecute these offenses. The positions were awarded on a competitive basis among the many districts with demonstrated records of successfully prosecuting sexual crimes against children, with no district awarded more than one new position. With these new prosecutors, we expect to continue building on our successes in this area.

Preventing crimes against children and convicting those who commit them are not sufficient without also managing and monitoring sex offenders in free society. Through the Adam Walsh Act the Department has been given new authorities and responsibilities to shore up this final piece of the effort to keep our children safe. The just-released Sex Offender Registration and Notification Act (SORNA) guidelines, which establish a baseline for states and tribes to maintain and share information about sex offenders, is a giant step forward. The creation of the failure to register violation at 18 U.S.C. Section 2250, and the expanded jurisdiction of the U.S. Marshals to enforce it, likewise add to

public safety. We appreciate the additional resources Congress has provided to combat this crime with more prosecutors and support for the U.S. Marshals to enforce the Adam Walsh Act.

Civil Rights

In this very important election year, the Civil Rights Division has been vigorous in its enforcement efforts. The Justice Department, through the Civil Rights Division, has primary responsibility for safeguarding the voting rights of all who are entitled to vote. Congress has given us various tools with which to do that work, and we are using all of them. Chief among them, of course, is the Voting Rights Act of 1965, one of the most important and most successful pieces of civil rights legislation in our country's history. Little more than a month ago, the Department won a major victory in court defending the constitutionality of Congress' 2006 reauthorization of that Act, which remains the basis for much of our work today.

Since I last appeared before this Committee, the Civil Rights Division has settled two important cases under Section 2 of the Voting Rights Act. In March 2008, the Justice Department settled a lawsuit against the Georgetown County, South Carolina, Board of Education. The complaint alleged that the at-large method of electing school board members violated Section 2 of the Voting Rights Act of 1965 because it diluted the voting strength of African-American voters in Georgetown County. While African-American citizens comprise approximately 38 percent of the population of Georgetown

County, the current school board is all white, and no African-American candidates have won a school board election during the last three election cycles.

Under the consent decree, in three single-member districts, African American citizens will constitute a majority of the age-eligible population. The district lines under the consent decree will mirror district lines for the Georgetown County Council. Under the terms of the consent decree, all seven districts will elect a board member in November 2008. The consent decree also requires that the chairperson of the board be elected by the board itself, instead of the current county-wide method for electing the board chairperson.

In April 2008, the Justice Department settled a Section 2 lawsuit against the Osceola County, Florida, School Board. The complaint alleged that the existing districts will result in Hispanic citizens having less opportunity than other citizens to participate in the electoral process and to elect candidates of their choice to office. Although county voters approved, in January 2008, a referendum changing from at-large elections to single-member district elections, state law prevented implementation of this plan in an even numbered year. Without this consent decree, the 2008 elections would have proceeded under a district plan that denied Hispanic citizens the equal voting opportunities guaranteed by the Voting Rights Act. This settlement follows a 2006 federal court ruling against Osceola County that at-large elections for electing its Board of County Commissioners violated Section 2 of the Voting Rights Act. The federal district court in Orlando held that the at-large election system diluted Hispanic voting

strength, and ordered elections to be held, beginning with a special election in 2007, under a remedial plan of five single-member districts.

On July 2, 2008, I spoke to over 200 federal prosecutors, civil rights attorneys, and FBI agents who took part in a two-day Ballot Access and Voter Integrity conference. They received a copy of a memorandum that I issued in March 2008 to remind all employees of policies regarding election-year sensitivities. I repeated the message that politics must play no role in the decisions of investigators or prosecutors as to any investigations or criminal charges; that law enforcement officers and prosecutors may never select the timing of investigative steps or criminal charges for the purpose of affecting any election; and that we must not do anything for the purpose of giving an advantage or disadvantage to any candidate or political party. Those principles have even more weight in decisions concerning ballot access and voter integrity, and I am confident that all Department employees will follow them.

The Department's successes under the Ballot Access and Voter Integrity Initiative have been significant. For example, in late January 2008, the Civil Rights Division reached an agreement with Tennessee officials to ensure that military service members and other U.S. citizens living abroad would have the opportunity to participate in the State's federal primary election in February. The agreement established emergency procedures for Tennessee's presidential primary election to allow eligible military and overseas citizens enough time to cast and return their ballots and to have their votes counted. In February, the Department settled a lawsuit it had filed under the Help

America Vote Act against Bolivar County, Mississippi. The consent decree established procedures for county officials to follow during federal elections regarding provisional ballots. In May 2008, the Department reached an agreement with the State of Arizona to bring the State's Department of Economic Security into compliance with federal laws, including the National Voter Registration Act, requiring public assistance agencies to offer their clients the opportunity to register to vote.

For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to further the goals of the Initiative. The program is designed 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 Civil Rights Division continues its enforcement in other areas as well. For example, in April 2008, the Department obtained a guilty plea for a federal hate crime in *U.S. v. Munsen*. Jeremiah Munsen drove past a group of African Americans who had participated in a civil rights rally in Jena, Louisiana, while displaying two hangman's nooses from the back of his pickup truck. The Department also recently obtained a conviction in *U.S. v. Milbourn* against a defendant for his role in burning an eight-foot-tall cross in the yard of the victim's home because the victim has three bi-racial children. In June 2008, the defendant was sentenced to 121 months in prison. Since Fiscal Year 2001, the Department of Justice has charged 65 defendants in 44 cross-burning cases.

The Department's enforcement efforts in human trafficking remain strong. In the last seven years, the Department of Justice has increased, by nearly seven-fold, the number of human trafficking cases filed in court as compared to the previous seven fiscal years. In Fiscal Year 2007, the Department obtained a record number of convictions in human trafficking prosecutions, whose victims were predominately women and minorities.

The Civil Rights Division's Housing and Civil Enforcement Section is charged with ensuring nondiscriminatory access to housing, credit, and public accommodations. The Section has continued to pursue Operation Home Sweet Home, an initiative that was launched two years ago to combat hidden forms of discrimination in housing. As part of the initiative, we committed additional resources to our fair testing program and enhanced our targeting. In Fiscal Year 2007, we conducted more than 500 paired tests, exceeding by more than 20 percent the highest number of tests conducted in any previous year since the program's inception. The testing program also is producing new cases. We are currently litigating a case alleging a pattern or practice of discrimination against African Americans in Roseville, Michigan. Another case on behalf of African Americans based on testing evidence is in pre-suit negotiations. In addition, during Fiscal Year 2007, Operation Home Sweet Home resulted in the first pattern or practice discrimination case ever brought by the Civil Rights Division on behalf of Asian Americans based on evidence from our testing program. That case, *United States* v. *Pine Properties* (D. Mass.), was settled in January 2008, with the defendants agreeing to pay up to $158,000

in monetary relief. Operation Home Sweet Home also has resulted in pattern or practice discrimination cases on behalf of families with children and guide-dog users.

In addition, in May 2008, the court in *United States* v. *Henry* (E.D. Va.), entered a consent order requiring the landlord of a subsidized housing complex to pay up to $361,000 to settle the Division's lawsuit alleging that the defendant imposed more restrictive rules and regulations on African-American tenants than on other tenants; verbally harassed African-American tenants with racial slurs and epithets; and evicted tenants by enforcing a limit of two children per family. We currently are litigating several other pattern or practice cases involving race and national origin discrimination.

The Americans with Disabilities Act (ADA) is a landmark law that protects the civil rights of the more than 50 million persons with disabilities and was intended to provide individuals' "equality of opportunity, full participation, independent living, and economic self-sufficiency." The Civil Rights Division's Disability Rights Section (DRS) protects the rights of persons with disabilities under Titles I, II, and III of the ADA. Two recent settlement agreements obtained by the Section illustrate some of its wide-ranging ADA enforcement efforts.

On March 10, 2008, a federal court in Michigan entered a consent decree resolving a lawsuit that the Justice Department and the Michigan Paralyzed Veterans of America filed against the University of Michigan. The lawsuit was brought to challenge the lack of accessible seating in the University's football stadium. Under the settlement, the University will add a minimum of 248 permanent wheelchair seats and 248

companion seats to the stadium during the next two years. The majority of these seats will be along the sidelines. Currently, the stadium has 81 pairs of wheelchair and companion seats, all located in the end zones. By the 2010 football season, the University will have at least 329 pairs of wheelchair and companion seats dispersed throughout the stadium.

Additionally, the Justice Department and the International Spy Museum recently reached a settlement agreement under the ADA. As a result of this precedent-setting agreement, which was announced on June 3, 2008, the museum agreed to work to bring the content of its exhibitions, public programs, and other offerings into full compliance with ADA requirements so that its exhibits are accessible and effectively communicated to individuals with disabilities, including individuals with hearing and vision impairments. By focusing on visitors who are blind or have low vision and who are deaf or hard of hearing, the agreement establishes a new level of access for cultural and informal educational settings. Of the 50 million Americans with disabilities, 16 million have sensory disabilities. The agreement seeks to ensure these individuals will have access to the museum's exhibitions, audiovisual presentations, and programs, as required by law.

The Department recently reached a settlement with New Century Travel, Inc., enforcing the ADA's requirement that over-the-road discount bus service be accessible for persons with disabilities. This is the first settlement agreement secured between the Department and a low cost, fixed route carrier. Among other things, the agreement

provides that persons who use wheelchairs can schedule rides on buses equipped with a wheelchair lift with 48 hours advance notice to New Century.

In addition to the Division's robust ADA enforcement efforts, the Department also recently announced that it is soliciting comment on proposed amendments to its regulations implementing Titles II and III of the ADA. The proposed regulations will, for the first time, establish specific requirements for the design of accessible public facilities such as courtrooms and an array of recreation facilities including playgrounds, swimming pools, amusement parks, and golf courses, making it easier for individuals with disabilities to travel, enjoy sports and leisure activities, play, and otherwise participate in society.

The proposed amendments are intended to implement standards consistent with revised guidelines published by the Architectural and Transportation Barriers Compliance Board (Access Board) and to adopt changes necessary to address issues that have arisen since the publication of the original regulations in 1991. The amendments, which represent more than 10 years of collaborative efforts among disability groups, the design and construction industry, state and local government entities, and building code organizations, also are intended to provide greater consistency between the ADA Standards and other federal and state accessibility requirements.

The Civil Rights Division's Special Litigation Section also protects the constitutional rights of persons with disabilities. Under Civil Rights of Institutionalized

Persons Act (CRIPA), the Department investigates conditions in public residential facilities and takes appropriate action if a pattern or practice of unlawful conditions deprives persons confined in the facilities of their constitutional or federal statutory rights. The Department's commitment to the enforcement of CRIPA is evidenced by the 76 investigations, 61 findings letters, 26 cases filed, and 58 substantial agreements filed from 2001 through 2007.

The Department and the State of Nebraska recently reached a settlement in a CRIPA case that protects the civil rights of the residents of a state owned and operated nursing home. Nebraska has agreed to ensure that the almost 300 individuals who reside at the Beatrice State Development Center will be safe and receive the care and services necessary to meet their individualized needs. Specifically, Nebraska has agreed to undertake a variety of measures, such as: providing a safe and humane environment with zero tolerance for resident abuse or neglect; providing adequate medical care, nursing services, and psychiatric care; and ensuring that residents are free from undue bodily restraint. Nebraska will also ensure that each resident is served in the most integrated setting pursuant to the ADA.

The Civil Rights Division also remains diligent in combating employment discrimination, one of the Division's longest-standing obligations. Title VII of the Civil Rights Act of 1964, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. Most allegations of employment discrimination are made against private employers. Those claims are investigated and

potentially litigated by the Equal Employment Opportunity Commission (EEOC). However, the Civil Rights Division's Employment Litigation Section is responsible for one vital aspect of Title VII enforcement: discrimination by public employers. The Department continues to litigate *United States v. City of New York*, which alleges that, since 1999, the City of New York has engaged in a pattern or practice of discrimination against black and Hispanic applicants for the position of entry-level firefighter in the Fire Department of the City of New York in violation of Title VII.

In June 2008, the Justice Department also announced the filing of a lawsuit against the city of Jackson, Alabama, alleging that the city violated Title VII when it discharged Virginia Savage, an African American, from her employment as a circulation clerk at the city's municipal library in retaliation for her complaints of racial discrimination and harassment by her supervisors.

Public Corruption

The investigation and prosecution of public corruption is among the highest obligations of law enforcement, and I consider it to be one of the top priorities of the Department of Justice. The Department's career prosecutors and criminal investigators are engaged in a renewed effort to pursue corruption at all levels and in all branches of government. 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's recent public corruption investigations have resulted in convictions of federal officials in all branches of government, as well as numerous state and local officials. At the federal level, in February, defense contractor Brent Wilkes was sentenced to 12 years in prison for his involvement in what the Washington Post called "the most brazen bribery conspiracy in modern congressional history." Wilkes funneled cash, mortgage payments, cars, meals, luxury travel, and prostitutes to former Congressman Randall "Duke" Cunningham in return for the Congressman's assistance in steering contracts to Wilkes's company.

In March 2008, the Department obtained the seventh criminal conviction arising out of an ongoing investigation into public corruption among state officials in Alaska. The convictions have included three former elected members of the Alaska State House of Representatives (including a former speaker of the house), a chief of staff to a former governor, and three high-ranking executives with a major Alaska oil-services company. The convicted individuals made or received thousands of dollars in corrupt payments as well as offers of employment in return for official actions—including votes in the legislature—that would benefit the company.

The Department, through its National Procurement Fraud Task Force, continues to devote significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related support efforts. For example, in April 2008, an indictment by a federal grand jury in San Francisco was unsealed against a Canadian night vision goggles manufacturing firm and two of its executives for their participation

in a scheme to defraud the U.S. military in the supply of equipment for the Iraqi army. In June 2008, a U.S. Army officer and his wife pleaded guilty for their participation in a conspiracy, bribery, and money laundering scheme involving contracts awarded in support of the Iraq war. Additionally, a retired U.S. Army colonel pleaded guilty in June for her role in a scheme designed to secure a U.S. Department of Defense contract at Camp Victory, Iraq, in 2004 and 2005. Also in June 2008, a defense contractor, Raman International, pleaded guilty for its role in a bribery scheme designed to influence the award of U.S. Department of Defense contracts at Camp Victory, Iraq.

Immigration and the Southwest Border

Enforcing the Nation's immigration laws remains an important priority for the Department. The ability to control who—and what—comes into and out of a country is a basic attribute of a sovereign government, and being able to do that is vital to our Nation's security.

In April, Deputy Attorney General Filip visited the borders of Arizona and Texas to meet with federal law enforcement officials who are on the front lines protecting our border. At that time, he announced the distribution of $7 million appropriated by Congress for the five border districts, to support security and immigration enforcement efforts. This money will fund 64 new Assistant U.S. Attorneys and 35 new contract support positions for the districts.

In an effort to make the most of those dollars, we have asked U.S. Attorneys who serve in the border districts to work with their law enforcement partners in the Departments of Justice and Homeland Security to strategically attack criminal activity along the border.

These are targeted resources, requested by each district, and they are emblematic of the Department's comprehensive but flexible strategy. There is no one-size-fits-all solution to the problems on the border—what works in one district or sector may not work in another. Law enforcement professionals in the border districts are the experts who know their areas and know what will work best there.

For the District of Arizona, that means an allocation of 21 new Assistant U.S. Attorneys and about a dozen additional support positions. That is a significant increase from the current 133 Assistant U.S. Attorneys in the district. For the Southern District of Texas, that means an allocation of 13 new Assistant U.S. Attorneys and seven additional support positions. That is a substantial increase from the current 150 Assistant U.S. Attorneys in the district. The Western District of Texas will also receive 16 new Assistant U.S. Attorney positions for work there. These new prosecutors will handle cases like drug and gun smuggling, illegal entry and reentry, worksite enforcement, and false documents.

In addition to these funds, which are available immediately and for the next two years, the Department has requested in its Fiscal Year 2009 budget another $100 million to help fight criminal activity along the border as part of our Southwest Border Enforcement Initiative.

The Department of Justice and these U.S. Attorney's Offices have always pursued large-scale drug smugglers on the border, along with smaller cases involving repeat offenders and other serious violators. We remain committed to that effort. This new money, and the positions it will fund, means that we will be able to prosecute even more cases than before, targeting smugglers both large and small.

* * *

Because of the abbreviated congressional calendar this year, today's oversight hearing is likely the last time I will appear before the House Judiciary Committee. Throughout my tenure as Attorney General, I have appreciated the courtesies, both professional and personal, that I have received from various members of this Committee and from the House as a whole. Although we have not always agreed on the issues, and in some instances we have disagreed vigorously, I want each of you to know that I have the utmost respect for the role you play in our constitutional system of government. Thank you for the opportunity to appear before you to talk about the important work of the Department, and I appreciate the opportunity to answer any questions you may have.

ATTACHMENT

Remarks Prepared for Delivery by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research

Washington, D.C.
Monday, July 21, 2008 - 11:00 A.M. EDT

Thank you for that introduction. AEI's scholars and fellows have contributed valuable scholarship on many of the central public policy issues of our time, and it is therefore a great privilege to be with you.

When I was nominated as Attorney General, I believed that I had been chosen in part because I knew something about terrorism. When I was a federal judge in the Southern District of New York, I presided over several significant terrorism matters, and after I left the bench I gave speeches and even wrote a bit on issues relating to the War on Terror. When I became Attorney General, however, it didn't take me long to discover how much I had not known—both about the nature and extent of the threat, and about the varied and extensive resources, human and technological, that the Department of Justice and the Executive Branch as a whole—civilian and military—have deployed to confront that threat.

One of my most solemn obligations, especially as we look ahead to the first post-2001 transition, is to try, along with others in our government, to make sure that our efforts in this conflict are put on a sound institutional footing so that the next Attorney General and the new Administration have in place what they need to continue to assure the nation's safety.

One success in that category occurred just two weeks ago, when the President signed into law the most significant reform of our surveillance statutes in a generation—bipartisan legislation that will give our intelligence professionals critical long-term authorities to monitor foreign intelligence targets located overseas. This modernization of the Foreign Intelligence Surveillance Act showed how the political branches can work together to put our national security laws on a more solid foundation.

Today, I would like to discuss one particular institutional challenge that we still face—the continued detention of enemy combatants after the Supreme Court's recent decision in *Boumediene v. Bush*. In that decision, the Court ruled that the 270 or so enemy combatants detained at Guantanamo Bay have a constitutional right to challenge their detention in federal court through petitions for habeas corpus. The Supreme Court said explicitly, however, that it was not deciding questions relating to how those habeas corpus proceedings must be conducted. It is those questions – the questions that *Boumediene* left unanswered, and how I believe the political branches should answer them – that I would like to discuss today.

At the outset, it is worth stressing that the *Boumediene* decision is about the *process* afforded to those we detain in our conflict with al Qaeda, the Taliban, and associated groups, not about whether we can detain them at all. The United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to return to the battlefield—as indeed some have after their release from Guantanamo. We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. In addition, this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer.

Although our right to detain enemy combatants in this armed conflict is clear, determining what, if any, rights those detainees should be granted to challenge their detention has been more complicated. This is not surprising, because the laws of war governing detention of enemy combatants were designed with traditional armed conflicts in mind. However, the President emphasized shortly after the attacks on September 11, 2001, the War on Terror is a different sort of war.

We are confronted not with a hostile foreign state whose fighters wear uniforms and abide by the laws of war themselves, but rather with a dispersed group of non-state terrorists who wear no uniforms and abide by neither laws nor the norms of civilization. And although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we'll know it's over. It is, after all, rather hard to imagine Al Qaeda and its allies laying down their arms and signing articles of surrender on the deck of an American warship. But those differences do not make it any less important, or any less fair, for us to detain those who take up arms against us.

Over the past seven years, the three branches of our government have been engaged in a dialogue—and, to put it candidly, at times a sharp debate—over the appropriate legal process for detaining combatants in this new kind of conflict. In the first few years after the September 11th attacks, for example, the Executive Branch took the view, consistent with

the traditional laws of war, that we could detain enemy combatants for the duration of hostilities without judicial review of those detentions, as we had done in World War II and earlier conflicts. In 2004, the Supreme Court agreed that enemy combatants could be detained based on military evaluations for the duration of the hostilities. At the same time, the Court recognized a role for the courts in reviewing the government's basis for detaining those enemy combatants.

Following these developments, Congress and the Administration tried to apply the Court's guidance in working out how judicial review might fit within a traditional framework of military detention. The answer, provided in the Detainee Treatment Act in 2005, and reaffirmed by the Military Commissions Act a year later, was to establish a new system of judicial review of decisions by the Department of Defense as to the status of detainees at Guantanamo. One central feature of this system was that Guantanamo detainees could not file lawsuits in the United States seeking the statutory remedy of habeas corpus, but could seek review in the federal court of appeals in Washington, D.C., of the determinations of the military tribunals.

Taken together, these laws gave more procedural protections than the United States—or any other country, for that matter—had ever before given to wartime captives, whether those captives were lawful soldiers in foreign armies, or unlawful combatants who target civilians and hide in civilian populations.

The Supreme Court considered these procedures in *Boumediene v. Bush*, and decided by a 5 to 4 vote that they were not adequate to fulfill the constitutional guarantees of habeas corpus. It is important to note that the Court did *not* invalidate the separate system of military commission trials established to prosecute some detainees for war crimes, including people alleged to have been directly responsible for the September 11 attacks. The war crimes trials were not reviewed by the Supreme Court in *Boumediene* and are proceeding; indeed, the first trial begins today at Guantanamo. *Boumediene* held only that detainees at Guantanamo Bay have a constitutional right to challenge their detention through petitions for habeas corpus, and that the Detainee Treatment Act procedures did not provide an adequate substitute for habeas corpus review.

Before I go any further, let me take a brief detour to explain what habeas corpus is. Although many of you here today are probably familiar with – some of you even expert in – the concept of habeas corpus, that concept is generally not the small change of daily discourse among non-lawyers in our country. In its basic terms, a habeas corpus action is a lawsuit brought by someone in custody who asks to be released on the ground that his detention is unlawful. As a federal judge, I routinely saw the most common example of habeas corpus actions – a defendant who has been convicted in state court filing an action in federal court and arguing that his conviction and detention violate the U.S. Constitution.

For at least a century, habeas corpus has usually applied to imprisonment in regular criminal cases and detention by immigration authorities. Congress and the courts have developed an extensive body of law in both statutes and cases to guide habeas proceedings in those settings. Before the Supreme Court's decision in *Boumediene*, however, no alien enemy combatant detained outside the United States had ever before received a right to habeas corpus. The majority opinion itself acknowledged as much. Nonetheless, the Court concluded that the unique nature of this conflict, and the unique features of our naval base at Guantanamo Bay, Cuba, particularly the control we exercise over that base, were enough to extend the writ to cover the aliens who are detained there as enemy combatants.

We have previously expressed, and I think unsurprisingly, disappointment with the *Boumediene* decision. That disappointment came about because, in our judgment, the political branches had established, in response to prior Supreme Court guidance, reasonable—indeed, historic—procedural protections for detainees. The Supreme Court, however, has spoken on this issue, and our task now is to move forward consistent with the principles set forth in the Court's decision.

The responsibility of moving forward rests with the Legislative and Executive Branches as much as it does with the judiciary. This reality follows from the *Boumediene* decision itself: Although the Supreme Court settled the constitutional question of whether the Guantanamo detainees have the right to habeas corpus, the Court stopped well short of detailing how the habeas corpus proceedings must be conducted. In other words, the Supreme Court left many significant questions open, and it is well within the historic role and competence of Congress and the Executive Branch to attempt to resolve them.

The Court also recognized that habeas proceedings for the detainees at Guantanamo Bay could raise serious national security issues, and that these issues could require that we adjust the rules that would ordinarily apply in habeas proceedings brought by defendants in domestic criminal custody. Indeed, the Supreme Court went out of its way to emphasize that "practical considerations and exigent circumstances" must help define the substance and the reach of these habeas corpus proceedings. The Court recognized, and with good reason, that certain accommodations must be made "to reduce the burden habeas corpus proceedings will place on the military" and to "protect sources and methods of intelligence gathering."

With the Supreme Court's explicit recognition of such practical concerns in mind, let's consider some of the difficult questions that *Boumediene* leaves unresolved, and the policy choices that must be made in order to answer them.

First, will a federal court be able to order that enemy combatants detained at Guantanamo Bay be released into the United States? The Supreme Court stated that a federal trial court must be able to order at least the conditional release of a detainee who successfully challenges his detention. But what does it mean to order the release of a foreign national captured abroad and detained at a secure United States military base in Cuba? Will the courts be able to order the government to bring detainees into the United States and release them here, rather than transferring them to another nation? What happens if a detainee's home country will not take him back, or if we cannot transfer the detainee to that country because it will not provide the required humanitarian guarantees that the detainee will not be subject to abuse when he gets home?

Second, how will the courts handle classified information in these unprecedented court proceedings? A lot of the information supporting the detention of enemy combatants held at Guantanamo Bay is drawn from highly classified and sensitive intelligence. Some of it was obtained by exposing American military and intelligence personnel to extraordinary dangers. And we know from bitter experience that terrorists adjust their tactics in response to what they learn about our intelligence-gathering methods. For the sake of national security, we cannot turn habeas corpus proceedings into a smorgasbord of classified information for our enemies. We need to devise rules for the habeas corpus cases that will provide for the necessary protection of national security information.

And third, what are the procedural rules that will govern these court proceedings? Does *Boumediene* require that each detainee receive a full-dress trial, with live testimony by the detainee here in Washington? Will a detainee be able to subpoena a soldier to return from combat duty in Afghanistan or Iraq to testify? Should one detainee be allowed to call other detainees as witnesses? Or compel the United States to reveal its intelligence sources in order to establish the admissibility of critical evidence?

One could say, I suppose, that these questions should be left to the courts, to resolve through litigation. But I do not think that is the most prudent course. Unless Congress acts, the lower federal courts will determine the specific procedural rules that will govern the more than 200 cases that are now pending. With so many cases, there is a serious risk of inconsistent rulings and considerable uncertainty. The federal court in the District of Columbia is already working on some of these issues, and I believe that court should be commended for the preliminary steps it has taken thus far to provide for the fair, efficient, and prompt adjudication of these cases.

But it hardly takes a pessimist to expect that, without guidance from the Congress, different judges even on the same court will disagree about how the difficult questions left open by *Boumediene* should be answered. Such disagreement will, in turn, lead to a long period of protracted litigation—with the possibility of different procedures being used in different cases—until, perhaps, the Supreme Court intervenes yet again.

But uncertainty is not the only, or even the main, reason these issues should not be left to the courts alone to resolve. There is also the question of which branches of government are best suited to resolve them. I am a former federal judge; I appreciate fully the institutional strengths of our courts, and the critical role the federal judiciary plays in our system of government. But I am also acutely aware of the judiciary's limitations. Judges decide particular cases, and they are limited to the evidence and the legal arguments presented in those cases. They have no independent way, or indeed authority, to find facts on their own, and they are generally limited by the parties' presentations of background information and expert testimony.

By contrast, Congress and the Executive Branch are affirmatively charged by our Constitution with protecting national security, are expert in such matters, and are in the best position to weigh the difficult policy choices that are posed by these issues. Judges play an important role in deciding whether a chosen policy is consistent with our laws and the Constitution, but it is our elected leaders who have the responsibility for making policy choices in the first instance.

So today, I am urging Congress to act – to resolve the difficult questions left open by the Supreme Court. I am urging Congress to pass legislation to ensure that the proceedings mandated by the Supreme Court are conducted in a responsible and prompt way and, as the Court itself urged, in a practical way. I believe that there are several principles that should guide such legislation.

First, and most important, Congress should make clear that a federal court may not order the Government to bring enemy combatants into the United States. There are more than 200 detainees remaining at Guantanamo Bay, and many of them pose an extraordinary threat to Americans; many already have demonstrated their ability and their desire to kill Americans. As a federal judge, I presided over a prominent terrorism-related trial, and the expense and effort required to provide security before, during, and after the trial were staggering. Simply bringing a detainee into the United States for the limited purpose of participating in his habeas proceeding would require extraordinary efforts to maintain the security of the site. To the extent detainees need to participate personally, technology should enable them to do so by video link from Guantanamo Bay, which is both remote and safe.

Far more critically, although the Constitution may require generally that a habeas court have the authority to order release, no court should be able to order that an alien captured and detained abroad during wartime be admitted and released *into the United States*.

Second, it is imperative that the proceedings for these enemy combatants be conducted in a way that protects how our Nation gathers intelligence, and what that intelligence is. In the terrorism case I mentioned a minute ago, the government was required by law to turn over to the defense a list of unindicted co-conspirators – a list that included Osama bin Laden. This was in 1995, long before most Americans had ever heard of Osama bin Laden. As we learned later, that list found its way into bin Laden's hands in Khartoum, tipping him off to the fact that the United States Government was aware not only of him but also of the identity of many of his co-conspirators. We simply cannot afford to reveal to terrorists all that we know about them and how we acquired that information. We need to protect our national security secrets, and we can do so in a way that is fair to both the Government and detainees alike.

Third, Congress should make clear that habeas proceedings should not delay the military commission trials of detainees charged with war crimes. Twenty individuals have already been charged, and many more may be charged in the upcoming months. Last Thursday, we received a favorable decision from a federal court rejecting the effort of a detainee to block his military commission trial from going forward, but detainees will inevitably file further court challenges in an effort to delay these proceedings. Americans charged with crimes in our courts must wait until after their trials and appeals are finished before they can seek habeas relief. So should alien enemy combatants. Congress can and should reaffirm that habeas review for those combatants must await the outcome of their trials. The victims of the September 11th terrorist attacks should not have to wait any longer to see those who stand accused face trial.

Fourth, any legislation should acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations, who have already proclaimed themselves at war with us and who are dedicated to the slaughter of Americans—soldiers and civilians alike. In order for us to prevail in that conflict, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations.

Fifth, Congress should establish sensible procedures for habeas challenges going forward. In order to eliminate the risk of duplicative efforts and inconsistent rulings, Congress should ensure that one district court takes exclusive jurisdiction over these habeas cases and should direct that common legal issues be decided by one judge in a coordinated fashion. And Congress should adopt rules that strike a reasonable balance between the detainees' rights to a fair hearing on the one hand, and our national security needs and the realities of wartime detention on the other hand. In other words, Congress should accept the Supreme Court's explicit invitation to make these proceedings, in a word repeated often in the *Boumediene* decision, practical—that is, proceedings adapted to the real world we live in, not the ideal world we wish we lived in.

Such rules should not provide greater protection than we would provide to American citizens held as enemy combatants in this conflict. And they must ensure that court proceedings are not permitted to interfere with the mission of our armed forces. Our soldiers fighting the War on Terror, for example, should not be required to leave the front lines to testify as witnesses in habeas hearings; affidavits, prepared after battlefield activities have ceased, should be enough.

And military personnel should not be required to risk their lives to create the sort of arrest reports and chain-of-custody reports that are used, under very different circumstances, by ordinary law enforcement officers in the United States. Battlefields are not an environment where such reports can be generated without substantial risk to American lives. As one editorialist put it, this is not CSI Kandahar. Federal courts have never treated habeas corpus as demanding full-dress trials, even in ordinary criminal cases, and it would be particularly unwise to do so here given the grave national security concerns I have discussed.

Sixth and finally, because of the significant resource constraints on the Government's ability to defend the hundreds of habeas cases proceeding in the district courts, Congress should make clear that the detainees cannot pursue other forms of litigation to challenge their detention. One unintended consequence of the Supreme Court's decision in *Boumediene* is that detainees now have two separate, and redundant, procedures to challenge their detention, one under the Detainee Treatment Act and the other under the Constitution. Congress should eliminate statutory judicial review under the Detainee Treatment Act, and it should reaffirm its previous decision to eliminate other burdensome litigation not required by the Constitution, such as challenges to conditions of confinement or transfers out of United States custody.

Here I must make explicit, and perhaps risk reiterating, a point I would hope was obvious from the discussion so far. We are talking here about habeas corpus proceedings, not about criminal trials of the sort that some but not all of the detainees at Guantanamo Bay may face. Some people have argued that we should either charge the detainees we are holding at Guantanamo with crimes, or release them. We can and we have charged some detainees with war crimes. These proceedings are exceptionally important, and I referred to them earlier.

But to suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers. The Department of Defense and the Department of State have worked together to release those whom we believe can be transferred to a third country, consistent with the safety of our citizens and our military personnel abroad, and with our humanitarian commitments; of the 775 people who have been detained at Guantanamo, only about one-third remain. The fact that we have not charged

all of those remaining at Guantanamo with crimes should not be regarded as a fair criticism of our detention policies; rather, it reflects the fundamental reality that these individuals were captured in an armed conflict, not in a police raid.

These are the central principles that should govern Congress's effort to legislate in this area. I think they are principles that should have bipartisan support, because they would provide unprecedented access for enemy combatants to challenge their detention in federal courts, while at the same time protecting the security of our citizens. Seven years ago, when we were attacked on September 11, 2001, our Nation's response to that challenge was swift, decisive, and bipartisan. Congress authorized the use of military force against Al Qaeda and others responsible for the attacks, demonstrating agreement that the Nation—not by its own choice, but by the choice of a totally ruthless enemy—was at war. The President then swiftly deployed United States troops, and the fight continues to this day.

I hope that the political branches can work together in the same way to address the process owed to terrorists and other combatants whom we have detained as part of this conflict. There is a pressing need for such legislation, as these cases are proceeding now. As I have explained, I believe that these questions are ones on which the judgment of the political branches can help the courts to adjudicate these cases fairly, uniformly, accurately, and efficiently, while ensuring that we have firm institutions in place that will allow our Nation to continue to prosecute this war with success.

Thank you very much, and I'll be happy to take your questions.

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Mr. CONYERS. The Chair recognizes the Chairman of the Subcommittee on the Constitution, Jerry Nadler of New York.

Mr. MUKASEY. Mr. Chairman, I don't mean to raise a matter that is none of my business, but I haven't been placed under oath. Did you want me to take an oath?

Mr. CONYERS. No, I did not require that.

Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. I have a number of questions, and I hope we can be brief. The first one is: When you last appeared before this Committee, sir, you stated that you could not order an investigation into interrogation practices that have been authorized by the OLC opinions because it would not be fair to infer any possibility of criminal intent to someone who is following an OLC legal opinion. But it is now clear that one of the detainees, Abu Zubaydah, for example, was interrogated for months in the spring and summer of 2002, before the first OLC opinion and the issue we know of, the August 1, 2002, legal memo by John Yoo was issued.

Attorney General Ashcroft testified last week he did not recall providing legal advice on interrogation methods at that time and did not recall whether anyone else at the Department had provided such advice. Now given the uncertainty about whether any legal advice had been provided before these interrogations, have you or anyone at the Department investigated the legality of the interrogation methods used before the August 1 Yoo memo was issued?

Mr. MUKASEY. I have not investigated that myself. I think part of that question involves whether the methods employed were consistent with that memo or not, and I don't know whether they were or they were not.

Mr. NADLER. Do you think someone should take a look at that?

Mr. MUKASEY. I think a look at that may very well be taken or have been taken. I am not specifically aware of it as I sit here.

Mr. NADLER. Can you let us know?

Mr. MUKASEY. I will take a look.

Mr. NADLER. Thank you.

Now one other thing. The Committee has issued a subpoena for all unclassified OLC opinions on issues of national security and presidential power that have not previously been released. The Department has refused to provide these unclassified opinions to the Congress. Can you tell us why we can't get those unclassified opinions?

Mr. MUKASEY. Without getting into any particular opinions, there are two considerations that relate to OLC opinions. One has to do with classification. Unclassified opinions. OLC opinions are there because somebody has come to the Department for advice. They have come to the Department for advice before they act. Part of maintaining a deliberative process is being able to assure them that they can come to the Department, ask for advice, and get it without——

Mr. NADLER. Excuse me. That is in effect a claim of executive privilege. That is the executive privilege.

Mr. MUKASEY. It is not really the executive privilege. It is a deliberative privilege, if you wish to call it that.

Mr. NADLER. So you are asserting a new privilege other than executive privilege?

Mr. MUKASEY. I am not asserting a new privilege. I am explaining that deliberative process is part of what you may call executive privilege, what I think is actually something separate, but in any event is one of the kinds of information that is protected from inquiry on the outside, and for good reason.

Mr. NADLER. Whatever the good reason, and I don't want to debate the reason, but if it is not protected against a subpoena by executive privilege, what is the legal authority for not giving it to Congress once subpoenaed?

Mr. MUKASEY. I believe that we are authorized to keep in confidence requests for advice and the advice that we give as counsel as part of a deliberative privilege, as part of essentially an attorney-client relationship, and for other good sound reasons that I am sure you can understand. We want people to come for advice. We don't want them to act without it.

Mr. NADLER. I understand the reasoning. I do not agree, and I would ask you to provide to this Committee, the legal authority. I do not agree that there is any privilege other than executive privilege. The executive privilege must be claimed by the President. The President is not the client of the Attorney General, he is the client of his own counsel. The Government is, the American people is the client of the Department of Justice. So I do not see any ground for withholding the subpoena.

Let me go on. I ask you to provide the Committee with the legal basis for this.

Mr. MUKASEY. Basis additional to the basis I have already articulated?

Mr. NADLER. With some citations.

We know many States now, going back to the Chairman's comment, are preparing a purge list of voters, list of people who shouldn't be allowed to vote because pursuant to the laws in the States they are felons or whatever. We also know that in Florida, for example, in 2000, such a list was prepared by a commercial vendor. We know that there was a 20 percent error rate. We know that they knew there was a 20 percent error rate, which means they knew one out of five people prevented from voting would be legitimate.

What is the Department doing to oversee to make sure that States cannot do that again; that the purge lists that are being prepared do not disenfranchise many legally eligible voters?

Mr. MUKASEY. Very broadly and then very narrowly. The Department has been working with State and local authorities to make sure that they conform with the requirements of all Federal voting laws and that they conduct their activities in a responsible way. That said, there is always available, and we are making certain of this, the alternative for everyone one who feels that he or she has been improperly denied the right to vote, challenged in trying to exercise the right to vote, to nonetheless cast a provisional ballot, and we are making certain that people are aware of that.

We are doing outreach to civil rights groups to make certain that people are aware of that because that is, as it were, a failsafe against the kind of practice that you just described. I don't know

whether it happened, I don't know what the source of that is, but assuming that happened, that is the ultimate failsafe.

We have been in communication with State and local authorities and we have an extensive training program from our own people to make sure that doesn't happen again, if in fact it happened.

Mr. NADLER. Thank you. I see my time will expire. The Chairman will admonish me shortly.

Mr. CONYERS. Lamar Smith.

Mr. SMITH. I have a couple of questions about the *Boumediene v. Bush* Supreme Court case. When the Supreme Court issued its ruling, Judge Lamberth, the chief judge of the Federal District Court in D.C., took the unusual step of issuing a news release saying that he hoped Congress would respond and address some of the questions raised by that case sooner rather than later.

My question is: Do you feel that it is urgent that Congress act quickly to address some of the questions raised by that case?

Mr. MUKASEY. I do feel that it is urgent. Actually, he issued the statement after the speech I issued urging legislation. I do feel that it is urgent. I outlined reasons in a 20 or 25-minute speech why it was urgent, and urged that six principles inform any legislation. But I was not drafting legislation. What I was urging was that Congress step up and do it.

Mr. SMITH. What are some of the unintended consequences of that ruling? Why is there a sense of urgency? Without getting into the principles, but what are the risks involved?

Mr. MUKASEY. The ultimate risk is—because the ultimate decision finder has to be able to direct release, the ultimate risk is that one of these folks could be released in the United States and that is something that we think has to be prevented.

Secondly, there is a matter of national security. Much of the evidence against the people at Guantanamo, both those charged with war crimes and those we are simply holding because they are detainees, comes from classified information. We need to protect how that information is used, who has access to it, and who doesn't.

Third, there are—as I said, some of them are going to be put on trial for war crimes and we have to make sure that habeas proceedings are not used as a way of delaying the onset of military commission trials, any more than a United States defendant charged with a crime has a right to file a habeas proceeding before his trial. No U.S. defendant has that right. We don't think these folks should be given that right.

We think that Congress should reaffirm that we are in fact involved in an armed conflict and that there is a right to detain enemy detainees. There is a separate question of whether those people are guilty of war crimes or not. That is a whole separate thing. But detention is an absolute, and it is something that there has to be firm authority for. We think there is, but we think it wouldn't hurt to reaffirm that.

Congress, I think, should establish sensible streamlined procedures that strike a reasonable balance between a detainee's rights to information and to present a case, which the Court said he had to have, as well as practicality. The word "practical" appeared numerous times in the Supreme Court decision. But they stopped far short of articulating the exact procedure that should apply.

Finally, we asked that Congress make sure that detainees could not pursue remedies other than habeas corpus. As it stands now, they have kind of a two-track system. They have what are called the CSRTs, the Combatant Status Review Tribunals, and review of those in the D.C. Circuit, and then they have the habeas petitions. We think in view of the requirement of habeas, that the CSRT system and appeal to the D.C. Circuit should be cut off completely and simply rely on habeas proceedings that are properly cabined in the way I have suggested. That is a rough outline.

Mr. SMITH. Thank you, Mr. Attorney General. Let me go back to your first two points. The first was that some of these individuals might be released. As I understand it, there are some known terrorists that are now being held at Guantanamo Bay. Are you saying if we don't act expeditiously that some of those terrorists might be released?

Mr. MUKASEY. There is always that possibility. So far it obviously hasn't happened, and so far I want to commend the D.C. District Court for the preliminary steps that it has taken, including having by and large one judge, although there are one or two other judges who are going ahead, but one judge principally organizing things procedurally so they proceed in an orderly way.

But if somebody decides they want to bring somebody here either to testify on his own or in somebody else's proceeding, there are additional rights that that person has simply by virtue of landing on American soil, and recall that these are all aliens. None of them has a right to be here. We don't want that to happen inadvertently and then have the outcome of a habeas petition be that somebody has to be released, and if he is on American soil, he gets released here. That we think would be the worst outcome, and we are trying to avoid that, and we think it can be avoided with legislation.

Mr. SMITH. Thank you, Mr. Attorney General. Thank you, Mr. Chairman.

Mr. CONYERS. The Chairman of the Crime Subcommittee, Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being with us today. I had a couple of questions in the area of the criminal justice system. First, in reference to the housing crisis, it appears to me that with the billions of dollars that has been lost, somebody has made a lot of money to a large extent, in my opinion, through criminal fraud. We are going to try to get a briefing from the Justice Department on this in detail. But could you just say a quick word about whether or not in your view crimes were committed that helped perpetuate the crisis that we are in?

Mr. MUKASEY. Without wishing to convict anybody before trial, we have so far charged more than 400 defendants in connection with the mortgage crisis that you mentioned, ranging up the scale from the people who are overvaluing houses, the people who are over-assessing houses, the banks that are purposely closing their eyes to that, the rating agencies, up to two promoters of a hedge fund who are charged with essentially criminally overlooking the fact that the paper they were selling the public was worthless.

There are 42 separate FBI task forces devoted to fighting that problem, but it is a problem that runs the gamut that I tried to

describe. We have got over 400 defendants charged so far, and the investigation is certainly by no means closed. It is in full pace.

Mr. SCOTT. Thank you. Another issue here, there are several bills pending with the problem of gangs. One I have introduced takes a proactive approach to try to keep young people out of trouble to begin with. Other legislation essentially, in my judgment, waits for young people to join a gang, mess up, get caught, and get over charged with crimes. We already lock up more people in the United States than anywhere else on earth. My question is: Your Web site actually, the Department of Justice Web site, sites under the category of what works many approaches that seem to be consistent with the Youth Promise Act that I have introduced. We don't have time now, but could you provide in writing any analysis that you may have done on what works and what doesn't work and how we ought to be addressing this, and any analysis or help you might have to do as we evaluate the different approaches?

Mr. MUKASEY. I think what works is a comprehensive approach. There is no one particular solution. What we try to do is to focus our efforts along with State and local governments, along with other agencies in both enforcement; that is, we use the task force approach to enforcement and we also use weed and seed programs and other community outreach programs.

I was just present last night at a privately funded competition, essay competition that was competed in by more than 120,000 youngsters on the subject of community violence. We are active in that. We help fund that. So we believe firmly that this requires a comprehensive approach. In the end, we are principally a law enforcement organization. But we do recognize the need for a comprehensive approach. We favor that. We do prevention.

Mr. SCOTT. If you have done any in-depth analysis and can provide guidance on that, that would be helpful.

My next question is with regard to the Federal prisons. We recently had to appropriate money in a supplemental appropriation to deal with what we believe to be a crisis in personnel in prisons. The prison industry program, Federal prison industry program, has been widely supported by virtually all Federal prison personnel. Can you explain why the Department of Justice hasn't been more aggressive in promoting the program in Congress, opposing efforts to weaken the program, and if you could say something about the staffing levels generally because there is some concern that the staffing levels are so low now that our prison guards may be in danger.

Mr. MUKASEY. Well, I think I am not supposed to express relief at a supplemental that is in excess of what was originally requested, but privately in the privacy of this room I am satisfied that there was a supplemental, particularly with respect to the BOP, which took a major hit in connection with the budget, and I am glad and gratified to see that.

With regard to Prison Industries, that is an important program not simply for the people who are in prison but rather as a way of controlling the population. As you know, those jobs are not only good training, they are valued by the prisoners themselves and they are an excellent control mechanism because loss of a job like that for infractions and for violence is a big risk. So giving that

privilege of access to such a program and denial of it is a helpful way to control people in prison.

It is not just for the good of the crooks, it is for the good of the guards, it is for the good of future victims who will not become future victims as a result of the fact that people learn valuable skills in that program.

When I was a judge, I was a proponent of that program. I still am.

Mr. SCOTT. Is there more danger to prison guards now because of the staffing level?

Mr. MUKASEY. We think that we have got the situation under control. But it is barely under control. The prison population recently has changed, and it hasn't changed for the better. People are getting more violent, they are not responsive to warning gunshots that are fired when they start riots, and so forth, and we have had an uptick in violence.

So far, it has been under control. But a couple of weeks ago I went out to attend the funeral of a guard who was killed out in California with a shank, a young man who had served two tours in Iraq, come out of the Navy, was building a career for himself. He was 2 weeks short of his 23rd birthday. It was a tragic situation.

That is the first time in a dozen years that a guard has been killed, but I want it to be the last time. I think we need to make greater efforts in that area. The fact is that the professionals in the Bureau of Prisons do an amazing job in the way they control those violent populations with a very small group of people. If you go into one of those institutions, it is remarkable how small the ratio is between guards and prisoners. But we need to do more in that area and we need to stop the kinds of incidences that I mentioned. We are concerned about them.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CONYERS. Howard Coble, Ranking Member of the Intellectual Property Committee.

Mr. COBLE. Thank you, Mr. Chairman. General, good to have you on the Hill. The distinguished Ranking Member from Texas commented on intellectual property, and I want to direct your attention to that issue.

General, as you know, this Committee has long sought to work with the Department to strengthen the ability of law enforcement to defer, investigate, and prosecute intellectual property related crimes. As you probably know, we overwhelmingly passed in the House earlier this year the bill prioritizing resources and organizations for intellectual property.

Some years ago, a Department witness stated to this Committee that there are known links between IP crime and organized crime, and even terrorism. General, can you comment today on what evidence can be produced to link IP-related crimes with terrorist funding and any specific details to known links. Now it may be more appropriate to do that in writing. But could you do that?

Mr. MUKASEY. I can do it in a general way. The fact is that we are facing on an international level more and more organized crime and these folks will sell absolutely everything they can for as much as they can. One of the most valuable things that this country has

is intellectual property. It is the engine that drives our economy. There are foreign governments that are intent on getting into that intellectual property and there are foreign nongovernments in the form of terrorist organizations that are interested in getting into that intellectual property so that they can exploit it not only for its inherent worth but also for its commercial worth.

I will provide in writing further specific instances of that, but the fact is that everything from phony shoes and handbags, on up, has been offered for sale by people who are completely indiscriminate in who gets the proceeds as long as they make money along the way. That has included people who are involved in or suspected of terrorist activity.

Mr. COBLE. If you could present additional details, we would be appreciative.

Mr. MUKASEY. I will do that.

Mr. COBLE. Earlier this year, President Bush signed the Second Chance Act into law. This legislation had broad support and I believe is a new approach to an old but alarming problem. That is prison overcrowding.

Have you had an opportunity to review or to be briefed on this legislation? Do you agree with me that it is a good first step addressing the skyrocketing problem of recidivism, particularly of nonviolent offenders?

Mr. MUKASEY. I agree that it is a good first step. The recidivism rate in Federal prisons is a good deal lower than the recidivism in all prisons, largely because we concern ourselves before people are released with putting them in programs that train them for release and with follow-up afterwards. And the Second Chance Act is an important part of that.

We hope to lower the recidivism rate still further. We think that that kind of legislation and that kind of outlook is a good way toward solving the kind of problem that Member Scott pointed out before, that we should be working on prevention, prevention at both ends, rather than simply enforcement. Enforcement is an important part. That is what we do principally. But we can't lose sight of the fact that when prevention opportunities present themselves, as they do in that legislation, we have to follow up.

Mr. COBLE. I do concur. I do believe that prison overcrowding may be one of the most pressing domestic problems facing us, and I furthermore believe it is probably more serious involved in the local and State institutions.

Mr. MUKASEY. It is much more serious on the State level than it is on the Federal level. We avail ourselves not only of the facilities that we have, but also of rented space in State and local institutions and in some private institutions that run prisons, if you will, or detention facilities on a private basis when they are reviewed and approved for standards. So far, we have been able to hold up and do that. But so far is so far. We want to make sure that we have got enough resources to continue to do it.

Mr. COBLE. I thank you, General.

Mr. Chairman, I want you to take note, I am beating the illumination of the red light.

Mr. CONYERS. You usually do. Thank you.

The Chair recognizes the Chairman of the Oversight Committee of the Finance Committee, but a senior Member of Judiciary as well, Mel Watt of North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Attorney General, back on April 23 of this year, the Director of the FBI was before this Committee and I asked him about a particular referral that had been made and we finally got a response back from him just 2 days ago, really, in which he says this: Regarding the referral made to our Charlotte field office, we confirm that in October, 2006, the field office was forwarded a letter which the North Carolina State Bureau of Investigation received from State lawmakers requesting an investigation into Aero Contractors. The letter alleged that Aero Contractors has been identified as a participant in the CIA-sponsored rendition program, which has flown persons detained in various countries, including the United States, to overseas torture sites. We consulted with our field office and the Department of Justice and at this time we do not have an open investigation regarding the allegation.

I have reviewed the jurisdiction of the various, I think there are 11 or 12 divisions under the Attorney General, and there is a National Security Division, there is a Criminal Division, and I guess my question is, first, would it be a violation of law for a contractor to fly persons detained to overseas torture sites?

Mr. MUKASEY. The country has enforced laws that require that before people are sent abroad we receive assurances from foreign governments that they will not be abused. That said, I am not familiar with either the case or the program that you refer to. As you point out, this correspondence goes back to 2006, which is essentially 2 years before I got here.

Mr. WATT. The concern I have is that I asked the FBI Director to give me all the information. We got one paragraph about it, and I still don't know anything more. We know a letter asking for an investigation was made. We know there is not a current active investigation. That is what the Director's letter says. But still we don't know what happened in the interim, whether they concluded that there was no basis for the investigation, whether the Department looked the other way, whether there is any—I don't even know whether you all think sending somebody out of the country for rendition to a torture site would be a violation of any law as it stands.

Mr. MUKASEY. I would like to take a look at the case before I comment on the case.

Mr. WATT. If you would do that.

Mr. MUKASEY. One thing I have learned from past bitter experience.

Mr. WATT. That is exactly what we asked the Director of the FBI to do. Unfortunately, when we got the response a number of months later, we don't know anything more, or very little more than I had told him. I mean I had told him that there was a referral but he wrote me a letter back confirming that there was a referral.

Mr. MUKASEY. Bob Mueller is a very diligent guy, but in this case I hope to be able to perform better and outdo him.

Mr. WATT. I certainly appreciate that.

Mr. MUKASEY. He is a very able person.

Mr. WATT. In addition, it would be nice to know if the Department thought that flying somebody out of the country, rendering them to a torture site, would be a violation of law. But I won't ask you for that opinion right now. But I hope you will include that.

Mr. MUKASEY. I will include that.

Mr. WATT. One part of the voting process this year that a number of people are expressing concerns about because we believe there will be a voting pattern that will be substantially different than there has historically been, and one of the concerns we have is that nobody is really anticipating those demographic shifts in the voting patterns that we anticipate will happen. Does your task force that you have been working with the States on, is that part of what you are doing, and if not, will you include it to make sure that there are enough machines, enough personnel, enough trained people that know what they are doing to get people processed without standing in line for hours on end?

Mr. MUKASEY. The short answer to your question is yes. We anticipate a much higher turnout this year because of increased enrollment this year, as you point out, and we are doing what we can. We have to keep in mind as we do that that this effort is organized principally by State and local governments. What we need to do is to make sure that they realize and understand that where there is increased enrollment, they know it, and that they are doing what they can to get the facilities that they need to handle the increased enrollment and the increased turnout, if in fact there is increased turnout. That is what we are doing.

We are trying to do everything we can, including to make information available not only to the State and local governments, but to particular groups with an interest in making sure that people turn out so that they know what the rules are and aren't and know what they can and can't do and police their State and local groups and make us aware of when there are shortcomings. It is kind of a two-way street.

Mr. WATT. Thank you, Mr. Chairman. My time has expired. I yield back.

Mr. CONYERS. A senior Ranking Member of Judiciary from California, Elton Gallegly.

Mr. GALLEGLY. Thank you very much, Mr. Chairman. Welcome, Attorney General Mukasey.

Recently, during different debates we have had on immigration, we have found that the FBI does various forms of background checks, name checks, and so on and so forth, and there is a backlog. Can you tell us how the FBI has addressed the backlog and the name check or other background checks?

Mr. MUKASEY. They are addressing the backlog in the one way you can address it, which is by throwing more personnel at it. They have, I think, gotten it way down, I believe. I think it is down to something like 90 or 120 days. I am not precisely sure, but I think it is. I know it is way below what it was before. But we recognize that that was a problem. We are addressing it. And we understand it and they understand it and have put more people on it to make sure that they do the background checks.

Mr. GALLEGLY. Is there currently a backlog in the criminal background check of legal aliens?

Mr. MUKASEY. There is currently some backlog across the board, be it criminal check, be it just check on background. This includes past criminal background.

Mr. GALLEGLY. This may be a little more difficult but in recent months and actually recent years there has been a lot of discussion about comprehensive immigration reform. Some of us think that is a code word for amnesty. In the event that that should take place, and depending on who you talk with, I think most reasonable people would say this could account for about 20 million people.

Is it logistically possible to do a background check on that many people?

Mr. MUKASEY. Now? No. I mean, it is logistically possible, I suppose, over an extended period of time. But if you throw 20 million more people into the system, is it going to stagger the system? Yes.

Mr. GALLEGLY. I think that was probably a rhetorical question.

In any event, one other question I have relating to immigration. In fact, I met with a former Attorney General in a previous Administration several years ago and was discussing the issue of sponsorship of legal aliens. When you have an immigrant coming into the country and they have a sponsor, they sign a statement of economic responsibility or financial responsibility.

Do you view that commitment, that document they sign, as a legal and binding contract, or as a moral commitment?

Mr. MUKASEY. I believe it is binding. I think if somebody says I am going to be financially responsible for somebody, what that means is, they are going to be financially responsible for somebody. That is what I understand it to mean.

Mr. GALLEGLY. Would you be kind enough to perhaps in the near future have your staff give us some type of a recap of how many folks have actually been prosecuted for not——

Mr. MUKASEY. For not stepping up?

Mr. GALLEGLY. For not taking that responsibility. And whether or not we are actually pursuing it. I could give you examples in my own district about people that are in the seven figures that bring someone here, that within 6 months a parent or brother or whoever they brought here is on Federal benefits getting hearing aids that cost over $5,000, and nothing is done about it.

So, in any event, I would just like to know if in fact with all the other things that your Department is challenged with, whether or not this is an issue that is taken seriously.

Mr. MUKASEY. In fairness, I think this is in some part a responsibility of DHS, which has, as you know, immigration control.

Mr. GALLEGLY. Of course, when I had this discussion before, we didn't have a DHS. But we do now.

Mr. MUKASEY. There has been a sundering of responsibility to a certain extent here. Let me find out what part we have got, what part they have got, and see if we can straighten it out.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Mr. CONYERS. Chairwoman Zoe Lofgren, Chairwoman of the Immigration Subcommittee.

Mrs. LOFGREN. Thank you, Mr. Chairman.

And Mr. Attorney General, it is good to see you. I have some questions about our policy on prosecution of immigration misdemeanor measures and how that is impacting the other prosecution priorities of the Government.

We received information a few weeks ago in a Subcommittee hearing with the U.S. Attorneys that, in the Southwest border region, there had been a very substantial, tens of thousands of increases in misdemeanor prosecutions for immigration violations, and a nearly 40 percent decrease in prosecution of organized crime. To me, that seemed like not a good trade-off in terms of the standards.

So I am wondering, TRAC—and I know the Department doesn't always agree with TRAC—has told us that 58 percent of all prosecutions in April of this year were for immigration-related matters, with only 13 percent for drug trafficking, and that 58 percent of all criminal prosecutions is mostly for misdemeanor immigration crimes.

Can you address this?

Mr. MUKASEY. I can address it in this way:

Yes, we have had an increase in misdemeanor prosecutions. The strategy across the border is a varied strategy; it is not one-size-fits-all. Part of that strategy involves prosecution, and in the districts where we found an increase in prosecution, we have also found a decrease in infiltration, that is, a decrease in the number of illegals coming across the border. That, to me, suggests a relationship. I don't by any means buy into the idea of a trade-off as between immigration prosecutions and drug prosecutions.

Mrs. LOFGREN. If I can, Mr. Attorney General, the statistics we got were from the Department, and what they told us is that there had been an increase, a substantial increase, and it was accompanied at the same time by a tremendous decrease in organized crime prosecutions.

I have heard from local prosecutors that DEA agents are now turning to local police for some of their drug prosecutions; because they can't get warrants through the U.S. Attorneys' offices, it is taking 6 months, which, for a drug prosecution, just doesn't work, and because the U.S. Attorneys' offices are so busy with prosecution of nannies and busboys, that they can't get to the court in a timely fashion to get these warrants in the fight against these drug cartels. That is what local prosecutors are telling me.

Can you address that?

Mr. MUKASEY. In fairness, I think it is a mistake to say that we are not prosecuting drug dealers and we are prosecuting nannies and busboys.

Some of the smaller drug cases are prosecuted in State and local courts. However, we do prosecute drug cases, even low-level drug cases, where it appears that people are bringing drugs in in relatively small amounts, are putting those together with other amounts and essentially packaging them up for a larger shipment.

So we try to prosecute the more serious drug cases, as well as the immigration cases, to keep the numbers down and to control a problem that I think we all recognize, which is unlawful immigration.

Mrs. LOFGREN. Well, I appreciate that is your philosophy. I don't think the statistics in your Department back up that philosophy.

Let me talk to you about the Federal circuit courts, because they have been in touch. As you know, immigration appeals are the single largest number of cases in the circuit courts. The Second and Ninth Circuits, that is 40 percent of their overall docket, immigration appeals. The circuits have actually organized to say, you know, we need to do something about this.

They really believe, and I think they are right, that the caseload expansion at the circuit courts is a result of the BIA streamlining procedures that former Attorney General Ashcroft implemented in 2002, which basically eliminated any effective, meaningful review for immigration appeals, which just shoved it up to the circuits.

What are you doing or planning to do to relieve this burden on the circuits?

Mr. MUKASEY. We are trying to systemize and organize the way in which immigration appeals are handled. It is my understanding, for example, that in the Second Circuit, which is the one that I come from, they have organized the docket of immigration cases in such a way that some of them are handled summarily, that is, without argument; others not, depending on the underlying merits of the case.

They have managed to screen and handle them that way.

Mrs. LOFGREN. If I could, I know my time has expired, this is really an emergency for our circuits, and I am sure you are sensitive to it. The Committee that the circuits have organized has indicated to me that the answer is not with the circuits, the answer is to look at what caused this shift to the circuits, and it is because if you have got bad cases, they are going to be heard somewhere. Somebody is going to be killed because their asylum appeal was erroneously denied. They are not just going to pass on that, because it is too serious.

So if you don't have a meaningful BIA process, which we don't, then we are going to have this bill up to the circuits, and it is overwhelming them, and it is not the appropriate format, it seems to me.

Mr. MUKASEY. My experience with BIA cases has been that they are resolved on the merits in a serious way. I don't see the BIA rubber-stamping them one way or another.

Mrs. LOFGREN. Well, that is not what the circuit courts believe.

I yield back, Mr. Chairman. Thank you.

Mr. CONYERS. Steve Chabot, formerly Ranking Member on the Antitrust Task Force Committee of Judiciary, now ranking on the Small Business Administration and still a Member of the Judiciary Committee.

Mr. CHABOT. Thank you, Mr. Chairman.

General Mukasey, I want to follow up on some questioning back in February regarding Delta Airlines and its announcement to merge with Northwest Airlines.

Mergers within the airline industry are treated with a great deal of speculation because of the impact that such a move has on consumers, particularly now with rising fuel prices, in terms of limited flights and increased fares and, in addition, the economic toll that

it can have on cities and regions in terms of their ability to bring businesses and development into an area.

My question to you is, how is the Department examining the merger and what factors are you examining and when do you expect a decision on that merger?

Mr. MUKASEY. The short answer to your question is carefully.

The Antitrust Division has been addressing that merger in particular in a very sensitive way. They have got their own economists on staff who weigh the economic effect of the merger as against the economic effect of having companies continue in business, neither of which can survive alone. So what they try to do is balance one against the other and see whether the merger promotes competition, enhances the health of the surviving entity, or the combined entity, and serves consumers better.

Those are the elements that they consider, and they consider them carefully. And they understand that this is an exigent matter. They are working hard on it. I meet with them regularly. But since it is a hard matter, they want to make sure they get it the right the first time.

Mr. CHABOT. Thank you.

Related to the Delta merger, members of the Ohio delegation sent a letter to you last month and to the Assistant Attorney General for Antitrust, Thomas O. Burnett, last week, expressing concerns with DHL's decision to enter into a contract with United Parcel Service. That agreement would allow UPS, one of DHL's principal competitors, to provide DHL's delivery services in North America.

To make a long story short, implementation of this agreement could impact Ohioans who are employed by companies already providing these services for DHL, as well as consumers nationwide who are purchasers of these delivery services.

Understanding the implications that this agreement has for the State of Ohio, and in fact for the Nation, my question is, how will the Department of Justice treat this agreement and what factors would your office be examining to ensure that the market remains competitive and consumers, protected?

I would assume your answer is somewhat similar to the first, but there it is.

Mr. MUKASEY. It is very similar to the first. I think we would consider obviously what alternatives are available to consumers to reliance on either UPS or DHL. FedEx comes to mind, although that is only because that is one I am familiar with. But the effect on consumers and the economic effect of the merger is going to be something that they consider. That includes jobs.

But the first I heard of it, I think, was yesterday when the letter came to my attention. I have not reviewed that particular one with the Antitrust Division, but I have no doubt that they are giving that the kind of consideration that they are giving to the rather larger merger which you referred to, which I have discussed with them.

Mr. CHABOT. Thank you very much.

Finally, on June 25, so just about a month ago, the U.S. Supreme Court struck down a Louisiana State law authorizing the death penalty for child rape cases. In overturning the death sentence, the

Court examined the eighth amendment under its evolving standards of decency standard, specifically focusing on national trends relating to the death penalty in child rape cases. The court claimed that there is a national consensus against the death penalty for child rape cases. In my opinion, nothing could be further from the truth.

In fact, Congress 2 years ago authorized the death penalty for child rapists under the Uniform Code of Military Justice. In 2007, President Bush issued Executive Order 13447 codifying this provision in the 2008 Manual for Courts-Martial. Just yesterday, the State of Louisiana filed a petition for rehearing in the case.

I have introduced a constitutional amendment, along with a number of my colleagues—Rick Keller, Lamar Smith, Tom Feeney and others—that would clearly state that the death penalty for child rape is not cruel and unusual punishment.

I would be very pleased to hear any input you could give us on that.

Mr. MUKASEY. Well, first of all, the fact that that was in the Uniform Code of Military Justice is something that we missed, and I regret that. And I take some, but frankly very little, consolation from the fact that all nine Supreme Court Justices missed it, all of their clerks missed it and the parties missed it. That was pointed out by somebody with a particular interest in military law, who found it later on. That leaves us in a position of not being able to petition independently.

The fact that Louisiana has petitioned gives us the opportunity to join in that petition. To my knowledge, the decision about whether to join in it or not has not yet been made, but is under consideration. That is what I know about that.

Mr. CHABOT. Thank you very much. I would urge you to join that, because I think it is unconscionable that those that commit perhaps one of the most despicable acts possible, the rape of a child, can't get the ultimate penalty because of a 5-4 vote in the U.S. Supreme Court. I think that should be reversed as quickly as possible.

Thank you very much.

Mr. CONYERS. The distinguished gentlelady from Texas, Chair of the Transportation Subcommittee and Homeland Security Committee and an officer in the Congressional Black Caucus, Sheila Jackson Lee of Houston, Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you, and to the Ranking Member.

It is an important time that we spend with you, Mr. Attorney General, on our oversight duties. And hoping that the word that I use does not suggest that there is no work at the Department of Justice, but let me just say there is a certain order and calm that you brought to the Department of Justice, and we applaud you—I do—for I hope the hard work that is going on there.

You have heard the many concerns of my colleagues, and I am going to add to them and try to speak as quickly as I can to try to frame the concerns that I have.

The role of the Department of Justice, I think, is the arm of justice for the Nation, and I note that the fiscal year 2000 budget on civil rights is $123 million. It sounds like a lot, but it is less than

$1 per American, and I believe all Americans deserve the right to civil liberties. So let me quickly put some things on the record.

I want to express concern, and I know overlapping jurisdictions on the random ICE raids that generated the arrest of American citizens because their last name happened to be, in many instances, in Texas Hispanic; and I would ask for a report back from the Department of Justice on how they are coordinating with these ICE raids that haul in Americans under the pretense of immigration reform.

Let me quickly also suggest that we have a broken watch list process. I want to commend an individual who is a medical doctor, who has been trying to become a citizen since 2004, and it is now 2008, and we believe that—well, we know that is a question of the watch list verification.

Another individual that had a sex change is a functioning, working individual, abiding by the law, has been trying to become a citizen since 12/03, and they too are in the midst of this confusion of the watch list.

So I would like to put into the record—Mr. Chairman, I ask unanimous consent to put into the record—General Mukasey, the letter I sent to you on July 22, 2008, to ask for an investigation of the FBI watch list and its progress. You might want to comment briefly, but I want to put this in the record. It specifically deals with the likes of Congressman John Lewis, but also Drew Griffin of CNN, who came on the watch list after an investigation.

Mr. CONYERS. Without objection, so ordered.

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SENIOR WHIP
DEMOCRATIC CAUCUS

WHIP
CONGRESSIONAL BLACK CAUCUS

CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

July 22, 2008

The Honorable Michael Chertoff
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Secretary Chertoff and Attorney General Mukasey:

During Secretary Chertoff's appearance before the Committee on Homeland Security last week, I requested that the Department of Homeland Security (DHS) begin an official investigation into a claim made by CNN Correspondent Drew Griffin that he appeared on the DHS watch list soon after his critical reporting on the Transportation Security Administration's (TSA) Federal Air Marshals (FAMs) program.[1]

To follow up on my public inquiry with Secretary Chertoff last week, I am writing formally to request that DHS and the Department of Justice launch an investigation into whether Mr. Griffin's name did in fact appear on the watch list following his critical report on TSA. Additionally, I am requesting an explanation as to the basis of his sudden inclusion on the watch list.

I am deeply disturbed by Mr. Griffin's allegations and, as a Member of the House Committee on Homeland Security, it is troubling that there is no mechanism in place to prevent citizens from being targeted and listed on any watch list as retaliation for their public criticism of our government. The purpose of this list is to keep people who intend to cause us harm away from airplanes; not to exact retribution against people who lawfully exercise their First Amendment rights to free speech and a free press. I will not tolerate this abuse.

[1] "Formal calls for probe into reporter's name on no-fly list," July 17, 2008. http://www.cnn.com/2008/US/07/17/watchlist.chertoff/index.html?iref=newssearch

Although Mr. Griffin's story appears to be something out of a movie, it is a real and unfortunate example of the underlying problems and challenges faced by the public. The redress process for individuals who find themselves erroneously placed on a DHS watch list are inadequate. Since February 2007, more than 32,000 Americans have sought redress through DHS and continue to experience problems with misidentifications.

The House recently took action to address concerns about the watch list by passing the FAST Redress Act (H.R. 4179). I now ask that you both build upon our progress by looking at the guidelines established in the FAST Redress Act and by taking steps to ensure that individuals, such as Rep. John Lewis (D-GA), will not be repeatedly stopped, delayed, or have to seek redress from multiple components in the same Federal agency.

Please respond to this formal request for an investigation into the circumstances surrounding Mr. Griffin's placement on the watch list by no later than Friday, August 8, 2008. If you have any questions or concerns regarding this letter, please do not hesitate to contact Michael Beland, Staff Director and Counsel of the Subcommittee on Transportation Security and Infrastructure Protection, at (202) 226-2616.

Sincerely,

Sheila Jackson-Lee
Chairwoman
Subcommittee on Transportation Security and
Infrastructure Protection
Committee on Homeland Security

Ms. JACKSON LEE. I also want to put into the record February 7, 2008, a letter dealing with the imams in the Minneapolis-St. Paul airport, as to why these imams were removed, arrested and detained. I understand they have a finding of discrimination; I would like to know what the Department of Justice is doing with that.

Mr. Chairman, I ask unanimous consent to put that in the record.

Mr. CONYERS. Without objection, so ordered.

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February 7, 2008

The Honorable Michael Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Mukasey:

It has come to our attention that, on November 20, 2006, at the Minneapolis-St. Paul International Airport, violations of religious liberties, the First Amendment, the Fourth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), 49 U.S.C. § 40127(a) (prohibiting discrimination in air transportation on the basis of race, religion and national origin) and 49 U.S.C. § 41705 (prohibiting discrimination in air transportation on the basis of disability) may have occurred. As such, the undersigned hereby request that the Department of Justice launch an investigation into the events surrounding:

- The removal of Ahmed Shqeirat, Mohamed Ibrahim, Didmar Faja, Omar Shahin, Mahmoud Sulaiman and Marwan Sadeddin (hereinafter "the Six Imams[1]") from U.S. Airways Flight 300 by US Airways' employees and the Minneapolis Airport Police;
- The subsequent arrest, detention and interrogation of the Six Imams by the Minneapolis Airport Police; and
- U.S. Airways' refusal to service these men after they were cleared of any wrongdoing.

According to the Six Imams legal complaint, on November 20, 2006, the Imams checked in for their flight at the Minneapolis-St. Paul International Airport and passed through security without incident. Before boarding, some of the Imams decided to pray Maghreb, the early evening/dusk Muslim prayer, in the waiting area

[1] An Imam is a Muslim religious leader. He is the person who leads congregational prayer in the mosque.

of the terminal. Shortly thereafter, the Six Imams boarded the plane and sat in their pre-assigned seats. Thirty minutes later, three airport police officers boarded the plane, approached the Six Imams one by one and demanded that they deplane. The Six Imams complied with this request. The Six Imams were then searched, arrested and handcuffed. The Federal Bureau of Investigation and the Secret Service interrogated the Imams. The interrogations revealed that the Imams posed no security risk whatsoever. Nevertheless, US Airways refused to re-book the Six Imams on a flight.

Although some have questioned the validity of the Six Imams' claims, a federal Judge recently held that the Imams have sufficiently pled claims of discrimination. Shqeirat v. U.S. Airways Group, Inc., 2007 U.S. Dist Lexis 85881, No. 07-1513 (D. Minn. November 20, 2007). The Honorable Ann Montgomery of the United States District Court of Minnesota rejected almost every argument set forth by US Airways and the Airport Police Department in pre-trial motions. She stated that the facts as pled by Plaintiffs "could support an inference that Plaintiffs' race and religion were motivating factors in MAC's [Airport Police] decision to arrest Plaintiffs." Id. at 26. Furthermore, she ruled that it was "dubious" that the events as set forth by Defendants "would lead a reasonable person to conclude that Plaintiffs were about to interfere with the crew of Flight 300". Id. at 22.

US Airways attached several documents to their motion for summary judgment which demonstrated that the Imams' race, national origin and religion were the motivating factors behind US Airways' decision to remove the Imams from the plane and to deny them any service. The documents revealed that the impetus for deplaning the Imams was a hand written note from a passenger to the pilot stating that the Imams were praying prior to boarding the plane. Furthermore, the Airport Police Department blindly acted upon the information provided by US Airways instead of conducting their own independent investigation to determine whether probable cause existed to arrest the Imams. In Court, the Police Department's representative admitted that the Six Imams were arrested due to their political views.

Such conduct raises several issues of federal interest. First, Defendants' conduct may have violated several Constitutional Amendments, including the Fourth Amendment and the First Amendment. Defendants' conduct also may have violated several federal civil rights statutes including Title VI of the Civil Rights Act of 1964. Furthermore, an inquiry by the Department of Justice is of special need in relation to 49 U.S.C. § 40127(a) (prohibiting discrimination on the basis of race and religion in air transportation) and 49 U.S.C. 41705 (prohibiting discrimination on the basis of disability in air transportation) because the statutory schemes of these provision either prohibit or greatly limit private causes of action.

Religious liberty lies at the bedrock of our society. The manner in which these religious leaders were treated raises several concerns. For the forgoing reasons, we

request a meeting to discuss further an investigation into these incidents and possible action against US Airways and MAC. Enclosed please find a full memorandum of law which sets forth the need for such an investigation.

Thank you in advance for your consideration of this issue. I look forward to working with you to improve the administration of our judicial system and the expeditious handling of this matter.

Very Truly Yours,

Sheila Jackson Lee
Member of Congress

Ms. JACKSON LEE. Let me get to where I will cease so that you can answer these questions.

We have had a series of incidents under the criminal laws of this Nation that have shown that we need improvement, Mr. General. I have mentioned the oversight of the long arm of the Government can bring about light at the end of the tunnel. The Jena Six I refer you to, the Sean Bell case I refer you to, the recent tasering of a Black man in Winnfield, Louisiana, and then to Harris County, where we have found that there have been 101 deaths from January 2001 to December 2006. We just had the additional loss of a

Ms. Saavedra, who died in the jail from an infected knee, having begged for medical treatment and having not received it.

I want to put into the record a May 7, 2007, letter that I have given to you previously and ask unanimous consent.

Mr. CONYERS. Without objection, so ordered.

[The information referred to follows:]

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May 7, 2007

Attorney General Alberto Gonzalez
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

Dear Attorney General Gonzalez,

I am writing you to request an investigation of the Harris County Jail. Recently, the Houston Chronicle reported that between January 2001 and December 2006, at least 101 persons, an average of about 17 a year, have died while in the custody of the Harris County Jail. In 2006 alone there were 22 such deaths. While overcrowding maybe a factor in these deaths, poorly trained or performing employees and inadequate and ineffective leadership may also be major contributing factors.

Let me share an excerpt from the Houston Chronicle that illustrates the gross misconduct on the part of jail administrators, and staff:

Calvin Mack...a homeless and hardened drug addict, continued to bleed, continued to die. "What do you want me to do, get a Band-Aid...?" a deputy quipped when he first appeared at the cellblock. Four hours passed before the officer called for medical help.

By then, Mack was all but dead. (Houston Chronicle, February 18, 2007)

During the course of their investigation, the Houston Chronicle uncovered some disturbing facts. In at least 13 cases, relatives or documents raised questions over whether inmates received needed medications prior to their deaths. Additionally, 11 of the deaths involve infections and illnesses suggesting sanitation problems. In 10 other cases, reports suggest possible neglect. As the nation's top law enforcement official, you will find it equally disturbing that of the 101 deaths, at least 72 of the inmates were awaiting court hearings and had yet to be convicted of the crimes that they were accused of. We are all entitled to life, liberty, and the pursuit of happiness. However, these 72 individuals saw their liberty taken away, without the

due process guaranteed by the constitution. They will never have their day in court, or in front of the jury thanks to the irresponsibility, incompetence, and indifference jail officials may have shown.

Likewise, Texas lacks the proper administrative procedures to look into these reported deaths. The Texas Commission on Jail Standards (TCJS) does not keep a record of the figures of in-custody deaths, illustrating a basic lack of concern for these inmates' lives.

The situation in the Harris County Jail System requires national attention. When it is alleged that inmates are sleeping on the floor next to the toilet and denied basic medical care, something must be done. The conditions at these jails border on cruel and unusual punishment. Should fault or wrongdoing be found, the persons responsible should be held accountable. I eagerly look forward to your expeditious response to this request.

Very truly yours,

Sheila Jackson Lee
Member of Congress

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July 16, 2008, 10:30PM

Congressman 'stunned' by county

Panel chief may convene hearing into alleged abuse by local law enforcement

By DALE LEZON

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Adan Hernandez, 19, right, standing with his family during an informal inquiry by lawmakers, was detained by immigration officials after a recent eastside raid on a rag factory. For video, go to chron.com.

LEONARDO CARRIZO CHRONICLE

The chairman of the House Judiciary Committee said he may convene a congressional hearing into allegations of abuse by Harris County law enforcement after he heard complaints from citizens during an informal inquiry Friday at Houston City Hall.

"I've been stunned," U.S. Rep. John Conyers Jr., D-Mich., said after the inquiry. "I've been shocked. I've been deeply moved by what I heard today."

Conyers said Judiciary Committee staff will begin reviewing the statements and other material Monday morning to determine if hearings should be held. He didn't know when that decision would be made.

Harris County Sheriff Tommy Thomas said [redacted]

"A great deal of recent media criticism has been directed toward me and the dedicated members of this office that is frivolous, exaggerated, or without merit," Thomas wrote in the e-mail. "In my four decades of service as a law enforcement officer, I have never shied away from my responsibility to the public or hesitated to take corrective action where it is warranted."

Friday's hearing, an unofficial inquiry into crime, justice and race in Harris County, was hosted by U.S. Rep Sheila Jackson Lee, D-Houston, a member of the Judiciary Committee.

State Sen. Mario Gallegos, D-Houston, State Rep. Harold Dutton, D-Houston, and City Councilman M.J. Khan also sat on the panel.

About 200 people attended, applauding loudly when speakers said justice was needed and waving signs, including one that read "Houston We Have a Problem." Many of them spoke.

Jackson Lee said the hearing was a chance to gather information from the public about allegations of abuse by the county District

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Attorney's Office and the Sheriff's Office as well as at the county jail.

She said recent revelations about insensitive e-mails circulated at the Sheriff's Office, a grand jury's decision not to indict Joe Horn in the shooting death of two burglars, jail inmate deaths and other complaints prompted the inquiry.

The statements she heard, Jackson Lee said, reaffirmed her fear that the "justice system in Harris County is fractured."

"The District Attorney's Office is firmly committed to a justice system that fairly represents all the citizens of Harris County," said George Flynn, office spokesman.

The hearing comes in the wake of a recent federal investigation of the jail and the firing of two jail officers for allegedly lying about their actions during an incident that led to the death of an inmate earlier this year.

People spoke to the panel about injustices they suffered at the hands of county law enforcement and jailers.

Among the speakers was Stephanie Storey, the fiancee of Hernando Riascos Torres, 38, one of the men Horn shot.

Storey said she doesn't condone what her fiance and Diego Ortiz, 30, were doing when they burglarized the home of Horn's neighbor, but they should have had the chance to face a jury.

"Horn took the law into his own hands," she said. She wants another grand jury to investigate the case.

The son of Margarita Saavedra, Jose Saavedra, cried as he told the panel about his mother's death in the county lockup.

"There is a problem at the jail," he said.

Margarita Saavedra, 44, died from sepsis due to a bacterial infection in her left knee, an autopsy shows.

Her son has said she hurt her knee in the jail two weeks before her death and had complained to her family that medical staff were not caring for her injury.

Social activists and criminal defense attorneys also spoke, reciting a litany of alleged problems ranging from apparent racist attitudes among prosecutors to allegations of unfair grand juries made up of judges' friends.

Quanell X, a community activist, encouraged people who attended the hearing to vote in the general election in November to change the leadership at the district attorney's and sheriff's offices.

Some of the people who attended said they hoped that the hearing would show federal authorities that the justice system in Harris County needs to be investigated.

"I still have hope that something positive can happen ... through the federal justice

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department," said Ovide Duncantell, 71.

"That's our last hope."

Thomas stated in his e-mail that the Harris County Sheriff's Office "stands ready to take corrective action addressing any deficiencies that may be raised by the (federal jail) inspection team."

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Ms. JACKSON LEE. A February 7, 2008, letter regarding the district attorney in Harris County, and I briefly read to you. This person is allegedly to have repeatedly sent racist and sexual e-mails in his actions in the cases in which he prosecuted. We asked simply for this to be reviewed on the basis of prosecutorial misconduct and abuse, civil rights violations, and the proclivity to remove Black jurors.

We got a letter back from the Department of Justice indicating that was not something that you would review, and I thought that had to do with civil rights.

So I would ask, Mr. Attorney General, one, what is the amount of money and staff and counsel that you are utilizing to help purge out the bad apples in the Nation's criminal justice system as it relates to the violation of civil rights of Americans; and, two, what are we doing with respect to the national security investigations of individuals who sometimes seem to be targeted because of racial, ethnic, sexual gender or otherwise?

I would appreciate your answer.

Mr. MUKASEY. I cannot enumerate for you now a specific amount of money being devoted to the problem that you raised. The fact is that we devote our resources across the board to civil rights problems, and we have had a phenomenal success rate. Criminal prosecutions are up, the level of our success in appellate cases is up, the number of voting rights cases that we have brought is up.

We bring Title VII cases to achieve the maximum amount of impact. We are doing this across-the-board.

With respect to, I think it was the Harris County jail situation——

Ms. JACKSON LEE. And the district attorney's office, which your office indicated they couldn't respond.

Mr. MUKASEY. If criminal evidence comes to hand that warrants a prosecution of that district attorney——

Ms. JACKSON LEE. Or civil rights.

Mr. MUKASEY. Or civil rights—who, by the way, is no longer in that position; he is now an ex-DA, and it sounds like he deserves to be a ex-DA. We will pursue that.

But with regard to the Harris County jail investigation, that is ongoing. It is bound to be a long-term thing because it involves revisiting the facility, evaluating all of its treatment, medical care, food, space and the like, and it is likely to take quite some period of time. But there is an active inquiry into the conditions in Harris County, and that is due in no small part to the fact that you are involved in that and have offered us both advice and leads in that.

And although you have been somewhat critical, I can't do anything but say that I am grateful for the fact that you are involved in it.

Ms. JACKSON LEE. I would just simply say, the district attorney's office, you have articulated the history of that office. But I think the question for the Justice Department would be pattern and practice. I would ask respectfully, Attorney General Mukasey, that that be looked at again, because I mentioned the elimination of minority jurors consistently, and I think that warrants a broader look-see, because we are talking about the infrastructure of the justice system.

Mr. MUKASEY. I will get back to you with respect to that one.

Ms. JACKSON LEE. Thank you.

Mr. CONYERS. The Chair recognizes Dan Lungren, who is the only former attorney general of a State on the Judiciary Committee, and he is senior of the three other former attorney generals that are here.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

Thank you for your appearing before us, Mr. Attorney General.

Mr. Attorney General, a year-and-a-half ago the Foreign Intelligence Surveillance Court made a ruling in which it indicated that new circumstances overwhelmed the FISA law and basically invited the Congress to deal with that issue. It took us a year-and-a-half to do that, during which time I think we lost valuable opportunities for intelligence.

Now you have come before us to refer us to the recent Supreme Court case dealing with unlawful enemy combatants and this new right they have to habeas corpus, a right that had never been seen before in the history of the United States, but, nonetheless, one that in the evolving sense of wisdom, the U.S. Supreme Court has found.

In the speech you gave yesterday, or the day before, AEI——

Mr. MUKASEY. The day before, I think.

Mr. LUNGREN [continuing]. You spoke at some length about this, and in the middle of your speech you said one of the questions that had to be answered was whether a Federal Court will be able to order the enemy combatants detained at Guantanamo Bay be released into the United States.

You then went on to say the Supreme Court stated that a Federal trial court must be able to order at least the conditional release of a detainee who successfully challenges his detention.

But what does it mean to order the release of a foreign national captured abroad and detained at a secure United States military base in Cuba? Will the courts be able to order the Government to bring detainees into the United States and release them here, rather than transferring them to another nation? And you further indicated that the court has invited the Congress to act on that.

So I wish you would go a little bit further than you did in your opening statement about the urgency of the matter for Congress to address this and the seriousness of the questions that you asked here, because it seems to me those are unsettled questions, whether the courts would be able to order the Government to bring detainees to the United States and release them here. Clearly, that has not been decided, yet I believe the Court is inviting the Congress to outline the parameters of that and, I would suggest, make it impossible for that to happen.

Mr. MUKASEY. The Court has left that matter open, and the fact—but it has said that at the end of the day it must be open to a decision-maker to direct release.

Now, the fact is that all of these people, every single one of them, are aliens captured abroad in essentially battle conditions who have absolutely no right to be here; and there is no good reason to have a court bring somebody here for purposes of release and release them into our communities, people who could pose a significant danger. We want that particular possibility cut off. We don't want to have to face it. We shouldn't have to face it. And if people are brought here for hearings or are brought here as witnesses, they can simply, by coming here, acquire rights that they did not have abroad.

You recall that there was an extraordinary effort to keep Haitians from coming here, to keep people in the Mariel Boatlift from coming here when they were released from Cuba, and for very good

reason; and that is if they set foot on American soil, there are matters that are at issue that were not at issue beforehand. We don't think they should be put at issue.

Mr. LUNGREN. You also mention in your speech the question of whether or not American military people on the battlefield would be subject to coming to a hearing, whether or not their testimony would be required, the kinds of evidence keeping that would be required under normal circumstances and how that applies to the battlefield.

I presume you are suggesting that Congress ought to deal with that issue as well.

Mr. MUKASEY. I am. The Court left it open specifically and said that this was to be approached in a practical way.

Courts don't have the ability to gather facts on their own. Congress has that ability. Courts don't have the collective expertise that Congress has or that the executive can provide in assisting and drafting that legislation. Courts don't have it; Congress and the executive does. And if anyone should step into this, it is Congress with the assistance of the executive, and that is what we hope to do.

Mr. LUNGREN. As I understand, we have over 200 people held currently at Guantanamo. This is ongoing. In other words——

Mr. MUKASEY. Down from 775.

Mr. LUNGREN. Right. But this is ongoing, requiring Congress to act sooner rather than later.

Mr. MUKASEY. Correct.

Another thing the Supreme Court said is that this process had to go ahead quickly, and it is going ahead quickly. And the quicker it goes ahead, the more likely it becomes that that there may be inconsistent results reached and situations created that could be stopped with intelligent legislation.

Intelligent legislation can do two things: It can both speed up the process by ensuring consistency, and it can assure that undesirable results are avoided.

Mr. LUNGREN. I hope you haven't assumed facts not in evidence, that is that we are capable of producing intelligent legislation. I hope that is not the case.

Mr. MUKASEY. I think they are in evidence. Congress acted very quickly to pass the Protect America Act, it acted very quickly to enact the authorization of military force; it acts quickly when it puts its collective mind to it.

I don't want to sit here and preach. That is not what I am here for. But the fact is that the capacity is here and the intelligence is here.

Mr. LUNGREN. I appreciate that very much, and I yield back the balance of my time.

Mr. CONYERS. The Chair recognizes the gentlelady from California, Maxine Waters, who chairs the Housing Subcommittee in Finance and is a Member of three Subcommittees on Judiciary.

Ms. WATERS. Thank you very much, Mr. Chairman. I appreciate the fact that you are always making available to us the heads of our agencies and departments that are responsible for important areas of Government. And I would like to thank Mr. Mukasey for being here today.

The Justice Department has the responsibility of enforcing civil rights, investigating complaints of civil rights violations, the Voting Rights Act, fair housing, Title IX enforcing discrimination complaints for those who are disabled, and, of course, AIDS discrimination is one of the areas you have responsibility for.

I would like to know, what do you know about the problem of the discrimination complaints within your own Department? If we are to have confidence that you can do the work that is mandated by law, I want to know why you continue to have so many discrimination complaints, what you understand about those complaints, how many are still pending. Have you proposed any initiative to deal with the problem? What are you doing to recruit and outreach to help cure the disparity?

You have 12,000 agents. Less than 5 percent of them are African American. Does this problem cause you any embarrassment, and, if so, what can you do about it? What are you going to do about it?

Mr. MUKASEY. When you refer to 12,000 agents, you mean 12,000 FBI agents?

Ms. WATERS. I have 12,000 agents serving in the FBI.

Mr. MUKASEY. That corresponds roughly to the number of FBI.

My experience has been, through direct observation, that FBI is engaged in significant outreach and that more and more FBI agents are being recruited from within the African American community.

Ms. WATERS. Do you have the numbers?

Mr. MUKASEY. I don't have the numbers. I can get them for you.

Ms. WATERS. I would appreciate that.

You have discrimination complaints. How many are pending within the Department?

Mr. MUKASEY. I don't know the precise number that are pending. There is one that I am familiar with that is in litigation that I can't really comment on. But my sense is different from yours, i.e., that there is not a large number of them. Let me go back and check. I know of one case that is in litigation.

Ms. WATERS. When you talk about recruitment, could you describe your outreach and recruitment efforts?

Mr. MUKASEY. We go to universities. We go to schools. We evaluate applications on the merits. We make it well known that we are looking for talented people.

Ms. WATERS. Do you feel you have a problem?

Mr. MUKASEY. We can always do more.

Ms. WATERS. Do you have a problem?

Mr. MUKASEY. We can always do more.

Ms. WATERS. Are you satisfied that aside from the kind of generic answer of you can always do more, that you don't have that many complaints, they are not that serious, and you don't need to take any special initiatives? If you can always do more, what more are you doing? What more do you propose to do?

Mr. MUKASEY. I am never satisfied. I am not in the business of being satisfied. I am in the business of looking for ways to recruit talented people from all communities. We have been doing that. I am going to get you the numbers on the FBI, and, if you have any particular cases, I will be happy to review them.

Ms. WATERS. No. I would like to ask our Chairman if we can make a request from this Committee to get a list of all of the discrimination complaints and the status of those complaints so that we can decide and I could impose upon you, Mr. Chairman, to see if we need to do a hearing about those complaints.

Mr. MUKASEY. Discrimination complaints within the Civil Rights Division?

Ms. WATERS. Complaints within the Department. Discrimination complaints from agents, African American agents, or from women, against the Department, and your discriminatory practices there in the Department.

Mr. MUKASEY. You somewhat broadened the target. But whatever is requested, if we can provide it, we will provide it.

Mr. CONYERS. Would the gentlelady yield? Because I would be willing to review that list when it is sent to you.

Ms. WATERS. I appreciate that. That is probably very important that we get the actual information. Mr. Mukasey is new and he perhaps doesn't know in depth the problem that exists.

Mr. MUKASEY. I am not taking refuge behind the fact that I am new. I am going to take a look at it, and it may provide a subject for discussion in a meeting that I am going to have.

Ms. WATERS. Mr. Chairman, I am being kind to provide him with an excuse for not knowing the information that I have asked him today. So whatever the reason is, we need that information.

I thank you, and I yield back the balance of my time.

Mr. CONYERS. Bob Goodlatte, Chairman emeritus of Agriculture and distinguished Member of the Committee.

Mr. GOODLATTE. Thank you, Mr. Chairman, and thank you for holding this hearing.

Attorney General Mukasey, welcome. We are very pleased to have you here. I also want to thank you for your commitment to protecting our elections process by aggressively prosecuting voter fraud cases.

I wonder how your efforts are going, and do you agree it is crucial that we ensure that U.S. Citizens' votes are diluted by those unauthorized to vote, including illegal aliens?

Mr. MUKASEY. I think it is crucial that we ensure it. I think that one way in which we have helped assure it is assuring that proper identification is required before somebody can vote. Obviously, when evidence presents itself that people are here unlawfully, they are apprehended and deported.

Mr. GOODLATTE. Thank you. A recent experience under Indiana's voter ID law seems to show that such laws do not diminish voter turnout. On the contrary, they can actually increase voter turnout.

As was recently reported, voter turnout among Democrats improved slightly last year in Indiana, despite a new law requiring voters to show photo identification at the polls. Jeffrey D. Milyo, a professor at the University of Missouri, compared the 2006 midterm elections, the first since Indiana's law was enacted, to the 2002 midterm elections, and said voter turnout increased about 2 percentage points. He said the increase was consistent across counties with the highest percentage of Democrats.

So do you think that this increased turnout could be explained by the fact that securing voter ID laws gives legal voters the secu-

rity of knowing that their vote will count and that it will not be diluted?

Mr. MUKASEY. I am not technically trained, so I don't want to speculate on the possible relationship. I think all that study shows is that you don't cut down the number of voters simply by requiring that people have to show ID. Whether there is a cause-and-effect relationship is for people who are much more schooled in statistics and sociology than I am.

Mr. GOODLATTE. I agree. Section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 bars State and local governments from restricting their law enforcement officers from communicating with the Department of Homeland Security about the immigration status of individuals. Despite that law, many sanctuary cities continue to prohibit law enforcement from checking the immigration status of criminal aliens that they encounter.

The results can be tragic. There have been many reported cases where the immigration status of criminal aliens was not checked because of sanctuary policies, and they were released back into society to murder American citizens.

What steps are you taking to enforce section 642 and to stop cities from using sanctuary policies?

Mr. MUKASEY. We are trying to police unlawful aliens in this country. We are doing our best to conduct controlled operations, along with the Department of Homeland Security, when we find them located in a particular place.

That said, I have said on prior occasions that I can understand the dilemma posed when unlawful aliens essentially present an attractive victim pool for people who know that they won't file complaints. And there is a balance to be struck here, but we are certainly alive to the need for enforcement, and we engage in it actively.

Mr. GOODLATTE. That dilemma that you face could be enhanced if you had the cooperation of communities, rather than some communities refusing to cooperate with the Department of Homeland Security or the Justice Department in enforcing our criminal laws.

Mr. MUKASEY. Precisely.

Mr. GOODLATTE. Thank you.

Attorney General, in April of this year, you announced the allocation of additional resources for prosecuting felony and misdemeanor immigration-related violations, such as human trafficking and drug smuggling, with $7 million provided to hire 64 assistant U.S. Attorneys and 35 support staff assigned to the Southwest border U.S. Attorneys' offices which prosecute the majority of the country's felony immigration cases.

For fiscal year 2009, the Department is requesting another $8.4 million to add another 50 attorneys along the border. With these increased resources, will you be placing increased emphasis on the prosecution of misdemeanor and felony immigration cases?

Mr. MUKASEY. We will be able to address this problem, as we have been addressing it, in a flexible sort of way, including increased prosecution, which, as I said, has led to reduced infiltration. We have more prosecutions, less infiltration, in each of the districts across the border.

We don't use precisely the same approach in each of the districts across the border. It is not one-size-fits-all, because one size doesn't fit all. There are places where there are greater numbers, numbers that, if fully prosecuted, would overwhelm the system, because there simply aren't enough judges, lawyers, bed space and marshals. But we try to address each problem in each district to meet that district's needs.

Mr. GOODLATTE. Thank you. I agree with that assessment.

I think Americans are starting to see some results along the border. I think more needs to be done, and more needs to be done in the interior of the country. But I encourage you to pursue those efforts.

Thank you again for being here today.

I yield back, Mr. Chairman.

Mr. CONYERS. Bob Wexler, Florida, Member of the Intellectual Property Subcommittee.

Mr. WEXLER. Thank you very much, Mr. Chairman.

Thank you, Mr. Attorney General, for appearing before us. I am hopeful that you, Mr. Attorney General, can somehow explain to this Committee and to the American people how this Administration effectively nullified the constitutional power of Congress to investigate actions of the executive branch and how this Administration has effectively rendered meaningless our power to seek and subpoena executive branch witnesses. Unfortunately, your actions, thus far, have enabled this President to assert this unprecedented abuse of executive privilege claims and the outright refusal of Administration officials to come before Congress.

I would like to specifically discuss with you the interview Vice President Cheney held with the FBI regarding the CIA leak investigation. In a demonstration of just how far you have stretched the definition of executive privilege, you declared that those FBI interviews were "internal White House deliberations" and, thus, exempt from congressional oversight.

These FBI interviews would seem to be nothing of the sort, and they would seem to have zero relation to any official White House business or Federal policy. These are transcripts of FBI investigators interviewing Vice President Cheney, nothing more, nothing less.

So my question, respectfully, Mr. Attorney General, is, does your Justice Department consider all FBI investigators to be part of the White House, and by your logic, is there any way, any conceivable way, that the White House could in fact be investigated without triggering executive privilege?

Mr. MUKASEY. Let me explain the problem as follows:

The FBI 302s that you referred to—which, by the way are not transcripts, they are reports by FBI agents on their conversations with particular people—the 302s that you referred to were on conversations with the Vice President. Those conversations concerned conversations that he had internally with respect to matters that were at the heart of the notion of executive privilege, i.e. conversations relating to whether the President was accurate or inaccurate in his comments in his State of the Union and related matters. That was the subject of those 302s.

The fact that those conversations happened to be recorded in 302s doesn't change the protection afforded to them. That is our view. And I think that principle is not my invention. It is nicely illustrated in a pair of cases involving the Nixon tapes, where an objection based on executive privilege was sustained in response to a congressional subpoena, whereas an objection based on executive privilege was not sustained in response to a demand for a subpoena by a prosecutor.

Those two cases could not stand side-by-side were it not for there being that distinction.

Mr. WEXLER. Are you asserting that the FBI did not inquire with the Vice President with respect to his role in the outing of a covert CIA agent?

Mr. MUKASEY. I am not going to disclose the substance of the FBI's inquiries beyond saying the substance of those inquiries involved core executive privilege concerns, which the President invoked.

Mr. WEXLER. If the Vice President of the United States did in fact participate in the outing of a covert CIA agent, is it your position that that involves the core actions of the Vice President?

Mr. MUKASEY. I should point out that your question embodies a counter-factual assumption, because the prosecutor in that case closed that case by saying that no further investigation was necessary.

Mr. WEXLER. What is your definition of "internal White House deliberations"? What qualifies?

Mr. MUKASEY. What qualifies? You mean what qualifies for executive privilege? Deliberations between the President and those immediately around him and the gathering of information by him for the purpose of making decisions.

Mr. WEXLER. So a discussion with the Vice President with FBI agents under that definition would only qualify to the extent he is talking about conversations that the President had; is that correct?

Mr. MUKASEY. Conversations that were had within the executive generally for the purpose of advising the President.

Mr. WEXLER. But clearly, you tell me otherwise, whether or not the Vice President participated in a scheme to out a CIA agent, would that be covered by executive privilege?

Mr. MUKASEY. The Vice President's participation, yes or no, was the subject of inquiry by a prosecutor.

Mr. WEXLER. I understand that. But does it qualify for executive privilege?

Mr. MUKASEY. In the abstract, no.

Mr. WEXLER. Thank you, Mr. Chairman. My time has expired.

Mr. CONYERS. The Chair recognizes Rick Keller, who serves on three Subcommittees on Judiciary. The gentleman from Florida is recognized.

Mr. KELLER. Thank you, Mr. Chairman, and thank you, Attorney General Mukasey, for being here today. We very much appreciate it. I am going to ask you about two subject areas.

First, I want to ask you about the media shield issues, and second, touch on violent crime. With respect to the media shield issue, I have read your testimony today. I know that you and the Bush

administration have expressed concerns about the media shield bill.

I have worked very closely with the authors of this legislation to come up with fair compromise language that helped to win overwhelming bipartisan support on this Judiciary Committee and in the full House. Since the sensible exceptions that we have come up with, such as not allowing reporters to withhold information that could prevent crime, terrorism, or harm national security, hasn't been enough to satisfy the Bush administration to support the media shield bill, I am curious myself about what it would take to have a bill that would be acceptable.

So my question to you is, is there any version of the Federal media shield bill that you would find acceptable enough to recommend to President Bush that he would not veto it?

Mr. MUKASEY. With great respect, there is nothing that I have seen in the media shield bill, as presented, that would allow for the sufficient protection of classified information, for the sufficient protection of the security of this country. In my view, the media shield bill, in the large, is a solution in search of a problem.

We have a procedure in place for the protection of subpoenas against reporters. The United States attorneys are not free simply to do that without the permission of the Attorney General. We have had less than two dozen cases in which such subpoenas have issued since 1993.

Mr. KELLER. Well, Mr. Attorney General, I would submit to you that there is language in there that specifically deals with the leaking of classified national security information.

Mr. MUKASEY. There is in fact a higher standard for prosecuting a leak case than there is for any other case in that statute, and it would provide not protection for reporters, it would provide protection for leakers.

Mr. KELLER. Right. Well, were you aware that the Ranking Members of the Intelligence Committee, along with the Chairman of the Intelligence Committee, Republicans and Democrats, along with the leaders, Republicans and Democrats, of the Armed Services Committee, felt that that language dealing with the national security protections was sufficient enough that it justified them voting for it?

Mr. MUKASEY. I don't know what they felt or didn't feel. I know what is in the bill. And what is in the bill, for example, requires a showing that classified information was properly classified and that the person who leaked it had authorized possession of it.

If somebody wants to leak classified information, it is child's play for that person to take that information, give it to somebody who is not authorized to leak it, and then the investigation ends.

Mr. KELLER. All right, let's focus on what we can agree on, because I don't want to quarrel with you, but I am trying to resolve this issue.

Mr. MUKASEY. That is what is in the bill.

Mr. KELLER. We can agree that 398 House Members voted for it. I think we can agree that both Senator Obama and Senator McCain said they would sign the bill, and I think we can agree that one of those two men is going to be the next President of the United States.

So you agree with all three of those facts?

Mr. MUKASEY. I would agree with all of those facts, and I would also agree that 10 angels swearing on Bibles that that bill was harmless would not change the provisions that are in it.

Mr. KELLER. So back to my original question.

You have got less than 6 months on the clock here until the end of the Bush administration. Will you commit today to sitting down with our congressional leaders to try to fashion a compromise relating to these national security issues that would ultimately result in your being able to recommend that the President sign the bill? Or in the alternative, is there no bill that you would recommend being signed?

Mr. MUKASEY. I am in the same position as a Socialist candidate for President named Eugene Debs, who said, "I will talk to anybody who will talk to me."

I will sit down with anybody who wants to sit down and have a serious conversation about what can be done and what can't be done, but first we need to talk about what is there. And what is there is not acceptable for the reasons I have started to explain, and I would be happy to continue to explain.

Mr. KELLER. If there is language that is acceptable to you that provides the protections for national security, would you then be able to be in a position to recommend it?

Mr. MUKASEY. If anybody can come up with language that is acceptable, that protects national security, that allows us to get information when there is serious indication of an impending crime, then yes.

Mr. KELLER. Okay. My time is about to expire on the violent crime issue, so let me just make a statement and give you a chance to respond.

On the positive front, Attorney General Mukasey, I have seen very good results in my area of Orlando, Florida, arising out of the ATF Violent Crime Impact Team, and I have seen very positive results as a result of 774 cops added to the streets of central Florida through the COPS program.

Can you give me your thoughts, as we wrap up, on the ATF Violent Crime Impact Teams and the COPS program?

Mr. MUKASEY. The VCITs, the Violent Crime Impact Teams, are part of, but not the entirety of the antigang strategy that we have pursued. ATF has been superb in handling, I think, more gun cases than we have ever handled before. They are part, but not the entirety of, the strategy.

We try to do targeted grants using not only our own capabilities, but targeted grants at State and local entities that can work with us, so as to maximize the resources that we can bring to bear.

Mr. KELLER. And the COPS program, any thoughts?

Mr. MUKASEY. The COPS program is one of many programs that can be worthwhile, but was never meant to be perpetual. The point was to get police on the streets, have them effective, and then encourage State and local communities, as many of them have, to step forward and fund the increased forces that they have which are effective.

Mr. KELLER. Thank you. I wish I had more time to follow that last one up, but my time has expired. I thank you for being here, Attorney General Mukasey.

Thank you, Mr. Chairman.

Mr. CONYERS. Linda Sánchez, Chair of Administrative Law and Commerce, and a Member of the Immigration Committee, from California.

Ms. SÁNCHEZ. Thank you, Mr. Chairman, and thank you, Mr. Attorney General, for being here today. There are a number of different areas of questioning that I have, and I am going to try to get through them as quickly as I can.

First off, in response to questioning before the Senate Judiciary Committee on July 9, about the allegations of selective prosecution of Alabama Governor Don Siegelman, you stated that there are—and I am quoting you here—"various avenues open for exploring those allegations, including having testimony on the subject."

Given your assertion about the ability of Congress to investigate the Siegelman matter through testimony, I am wondering, do you support Karl Rove's decision to ignore a congressional subpoena on July 10th and refusal to testify about his role in the Siegelman matter and other matters regarding the politicization of the Justice Department?

Mr. MUKASEY. As I understand it, Mr. Rove acted at the request of the President in response to an invocation of executive privilege. He has offered to meet with staff. He has offered to discuss the matter.

Ms. SÁNCHEZ. But he has not offered to be under oath or be subject to transcript. And my understanding from prior court law—and I would expect an Attorney General to know this, as well—if the White House wishes to invoke a claim of executive privilege, the witness still has to present themselves before Congress and claim that privilege on a question-by-question basis.

Mr. MUKASEY. With all due respect, I think that is a matter that is currently being litigated on which I can't comment any further.

Ms. SÁNCHEZ. But prior case law has held that that is the case.

Mr. MUKASEY. I don't know that. I know that that is a matter that is under active litigation, and is I believe sub judice before a judge in the District of——

Ms. SÁNCHEZ. So you agree that Karl Rove can disregard a congressional subpoena if we wish to——

Mr. MUKASEY. What I am saying is, the question of whether an immediate adviser to the President has to appear at all when a proper claim has been made of executive privilege is a matter that I believe is actively before a district judge; and I shouldn't comment any further on that, and I won't.

Ms. SÁNCHEZ. I think if you brush up on your case law, you will find that prior case law holds that not to be the case. And if we are talking about conversations that Mr. Rove had with others in the U.S. Attorney's office in Alabama, for example, in the Siegelman matter, not conversations with the President himself, I have a hard time seeing exactly how the claim of executive privilege can be asserted if it wasn't advice that was given to the President or direct conversations with the President.

But apparently we disagree on that matter.

On the issue of nonprosecution and deferred prosecution agreements, out of the 40 known corporate monitors that have been appointed in deferred or nonprosecution agreements since 2000, at least 30 were Government officials and 23 were former prosecutors.

Mr. MUKASEY. Were Government officials at the time they were appointed?

Ms. SÁNCHEZ. Previous Government officials, and 23 were former prosecutors. As I am sure you are aware, New Jersey U.S. Attorney General Chris Christie gave a multimillion-dollar, no-bid contract, monitoring contract, to John Ashcroft, who was his former superior.

I am wondering if you believe that all qualified individuals should have the opportunity to serve as a corporate monitor in an open and competitive bidding process. Or do you favor the selection of corporate monitors with no transparency and no accountability?

Mr. MUKASEY. With all due respect, we enacted or put into place in March of 2008, after consultation with the United States attorneys, a set of guidelines relating to the appointment of corporate monitors that assures precisely the transparency that I think you advocated, and it goes from the start of the process to the conclusion of the process.

Ms. SÁNCHEZ. My understanding is those guidelines were issued on the eve before a hearing that we were holding on that very issue. I think that there was probably a strategic reason for trying to get them done before the hearing.

Mr. MUKASEY. Oh, gosh, I was unaware of the hearing. With all due respect——

Ms. SÁNCHEZ. Furthermore, the guidelines have been criticized for lacking sufficient detail to really be of any significant use either to Federal prosecutors or to the corporations that were——

Mr. MUKASEY. Why don't we await the experience that we have using the guidelines and find out whether they work?

Ms. SÁNCHEZ. Well, so far, we have not seen any instance of an open and fair and transparent process by which monitors are selected. It seems to be pretty much at the discretion of one person within the Department of Justice.

Mr. MUKASEY. It is not.

What happens is what is required under the guidelines with regard to when you get to the point of selection——

Ms. SÁNCHEZ. These are the new guidelines that just got enacted and got released.

Mr. MUKASEY. The new guidelines, correct.

There is a panel of at least three people from whom the selection is made. That person has to be approved by the Deputy Attorney General, which assures uniformity; and the money that comes to fund somebody who serves in that position is paid not by the public, but by the corporation.

Ms. SÁNCHEZ. We understand. But there are still questions to whom that monitor owes a duty: Is it to the Government? Is it to the people? Is it to the corporate monitor? That has not been spelled out in those guidelines, unless something has been revised since March.

Mr. MUKASEY. That monitor owes a duty to the duty that he undertakes to act in a fair, open and transparent way.

The fact is that the Government people, ex-Government people, you mentioned put their reputations for fairness on the line every time they agree to do that.

Ms. SÁNCHEZ. And they also are paid oftentimes very lucratively. I would just say this because my time has expired. We would love to get additional information regarding the use of non-prosecution and deferred prosecution agreements. We will look forward to that because so far we have not received all of the information that we have requested regarding those agreements, and we have written to you on several occasions to ask you to provide that information.

So if you are saying here today that we should evaluate the cases where it is used and see whether the guidelines are working or not, we can only do that if we receive the information from your office.

With that, I will yield back the balance of my time.

Mr. CONYERS. The Judiciary Committee will stand in recess for 8 minutes.

[Recess.]

Mr. CONYERS. The Committee will come to order. The Chair recognizes the distinguished gentleman from California, Darrell Issa, who serves on the Intellectual Property Committee, the Constitution Committee, and the Task Force on Antitrust.

Mr. ISSA. Thank you, Mr. Chairman, and it is an honor to serve on those Committees with you.

General, a couple of things, and before I get back to, if you will, this whole question of media, I would like to do just a couple of questions on executive privilege. Earlier Ms. Sánchez was asking about Karl Rove's failure to appear based on an assertion by the President of executive privilege. What useful purpose would it serve if he came here when the questions are likely to be specifically related to items he is prohibited from telling us? Other than to be a dog and pony show, can you name us a useful reason to have Karl Rove here?

Mr. MUKASEY. Congressman Issa, I don't want to get in the middle of a controversy as to what good would or wouldn't be served. I know that the President's immediate advisers are subject to his claims of privilege, and notwithstanding their own desire or ability to discuss issues, if they are told they ought not to get into matters that relate to their conversations with him or his ability to gather information, they can't.

Mr. ISSA. General, in your past experience, if you want to get to the truth, don't you usually try to get a written statement, sworn or unsworn, through requests for production? Isn't that a generally more effective way to do it and isn't that what you would normally recommend for the efficiency of any body, that they try to get the answers in writing rather than schedule people if the questions are known and the answers are unknown?

Mr. MUKASEY. I guess, again, I don't want to get in the middle of an intramural dispute here. There are various ways of gathering information, people use written interrogatories, they use live testimony. I am not demeaning the value of live testimony. There are many ways, as you point out.

Mr. ISSA. General, I didn't plan on asking these questions but since Ms. Sánchez did I thought I would try to make the record as complete as possible today because of your presence here.

Mr. Chairman, I would like to ask unanimous consent to enter in the Record at this time a letter from Ranking Member Lamar Smith asking Mr. Luskin, who represents Karl Rove, whether or not he would answer some very specific questions related to the prosecution of Governor Donald Siegelman and then the accompanying answers in detail from Patton Boggs. Perhaps that would enlighten us, at least until we can get further answers from some other source.

Mr. CONYERS. Without objection, so ordered.

[The information referred to follows:]

U.S. House of Representatives
Committee on the Judiciary

Washington, DC 20515–6216
One Hundred Tenth Congress

July 15, 2008

Robert D. Luskin, Esq.
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037-1350

Dear Mr. Luskin:

On multiple occasions, you have extended to the House Judiciary Committee the offer that your client, Karl C. Rove, would voluntarily answer in writing the Committee's questions for him regarding his alleged role in the investigation and prosecution of former Alabama Governor Donald E. Siegelman. Most recently, you extended this offer in your letter to the Committee of July 9, 2008. At the same time, you explained limitations imposed by the President on your client's ability to provide information under the compulsion of a congressional subpoena.

The Committee majority, as before, declined your offer when it was renewed on July 9th. This unnecessarily forced upon your client the Hobson's choice of obeying the limitations placed upon him by the President or obeying the demand of the majority that he appear and testify at a July 10, 2008 hearing before the Subcommittee on Commercial and Administrative Law. The forcing of this issue did not obtain information for the Committee. Rather, it simply provoked partisan spectacle and gratuitously exposed your client to potential legal jeopardy.

I believe that the point of the Committee's efforts should be to obtain information that can lay to rest questions that have been raised concerning the current Administration's management of the Department of Justice. The Committee's goal should not be the unnecessary persecution of witnesses with compulsory congressional process and needless contempt proceedings. Because written answers to written questions about the Siegelman matter would serve the Committee's proper objective, I am accepting by this letter your offer to provide those answers. Attached hereto, please find a series of questions that I believe would help the Committee to resolve this matter. To facilitate the Committee's prompt receipt of the relevant information, I request that your client submit his answers in writing by the morning of July 16, 2008, if at all possible. If your client reasonably would require more time, please inform me as soon as possible.

Sincerely,

Lamar Smith

Lamar Smith
Ranking Member
House Judiciary Committee

Questions from House Judiciary Committee Ranking Member Lamar Smith to Karl C. Rove Regarding Allegations of Selective Prosecution in the Case of Former Alabama Governor Donald E. Siegelman

1. Before former Alabama Governor Donald E. Siegelman's initial indictment in May 2005, did you ever communicate with any Department of Justice officials, State of Alabama officials, or any individual other than Dana Jill Simpson, Esq., regarding Governor Siegelman's investigation or potential prosecution? If so, please state separately for each communication the date, time, location, and means of the communication, the official or individual with whom you communicated, and the content of the communication.

2. Before Governor Siegelman's initial indictment in May 2005, did you ever communicate with Dana Jill Simpson, Esq., regarding Governor Siegelman or Governor Siegelman's investigation or potential prosecution? If so, please state separately for each communication the date, time, location, means, and content of the communication.

3. After Governor Siegelman was initially indicted in May 2005, but before the first superseding indictment against him in October 2005, did you ever communicate with any Department of Justice officials, State of Alabama officials, or any individual other than Dana Jill Simpson, Esq., regarding Governor Siegelman's investigation or prosecution? If so, please state separately for each communication the date, time, location, and means of the communication, the official or individual with whom you communicated, and the content of the communication.

4. After Governor Siegelman's was initially indicted in May 2005, but before the first superseding indictment against him in October 2005, did you ever communicate with Dana Jill Simpson, Esq., regarding Governor Siegelman or Governor Siegelman's investigation or prosecution? If so, please state separately for each communication the date, time, location, means, and content of the communication.

5. After Governor Siegelman's first superseding indictment in October 2005, but before his subsequent conviction, did you ever communicate with any Department of Justice officials, State of Alabama officials, or any individual other than Dana Jill Simpson, Esq., regarding Governor Siegelman's investigaton and prosecution? If so, please state separately for each communication the date, time, location, and means of the communication, the official with whom you communicated, and the content of the communication.

6. After Governor Siegelman's first superseding indictment in October 2005, but before his subsequent conviction, did you ever communicate with Dana Jill Simpson, Esq., regarding Governor Siegelman or Governor Siegelman's investigation or prosecution? If so, please state separately for each communication the date, time, location, means, and content of the communication.

7. Since Governor Siegelman's conviction, have you ever communicated with any Department of Justice officials, State of Alabama officials, or any individual other than Dana Jill Simpson, Esq., regarding Governor Siegelman's conviction, sentencing or appeal? If so, please state separately for each communication the date, time, location, and means of the communication, the official with whom you communicated, and the content of the communication.

8. Since Governor Siegelman's conviction, have you ever communicated with Dana Jill Simpson, Esq., regarding Governor Siegelman or Governor Siegelman's conviction, sentencing or appeal? If so, please state separately for each communication the date, time, location, means, and content of the communication.

9. Did you ever communicate with Dana Jill Simpson, Esq., regarding any political campaign before, during or after 2001? If so, please state separately for each communication the date, time, location, means, and content of the communication.

10. Do you know Dana Jill Simpson, Esq., personally, and have you ever met or communicated with her in any other manner or context? If so, please describe the nature and context of the meeting or communication.

11. In a September 14, 2007, interview with staff of the House Committee on the Judiciary, Ms. Simpson identified you as the "Karl" referred to in a hand-written note atop an email discussing a 2001 FEMA contract. *Interview of Dana Jill Simpson, September 14, 2007, at 36.* The e-mail refers to a proposed letter dated May 23, 2002, to FEMA Director Joe Allbaugh. *Simpson Exhibit 550.* This letter appears to refer to an appeal of a FEMA decision to deny payment for work performed pursuant to the contract. The hand-written note reads: "To: Jill . . . I e-mailed this to [redacted], Karl, and Stewart today . . . Rob." *Id.* Ms. Simpson identifies the hand-writing as that of Mr. Rob Riley and identifies "Stewart" as "a lobbyist that works for the Federalist Group." *Interview at 35-36.* Do you have any reason to believe that you are the "Karl" referred to in this exhibit?

12. In a February 24, 2008, interview with *60 Minutes*, Ms. Simpson specifically claimed that during a meeting with you in 2001, you asked her to try to catch then-Alabama Governor Donald E. Siegelman cheating on his wife. Specifically, Ms. Simpson claimed that you asked Ms. Simpson to take pictures of Governor Siegelman in a compromising sexual position with one of his aides. Did you ever ask Ms. Simpson to take pictures of Governor Siegelman in a compromising sexual position with one of his aides?

13. Are you aware of statements by any officials or individuals regarding whether or not Ms. Simpson's allegations about the investigation and prosecution of Governor Siegelman, your alleged role in it, or your alleged communications with Ms. Simpson are credible? If so, please identify the official or individual who made the statement,

the date, place and manner of the statement's publication, and the statement's content. Please also provide a citation to or copy of each such statement, if you have one.

14. Please share with us any additional information which you would like to provide concerning Ms. Simpson's and Governor Siegelman's allegations against you or any other questions that have arisen concerning your alleged involvement with Governor Siegelman's investigation and prosecution.

Mr. ISSA. Thank you. Having dispensed with at least questions and answers that do not assert executive privilege, General, you were unable to fully answer questions related to the current relationship of media leaks and how they affect national security earlier. I would like to give you an opportunity to do it, but I would like you to do it, if you would, also by commenting in your opinion both before and after you were the AG what the effects of organiza-

tions like the New York Times, and so on, leaking the most sensitive information have been as to the ability of us to conduct the war on terror and as to potential prosecutions.

So I want you to fully answer how you feel we would, because you are saying to us show me a bill that I would sign, I am saying to you I fully agree that the leaks of classified information serving no purpose other than to take the most sequestered information, in some cases information that even some Members of the Intelligence Committee haven't received, and divulge them, has hurt this country. But I would like you to go from that and, if you will, tell us what we need to do in order to stop that while respecting the legitimate use of the press.

Mr. MUKASEY. I think, without going into detail or starting to criticize individual newspapers——

Mr. ISSA. I am not restrained from saying Eric Liplaw and the other people who leak national secrets, but I understand that you wouldn't.

Mr. MUKASEY. They ultimately get even by writing your obituary, so you have to be very careful.

Mr. ISSA. I am from a family of long livers.

Mr. MUKASEY. But when a statute and an obligation to disclose by the Government that electronic eavesdropping is going on can be tripped even without an attempt to get at confidential information such as where somebody who is under legitimate FISA surveillance or under title III surveillance makes a call to a reporter and that triggers an obligation to notify the reporter that he or she has been overheard on a wiretap and then stops the Government from using the fruits of that wiretap, that statute is seriously misconceived.

I don't think that was the intention of the people who drafted the statute, but the law of unintended consequences operates just as much as the law of intended consequences, and sometimes in a lot more deadly fashion. That is one of many fashions in which it could operate under this bill.

In addition, there are numerous crimes that are not included within the list of crimes that are subject to the exception for being able to get at sources. For example, child abuse is not one of the crimes that are listed, so that somebody could do an interview with a child abuser and be able to claim privilege.

Finally, there is no way to compel a reporter, even when a balance is struck as between the public interest in disclosure against the interests in keeping information private, which is apples and oranges put before somebody who has no other standard, there is no way ultimately to compel a reporter to disclose. A reporter is just as free as he or she is now to say I am not going to disclose, I would rather take a contempt citation.

There is no requirement, for example, that the information be put in the custody of the court and the matter then adjudicated with the information to be disclosed thereafter. The reporter retains the information. They are just as free as they are now to disclose it.

It also creates a possible lack of uniformity, given the fact that this is a jump ball for however hundreds of many judges there are. Under current standards, uniformity is achieved by having these

matters go up through the Justice Department and having them decided in a uniform way. As I said, it is a solution in search of a problem.

Mr. ISSA. Thank you.

Mr. MUKASEY. As currently drawn.

Mr. ISSA. Thank you. Hopefully that gives you a little more time to speak.

Thank you, Mr. Chairman.

Mr. CONYERS. Bill Delahunt, Chair of the Oversight Subcommittee of Foreign Affairs and a Member of three Subcommittees on Judiciary.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. MUKASEY. Good afternoon.

Mr. DELAHUNT. Good afternoon, General. Earlier you discussed the issue of Guantanamo and used the word "urgency" to deal with the issues. I presume that sense of urgency also goes to the 45 detainees who are currently at Guantanamo who have been cleared for release by the Department of Defense.

Mr. MUKASEY. You are talking about the Uighurs?

Mr. DELAHUNT. I am talking about 45, including the Uighurs, detainees who the Department of Defense has cleared for release who are still being detained at Guantanamo.

Mr. MUKASEY. If there are in fact 45.

Mr. DELAHUNT. Let me suggest that 45 list was given to Judge Hogan on this past Monday.

Mr. MUKASEY. I have no doubt that it is accurate. The fact remains that we are not allowed to release people unless we can find countries that are willing to take them with the assurance that they will not be abused when they get to those countries. And the State Department has been making heroic efforts at placing people, and it has been thus far fairly successful. The list has been sweated down from 775 to something in the neighborhood of 260.

Mr. DELAHUNT. There are 270-plus detainees currently at Guantanamo.

Mr. MUKASEY. I think there are slightly fewer than that. In any event.

Mr. DELAHUNT. But we find ourselves in a position as a Nation where we are detaining at least 45 individuals who have been cleared for release. You indicated that you would object to having those individuals or any individual repatriated to the United States?

Mr. MUKASEY. Yes.

Mr. DELAHUNT. Okay. Let me again go to the issue——

Mr. MUKASEY. Because the reasons why they have been cleared for release did not necessarily go to what havoc they could cause if they came here. They go through a whole lot of things.

Mr. DELAHUNT. Other countries where they can create havoc?

Mr. MUKASEY. No. Other countries where they could not.

Mr. DELAHUNT. Could not create havoc. That havoc will be limited by geographical boundaries.

Mr. MUKASEY. It doesn't necessarily mean those people who were picked up by mistake or that they have been ceased to be dangerous at all.

Mr. DELAHUNT. The Department of Defense is willing to release them if they are still dangerous?

Mr. MUKASEY. The Department of Defense is willing to release them under controlled conditions if they can be put in places where they won't cause us additional harm. The Department of Defense has leaned over backward, and in some cases we have all lived, and a couple of us have died, to regret it.

Mr. DELAHUNT. With all due respect, these 45, I dare say, if we should release them and they are still dangerous, we are doing a disservice to those of our allies that would be willing to accept them. But having said that, I want to get to the issue of assurances.

Earlier, you and Congressman Watt had a colloquy about a case involving the Director, the FBI Director, in which you didn't have any particular knowledge. Just yesterday we received a letter that I had authored, along with the Chair, Mr. Conyers, and Mr. Nadler, regarding the case of Maher Arar. You responded that you did not believe that it warranted the appointment of a special prosecutor.

Mr. MUKASEY. I think you left out a phrase.

Mr. DELAHUNT. Well, give me the phrase I left out.

Mr. MUKASEY. At this time.

Mr. DELAHUNT. At this time. Thank you then. Because we have inspector generals that have stated that in their opinion the assurances were of such a dubious nature that one of them, Mr. Irwin, interpreted it to be that there could have been, and I am not suggesting that is the case factually, but there could have been an intent, and these are his words, an intent to render to Syria rather than Canada because there was a knowledge or a likelihood of torture. If that doesn't trigger, in my judgment, the need for a special prosecutor, I can't imagine what would.

Having said that, and having looked at your letter, are you prepared after your review, pursuant to our letter, that there was sufficient assurances from Syria that warranted the sending or the rendition of Mr. Arar to Syria as opposed to Canada?

Mr. MUKASEY. I am not certain I understand the question. I am really not. You say are you prepared, assuming that I believe there was sufficient assurances, am I prepared to do what?

Mr. DELAHUNT. Are you prepared to say that there were sufficient assurances on the part of individuals in the Government that emanated from Syria to meet the standards of the Convention Against Torture and our own domestic legislation to render Mr. Arar to Syria rather than his stated preference, which was Canada?

Mr. MUKASEY. So far as I am aware, there was a classified briefing available to the authors of that letter as to what assurances were received. There can't be any change in the nature of what assurances were received. Things happen one way. Either assurances were received or not, and they were received in a particular way or not. But there was, I believe, a classified briefing to all three, or available to all three authors of that letter.

Mr. DELAHUNT. Well, it was available. I did not attend the classified briefing because I didn't want to be in a position to inadvertently discuss it in a public venue. But I presume that assurances

that would be relied on by the United States Government would be of such a nature that they would come from high ranking officials in the United States Government, particularly from a nation that has been described by the President as a practitioner of torture.

Mr. MUKASEY. They were provided. I don't want to get into classified information either. And so I won't. Assurances were received by the United States Government. That is all I am prepared to say in this setting.

Mr. DELAHUNT. Mr. Attorney General.

Mr. MUKASEY. I also find it somewhat unlikely that somebody would hope to get anything out of anything that went on in Syria, given the history that you pointed out. So the likelihoods kind of point the other way.

Mr. DELAHUNT. Well, let me express my gratitude for you making that statement. I am still trying to figure out why Mr. Arar was sent to Syria.

Mr. MUKASEY. He was a joint Canadian-Syrian national. Sending him to Canada could have posed a danger to this country. Sending him to Syria was safer, provided we got the assurances, and it is my understanding that we did.

Mr. CONYERS. The Chair recognizes the distinguished gentleman from Indiana, Mike Pence, who serves on the Intellectual Property and the Constitution Subcommittees.

Mr. PENCE. Thank you, Chairman, and Mr. Attorney General, welcome to the Judiciary Committee. Let me take the opportunity to thank you for your exceptional leadership on the recent bipartisan compromise on the Foreign Intelligence Surveillance Act. You played an instrumental role in achieving a legislative accomplishment that I believe contributes greatly to our national security.

As you might suspect, since we have debated it in one of the largest newspapers, I want to focus my attention on an issue on which we disagree, H.R. 2102, the Free Flow of Information Act. You have commented about it earlier, and I want to take the opportunity to raise some issues and pursue a line of questioning, but I do so with great respect.

This legislation was introduced about 3 years ago by myself and my Democrat colleague, Congressman Rick Boucher. You have made your opposition very clear in this testimony today and in your public statements.

Your written testimony says that the bill "would endanger national security by making it nearly impossible for us to investigate leaks of even the most sensitive national security information." I am very aware of that. That kind of a strong pronouncement may be somewhat jarring to a Committee that very strongly endorsed this legislation and to a Congress that voted 398-21 on October 16, 2007, to endorse this bill.

I want to point out for the record to the Attorney General that this was supported by the Republican and the Democratic leadership. It was also supported by the Ranking Members of the Intelligence Committee and the Armed Services Committee and the Chairmen of those Committees. I think it was supported precisely because we did endeavor to deal thoughtfully and carefully with precisely the issue that seems to be the focal point of your objection; namely, concerns about national security.

As you are aware, in the legislation in the House version of the bill we only provided a qualified privilege for journalists and made national security the leading reason for which the shield could be pierced. Our legislation permits compelled disclosure to prevent or identify the perpetrator of an act of terrorism against the United States and prevent significant and specified harm to national security.

And you made reference to a child abuse exception not being included in the bill. I would think that would be probably included by inference in the bodily harm exception in our bill, but I know the Senate includes child abuse in their legislation, and I am open to it.

It also allows compelled disclosure of sources in cases that involve the authorized disclosure of properly classified information that caused or will cause significant or articulable harm to national security.

I think the inclusion of that very careful structure that does at a point call upon our judicial branch to exercise discretion, balancing our interest in national security with our interest in preserving the liberties upon which this Nation was founded, seems to be a focal point of your concern.

But I want to begin by assuring you, General, that as the Congress tried to fulfill its role in addressing both our national security, as well as preserving what we are trying to secure, that we did so in a way that made national security interests truly paramount, which of course comes to no surprise Congress would act in this case.

As you know much better than I, being an authority in the law, in 1972, the Branzburg case, Justice White virtually invited Congress to develop a Federal media shield statute, saying that Congress had "the freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rule as narrow and broad as deemed necessary."

I guess my question would be, with a little latitude from the Chairman to give you a chance to respond, is you made the comment today that 10 angels swearing on bibles wouldn't change your mind.

Mr. MUKASEY. That is not what I said. I said wouldn't change what is in the bill.

Mr. PENCE. Wouldn't change what is in the bill. Let me say if 10 angels swearing on bibles wouldn't change your view of this bill, would 40 American journalists subpoenaed, questioned or held in contempt do it?

I mean you said this is a problem or a solution in search of a problem. The Justice Department has argued that it has only approved 19 source-related subpoenas since 1991. However, the number does not include the number of subpoenas issued for non-source information. Also, since 2001, at least 19 additional journalists have been subpoenaed by both Federal and special prosecutors, and you yourself know the Department of Justice guidelines do not apply to civil litigants or special prosecutors.

I would say this is not a solution in search a problem, this is a constitutional statutory response to a rising erosion of our first amendment freedom of the press.

Let me make one last point, if I may, at the Chairman's indulgence. I must express some disappointment at the fact that I in my 3 years as a working legislator on this issue, and most of that time you were not in your present role so I don't direct this to you, as you speak about the need for language, I don't believe the Justice Department has offered any language to this Committee relative to what would be an acceptable version of a Federal media shield statute.

My question would be, recognizing that, as you said in your testimony, the Administration has a "constitutional responsibility to safeguard classified information," and I know you recognize the Administration also has a constitutional responsibility to protect the Constitution and the first amendment freedom of the press, can we anticipate, as the Senate may well be taking this bill up in the coming days, may we anticipate a more constructive engagement from the Justice Department in fashioning this legislation in a way that meets both the interests of our liberty and our security, or should we continue to anticipate as legislators what I would characterize as the strident opposition of the Justice Department to creating the statutory newsman's privilege that the Supreme Court acknowledged could be created 36 years ago?

Mr. MUKASEY. I guess I am going to ask for both latitude and longitude from the Chair. Say a minute or minute and a half to respond to the 6 minutes or so that I just heard.

First, three points. First of all, I am not questioning anybody's good faith in the drafting of this legislation, Congressmen or anybody else, but I think it is possible to have a disagreement in good faith.

Mr. PENCE. So do I.

Mr. MUKASEY. Let's focus on two of the points that you just mentioned. One, which was a showing that the information was properly classified. That raises a host of problems. We are talking about procedurally, substantively. Does that require the Government to come in and disclose yet more classified information to show that the classified information was properly classified.

A closely related problem is the showing that the danger exceeds the value of disclosure. Passing for a minute the fact that that is a complete imponderable, totally imponderable, that would require the Government to come in and basically make a bad problem worse by articulating precisely how threatened disclosure could cause yet more harm. I don't think that is a solution.

Now, as I said, I am willing to talk to anybody who will talk to me, but we have in place a system that closely restricts the ability to subpoena reporters and the ability to subpoena source information. I think that system has proved adequate. I am willing to talk to anybody who thinks it hasn't. But what I am not willing to do is to take steps that will essentially do more to protect leakers than it does to protect journalists.

Mr. PENCE. Thank you, General. I thank the Chairman for his indulgence.

Mr. CONYERS. The Chair recognizes Steve Cohen of Tennessee, who serves on the Commercial and Administrative Law Subcommittee, as well as Intellectual Property.

Mr. COHEN. Thank you, Mr. Chairman. General, I appreciate your taking this position and improving the image of the Justice Department in the Nation's eyes. I appreciate your looking into the issue we talked about during the break with the football stadium in Memphis.

Mr. MUKASEY. Which I will.

Mr. COHEN. Thank you. The University of Michigan has, I think, about the same number of seats we do, but they have 100,000 thousand people per game and we have 25,000. That is somehow to be factored in.

Mr. MUKASEY. Sorry to see there is less interest in your team than the University of Michigan.

Mr. COHEN. We have emphasized academics more, I guess.

Mr. CONYERS. The gentleman's words will be taken down.

Mr. COHEN. Yes, please.

Paul Minor, an attorney from Mississippi, is in prison now, and we have discussed his case. There is some thought that he might have been—politics might have influenced his prosecution. Without getting into the bases of the facts, and I know there have been allegations of prosecutions in other cases, Mr. Minor has an appeal, which I think the Office of Professional Responsibility is looking into. But at the present time he is seeking a release, temporary release pending his appeal because his wife is dying of cancer and she may be, I believe, in her final months.

I would just like to ask you for an assurance that you will personally review the matter and make sure that within the parameters that are possible you could take into consideration the facts that led to his conviction and the particular situation with his wife.

Mr. MUKASEY. Well, if OPR is conducting an inquiry, and I believe they are, then I think I will await, and have to await, I should await the outcome of that because I may be called to act in response to it. So far as the other situation, as I understand it, and I don't know precisely, I know the BOP has the humane release program that relates to the illnesses of prisoners. I don't know whether they have a humane release program that relates to relatives of prisoners or how close he is to the release date. I can try to make inquiry as to what the precise situation is.

Mr. COHEN. Thank you. I think he is nowhere near the release date, and I think possibly a review of the policies because if somebody's spouse is dying——

Mr. MUKASEY. There have been situations in which people have been taken from custody for visitation and so on. I don't want to get too far ahead of the curve, but I have encountered that as a district judge. Let me find out what the policy is.

Mr. COHEN. Thank you, sir.

You mention in your testimony that violent crime remains near historic lows in the United States. That is the quote. Am I reading this——

Mr. MUKASEY. There have been spikes in certain areas, I recognize that. Violent crime is down something like 1.6 percent, which sounds like a modest number, but that is a lot of people who haven't been victims.

Mr. COHEN. That can't be historic lows. Crime is really pretty high right now.

Mr. MUKASEY. I am not familiar with crime statistics from the founding of the republic to today. I believe that that was something of a metaphor. It is low by current standards. That is not to say that it is tolerable.

Mr. COHEN. My City of Memphis has a high crime problem and violent crime is high there and people would not ever think it is not. You have programs that are excellent concerning Project Safe Neighborhood, and you mention you will be offering regional training throughout the United States. What is the process by which the City of Memphis, Tennessee, and the Ninth Congressional District could participate in one of those regional opportunities?

Mr. MUKASEY. Localities essentially compete based on a showing of need and showing of their ability to use the resources along with Federal authorities. I know there is a tenth site program relating to gangs, and if I can find it in my notes, I can find out whether Memphis is one of those locations

Mr. COHEN. I don't think it is, from your notes. If it is possible you can consider Memphis, we certainly need the help, and if I could push it along I would be happy to.

You mentioned on Mr. Wexler's question about the Vice President, you said in the abstract, No, he would not have executive privilege extended to him. Can you go a little further with that? Mr. Addington was here and said that Vice President Cheney was not either the executive or legislative, he was basically a barnacle attached to the legislative branch. Why do you see him floating and why would he not—does he have executive privilege?

Mr. MUKASEY. It is my own belief that the Vice President is a member of the executive branch. I know that there has been a discussion about where his office is located and lots of sort of abstract debate about that. The Vice President is obviously one of the closest advisers to the President and he is a close adviser to the President within the executive branch. That, in my view, is where he sits.

Mr. CONYERS. The gentleman's time has expired.

Mr. MUKASEY. Abstract theory of whether there is or isn't a barnacle status.

Mr. COHEN. In the tradition of Congress, since my time has expired, I will yield the remainder of my time.

Mr. CONYERS. The Chair recognizes Randy Forbes of Virginia, former Ranking Member of the Crime Subcommittee, now on Immigration and the Crime Subcommittee.

Mr. FORBES. Thank you, Mr. Chairman. Mr. Attorney General, thank you so much for being here. I want to compliment you today for handling such a host of issues. I just kind of jotted them down today. Today they have tested you on oil speculators, mortgage lenders, terrorists, spies, illegal immigration, espionage, airline mergers, torture, and you have done just a remarkable job of trying to marshal all that.

I also know that you have a lot on your plate in terms of having to deal with all these issues around the country, and from time to time you have to allocate your resources. One of the issues that came up today was gangs. We have got about 850,000 criminal gang members, depending on what statistic you look at, across the country. Obviously we have to allocate resources, especially from

the Federal level, in dealing with gang violence. One of the particular tickups probably in crime today might be gangs if we had any that we are looking at.

The statistics we have had come before our Committee so far is that if we looked at the most violent criminal gang in the country today, it probably would still be MS-13. Is that a fair assessment?

Mr. MUKASEY. They are pretty close. Part of the problem is that they seem to be in it, oddly, for the violence, not entirely for the money.

Mr. FORBES. One of the things that has been bad is not only have they done the violent acts, but they tend to give a copycat to so many other gangs to try to catch up to them. The other statistic we have had on MS-13, for example, has been that, with testimony, we have had as much as 75 to 85 percent of their members could be here illegally in part of those gangs. I don't ask you to master those statistics today, but that is at least what we have had presented to our Committee. I assume it is kind of a ballpark.

Mr. MUKASEY. It would not surprise me.

Mr. FORBES. My question is if we have the most violent criminal gang, one that is kind of being a pattern and copied by other gangs of MS-13, 75 to 85 percent of whose members are here illegally, if at some point in time, and I don't expect you to have this information with you today, but at some point in time if you could give us any information your office has on, one, how those individuals go from crossing the border to joining those gangs; number two, if there are any prevention programs out there that have a proven record, not just an anecdotal record but a proven record of stopping those individuals from joining the gangs because at least what I have seen is that prevention programs might work in other areas. But if you are coming in here illegally, those programs aren't reaching that 75 to 85 percent, but perhaps you have some that you can suggest. Obviously we want to allocate our dollars where they best go.

The final thing though is: Is there evidence that going after those gang networks does have an impact on reducing the gang violence, because we are trying obviously to allocate our resources at the best possible way, just like you are trying to do?

Mr. MUKASEY. I think there is. I was down in, I think, South Carolina, where they announced the roundup of a huge number of MS-13 gang members and we had with us a police chief from El Salvador from which that gang is supervised and which cooperated in the roundup and in the intelligence.

So we find that when we cooperate not only with State and locals, who were at that press conference as well, but also with our international partners, specifically in the case of MS-13, Mexico, Honduras, El Salvador and Guatemala, which is where a lot of them are at, we find that we can have much greater effect.

Mr. FORBES. When you do that, we have at least had some testimony before the Committee that the subsequent gang violence does reduce down after you have taken some of those networks out. Is that fair to say?

Mr. MUKASEY. It is definitely fair to say, and we expect it to drop in that particular location as well.

Mr. FORBES. Mr. Attorney General, I just leave you with, not for today, but if anybody on your staff has any prevention programs that have been shown to work for those people coming in illegally, if you could get them to us. I just haven't seen any. If you have any, if you can present them to us.

Mr. MUKASEY. I will get what I can.

Mr. FORBES. Mr. Chairman, I yield back.

Mr. CONYERS. Thank you. We will have one more Member ask questions before we recess for four votes, and that is Adam Schiff, a former Assistant United States Attorney from California, who serves with distinction on the Intellectual Property Committee.

Mr. SCHIFF. Thank you, Mr. Chairman. Thank you, Mr. Attorney General, for spending the afternoon with us.

I will follow up with your office on a couple of issues that we have discussed earlier involving DNA evidence and some of the issues raised in Arizona. But I had the opportunity during your remarks to read your speech at the American Enterprise Institute on principles in dealing with the Guantanamo detainees and would like to follow up on a couple of points that you made in your speech.

First of all, I wanted to mention that I made several efforts with your predecessor and his predecessor to get the Administration and Congress working together to set detainee policy. I appreciate your outreach to the Congress and encouragement that the Congress set these rules rather than have the courts decide. I think that makes a great deal of sense and would help us avoid a patchwork of court decisions that take up a lot of time and don't bring us any closer to a good result.

But two of the questions I have, the first is you make a point I think in your conclusion that people at Guantanamo—you take issue with the idea that people should be charge or released. I think the issue that that raises is if you don't charge people at Guantanamo and if there is a category of people not charged and yet not released, what is their status? How do you define what legal rights should attach to a group that has not been charged with a crime and yet, your argument, should not be released?

One of the arguments that I have been making with the DOD and DOJ for some years now, and I introduced a bill in 2002 to adopt or adapt the Uniform Code of Military Justice to be used at Guantanamo, couldn't we establish a baseline offense of being an unlawful enemy combatant such that there would be something that everyone could be charged at if there is the evidence to support it so that you don't have this conundrum of having people who are not charged and not yet released?

Mr. MUKASEY. I guess we could. The people who are detained there are, as far as I know, uniformly were people who fit the classic definition of an unlawful combatant; that is, not fighting in uniform, not carrying their weapons openly. They did not target only military targets but rather targeted civilians and were not bound by the laws of war.

So, yes, we could establish such a regime. But the fact is that we detained thousands upon thousands of prisoners of war who were legitimate detainees during World War II. Not one of them, not one of them was permitted to file a habeas petition. They were

all held for the duration, notwithstanding they had done nothing, other than——

Mr. SCHIFF. I understand that, but the problem you also point out is that those wars had an end that you could see coming at some point.

Mr. MUKASEY. You couldn't always see it coming. You couldn't see it coming in 1942, 1943. We had people in custody at this time.

Mr. SCHIFF. I think even then you could see that the war would end. This is a war of a different caliber, which may go on indefinitely. As you point out, there may never be a VT day, Victory over Terrorism day. The fact that these questions are difficult doesn't mean they are going to go away, and I think that we need to grapple with them. I would just encourage the Department to consider a situation where people are charged.

I want to give you more time on that, but I want to throw out my second question, too, so I don't lose the opportunity to ask you about it, and that is I think you make some very good suggestions in the six points you make. One of the suggestions you make though may be problematic for a couple of reasons, and that is the idea that the courts should be prohibited from releasing people in the United States—not just being released but being brought to the United States for testimony or court proceedings. That presupposes Guantanamo doesn't close. We have two presidential candidates, both who have said Guantanamo should close.

Would it be wise for us to enact a law that says you can't bring people to the U.S. for court proceedings if in fact both candidates for the presidency intend to close Guantanamo?

Mr. MUKASEY. I think they both say, and I am not purporting to be expert on all of their pronouncements, which have at times varied from one another, both within each camp and between the camps, but I don't think anybody says just close it off, turn off the lights and go home. I think they said you close it responsibly, and responsibly means just that.

Mr. SCHIFF. Well, I certainly agree with that, but that doesn't ultimately answer the question of what do you do with the people in Guantanamo if you have established a law that says you can't bring them for legal process to the United States?

Mr. MUKASEY. One of the things I was going to say before is you have an ongoing obligation, an ongoing ability to assess the dangerousness of each particular person you have got. But all of them are aliens who were caught abroad under circumstances in which they were in combat with either U.S. troops or those with whom we fight or were supporting those in combat with U.S. troops.

Mr. CONYERS. The gentleman's time has expired. The Committee stands in recess.

[Recess.]

Mr. CONYERS. The Committee will come to order.

The Chair recognizes Judge Gohmert, who serves with distinction on the Immigration and Crime Committees and is the acting Ranking Member of the full Committee.

Mr. GOHMERT. Thank you. I appreciate your not saying I was the rankest Member on the Committee.

But, Attorney General Mukasey, thank you for being here. Thank you for the class you do bring to the office—no disparage-

ment of anybody that served before you. But I know it is tough, as a former judge, for you to sit through so many questions and be thinking you just need to be ruling that that is immaterial, that is irrelevant, that is multifarious, that is repetitious, and not having that opportunity to get things in order. I know it is difficult, but you have done well, and we appreciate it.

A couple of things I wanted to touch with you on. One of them, going back, of course, we have had a case saying that raid was apparently improper, and this was before your time, and it is ongoing litigation; I wouldn't ask you to comment on that anyway.

But as far as procedure, I recall reading an 80-page affidavit in seeking to make the raid on Congressman Jefferson's office. There was a description of a procedure where within DOJ there is some group or division that is set up to do an analysis for things that may be protected or privileged.

Is that your understanding of how that process works? If there is something that may come out privileged or protected in order to keep from tainting the rest of the evidence, do you have a firewall capacity there?

Mr. MUKASEY. We do. I mean, it happens frequently in cases where certain information has to be walled off from other lawyers working on a case. That is not uncommon. I don't know of any particular division within the Department of Justice that is devoted to that, but it wouldn't surprise me that, in a particular case, some group of lawyers would be lawyers to whom the material would be disclosed so that it wasn't disclosed to others.

Mr. GOHMERT. And that would, I guess, be in an effort—I understand some civil firms do this, where they have a group where there is a firewall and they make sure information doesn't pass to the other side if it is privileged, and you keep those groups separate on a given case. Is that correct?

Mr. MUKASEY. Yes.

Mr. GOHMERT. Anyway, I had been asked about that, and I appreciate you clarifying that.

But going back to the Guantanamo case and the Boumediene case, I know Justice Scalia had said in his dissent, "Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails."

And then, of course, Chief Justice Roberts had indicated that the Detainee Treatment Act of military tribunal hearings followed by Article III review looks a lot like the procedure the Hamdi case blessed. If nothing else, it is plain from the design of the DTA that Congress, the President and this Nation's military leaders have made a good-faith effort to follow our precedent. The court, however, will not take yes for an answer.

And, again, in Justice Scalia's dissent, he said, quoting again, "In short, the decision is devastating. The game of bait-and-switch that today's opinion plays upon the Nation's commander-in-chief will make war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our national or constitutional republic, but it is this court's blatant abandonment of such a principle that produces the decision today."

There were many of us that believed that, based upon the Hamdi decision and the Hamdan decision in 2006, that Congress had acted in good faith; we had done as the Supreme Court directed. I had serious concerns about the executive branch being able to formulate what military tribunals would be used. I had concerns about that as an executive branch function. But once Congress did it, it certainly seemed to be in line with what the court had previously ruled.

So it appears to me, just like Justice Scalia said, we have a branch, the judiciary, the Supreme Court, that really wants to involve itself in both the executive and legislative effort here.

I don't know if we will have a chance to take this up and discuss it, put forth legislation before the end of the year. I know time is short. But I do have a bill here that I intend to file in the next few days that will basically provide for the transport of the enemy combatants detained at Guantanamo Bay, Cuba, to Washington, D.C., where the Chief Justice of the Supreme Court will assist the other Justices in order to more effectively micromanage the prisoners being detained. Of course, there can be no better way for the U.S. Supreme Court to micromanage than if they are there on the ground, using the same restaurant facilities and taking care of them there.

My time has run out, but I want you to be aware that we are trying to deal with it from this side too, to help the Supreme Court in their efforts to micromanage.

Mr. KING. Mr. Chairman, I would ask unanimous consent that the witness be allowed to respond.

Mr. CONYERS. Without objection.

Mr. MUKASEY. I can't really comment on that. The Boumediene decision is the law of the land, and my speech was based on our going ahead and accepting it as the law of the land. I am going to limit my comments to that. Thank you.

Mr. GOHMERT. I didn't wish to demean the decision, necessarily. Maybe I am being tongue in cheek in saying that. But I have to take it as lawful too, because I believe in the Supreme Court's power. So that is why I was going to file that bill, to assist them in furthering that ambition.

Mr. CONYERS. The Chair recognizes Artur Davis, a former Assistant United States Attorney, who serves with distinction on the Immigration, the Crime and the Constitution Subcommittees of Judiciary.

Mr. DAVIS. Thank you, Mr. Chairman.

Attorney General Mukasey, good afternoon to you.

I have two areas I want to touch on, and because of time limits, I will try to move to both of them in an expeditious fashion.

The first one has to deal with a matter that Ms. Sánchez raised with you and that I raised with you in our phone call yesterday, the Siegelman prosecution in the State of Alabama. As you know, there have been a number of questions raised about possible political influence in that prosecution. I want to touch on something that has not been raised publicly, though, in any other forum, and this is the context for it.

As you perhaps know, there were e-mails that surfaced after the trial, after the conviction, which suggested that various jurors, two

in particular, had engaged in misconduct, that there had been deliberations outside of the jury room, that they had consulted the Internet and done research and engaged in various other conduct that I think you, as a former judge, would certainly characterize as improper.

Over a period of time, for a number of months, there were motions filed with the District Court urging a new trial. There was a protracted dispute over whether or not—could I ask my colleague to finish her conversation outside, actually? Would you mind? I didn't mean to interrupt you.

But there were a series of hearings back and forth and a series of arguments back and forth on whether or not there ought to be some kind of evidentiary hearing. The Government took the position that an evidentiary hearing had to be very limited in nature. And this went on for a number of months.

In July of this year, the Chief of the Appellate Section of the Criminal Division of the Department of Justice, Ms. Stemler, notified defense counsel that she had just learned that while the district judge, Judge Fuller, was considering some of the various motions for a new trial and the motions to reconsider for a new trial, that the district judge had had an ex parte communication with the U.S. Marshals Service.

If I understand the facts correctly, the U.S. Marshals Service had been instructed by the U.S. Attorney's Office to conduct its own investigation of the authenticity of the e-mails. The U.S. Marshals Service reached the conclusion that the e-mails were not valid, and apparently shared that conclusion with the district judge while some of the motions to reconsider were going on.

Now, you were a district judge, and a very distinguished one, Mr. Mukasey. Would there have been any circumstance in which you would have allowed yourself to have a communication with a branch of the Government, the U.S. Marshals Service, of an ex parte nature, while you were considering a motion?

Mr. MUKASEY. Let me just take a step back. You were kind enough to point out that letter yesterday, and I appreciate that. I read the letter. I read it, the facts, somewhat differently.

What happened was the jurors' coworkers got copies of the letters that were already before the judge. They turned them over to the jurors. The jurors turned them over to the marshals. The marshals didn't know what to do with them and turned them over to the U.S. Attorney's Office. And they gave them—since they had been sent by mail, they gave them to the Postal Service. And then the U.S. Attorney who was involved in the prosecution turned the whole matter over to somebody else who was not at all involved. And the Postal Service reached whatever conclusions they reached, apparently told the Marshals Service about it, and the Marshals Service told the judge about it.

Mr. DAVIS. Well, let me just quote one sentence from the letter. On page 2 of Ms. Stemler's letter she says, quote, "While the investigation was ongoing in early April 2007, after the second evidentiary hearing on November 17, 2006," but I will add parenthetically while various other motions related to the same matter were being considered, she says, "representatives of the United States Marshals Service apprised Chief Judge Fuller that the postal in-

spectors were investing the receipt of e-mails, and they concluded that the purported e-mails were not authentic. The marshals who spoke to Chief Judge Fuller have advised us that the chief judge did not solicit this report."

So I understand there was a lengthy procedural sequence here, and there were multiple motions to reconsider, but they all touched on the underlying question of these e-mails.

So I ask again, when you were a U.S. district judge, would there have been any instance in which you would have allowed yourself to have an ex parte communication with a branch of the Government while a motion was going on?

Mr. MUKASEY. There were times when I got ex parte communications from branches of the Government for good and proper reasons. I don't know what the reason was here, and I don't know whether the judge had any choice about whether to listen.

Mr. DAVIS. Well, would it trouble you, though, Attorney General Mukasey, because, again, this is an important matter——

Mr. MUKASEY. It is important, and I would like to finish.

I don't know what role those copies of e-mails played in the larger matter that is under review by OPR, so I can't—I mean, I am going to get a report from OPR at some point about this whole matter. I may be called on, if there is a finding of misconduct, to pass upon whether there ought to be a sanction against somebody or not and, if so, what it ought to be. So I can't really start offering opinions about it.

Mr. DAVIS. I understand. But let me just narrow in, so we are at least clear on what the alleged facts are.

The very subject of these hearings was whether or not the e-mails were authentic and whether or not they influenced the jurors. You can't get to inquiry B without getting to inquiry A. So it was very much at issue whether or not the e-mails were authentic.

And what troubles me is the notion that the Government asked the Marshals Service, who then asked the postal inspectors, to conduct an investigation of their authenticity, didn't share that fact with defense counsel, shared it with the judge. Because it raises, Attorney General Mukasey, the obvious question, whether the judge's rulings might have been influenced by information that he had that wasn't available to defense counsel.

Mr. MUKASEY. I don't know what the basis was for the judge's rulings. I haven't seen those.

As you know as a former assistant, there is an enormously heavy presumption against undermining the validity of a jury verdict. All kinds of things have been shown or testified to about what jurors did or didn't do during deliberations that have not resulted in the overturning of a verdict.

I don't know what the basis was for the judge's ruling here or how it would fit into the grander story.

Mr. DAVIS. Let me ask another quick question. Ms. Stemler disclosed this information on July 8th of this year. Do you know the circumstances in which Ms. Stemler learned about these ex parte contacts?

Mr. MUKASEY. I do not.

Mr. DAVIS. Have you had a chance——

Mr. MUKASEY. I mean, it appears to indicate that she came upon it by happenstance during the course of her review of the documents. And she, as she put it in the letter, in an excess of caution, disclosed them.

Ultimately, as the letter makes apparent, it was the Justice Department that disclosed it.

Mr. DAVIS. Well, the concern, again, would be this: One year after this ex parte communication, 1 year and 3 months after the ex parte communication, apparently the Marshals Service disclosed it to the Government, which would raise the obvious question whether the Marshals Service has disclosed all they know to the Government now.

I am certain Ms. Stemler has made representations that she knows to be accurate, but it would raise the obvious question as to whether Ms. Stemler or the Department have conducted any investigation to determine whether her representations on page 2 of this letter are complete. Because, frankly, it appears that the Marshals Service may not have told Ms. Stemler the relevant facts until very recently.

Mr. MUKASEY. I don't know when they told her the relevant facts. It doesn't appear to me that there is any more for the Marshals Service to have known, since this appears to have been a singular incident.

Mr. DAVIS. Would it trouble you that the Marshals Service didn't immediately disclose to the Justice Department that they had had contacts with Judge Fuller?

Mr. MUKASEY. Marshals, as is obvious from this, are not lawyers. It might have been disclosed sooner. It ultimately——

Mr. DAVIS. Should Judge Fuller have disclosed that to defense counsel?

Mr. MUKASEY. I am not going to get into how Judge Fuller behaved, because I don't know the full circumstances under which they were disclosed to him, what the basis was of his ruling or when it was rendered. And all of this is going to be the subject of a report to me.

Mr. DAVIS. Last question: Are we confident that the prosecution did not have any communications with Judge Fuller about the Marshals Service investigation?

Mr. MUKASEY. All I can say is I see nothing in this letter to suggest that. Whether they did or didn't may emerge from other facts that I don't know. That may be part of the OPR investigation.

Mr. DAVIS. Should the Department ask them?

Mr. MUKASEY. I think that I ought to await the OPR report before I make judgments about who knew what when and disclosed what to whom.

Mr. DAVIS. Will we have a chance to see the results of the OPR report?

Mr. MUKASEY. Absolutely. If there is a finding of misconduct, you will see the report itself. But as I understand it, and I learned this only recently, Congress was itself the complainant in that case, and the complainant is always notified about the result, about the outcome. So the answer to that last question is yes.

Mr. DAVIS. All right. Thank you.

Thank you for being indulgent with my time, Mr. Chairman.

Mr. CONYERS. Steve King of Iowa is a Member with great distinction on the Immigration Committee and on the Constitutional Committee as well, and he is recognized at this time.

Mr. KING. Thank you, Mr. Chairman.

I want to thank Attorney General Mukasey for his very astute testimony here today. And I have had that same observation the previous time you were before this Committee, General.

I would like to first take up the issue—I was listening to the gentlelady from California, the Chair of the Immigration Subcommittee, Ms. Lofgren, when she brought up the issue of the caseload in the circuit courts and in, particularly, the Second and the Ninth, as I recall, and that 40 percent of those cases are immigration cases.

And I would ask you if you are aware and if you would comment on those two particular courts in particular, on whether it is a practice for them to grant automatic stays of deportation or removal to any alien who files an appeal?

Mr. MUKASEY. Again, I am working off lore, L-O-R-E, not law, L-A-W, but I believe it is the normal practice, because it used to be the practice for DIA judges to do that. I don't know for a fact. I think that is the case.

Mr. KING. Okay. If we could operate under just my presumption that it is, if we are operating under my presumption that it is and my information that that is the practice, to grant the automatic stay, what would you expect to be the behavior of the defendants if they got an automatic stay and were allowed to stay in the United States until the issue was completely adjudicated through the Circuit Court?

Mr. MUKASEY. I can't speculate on that. I really can't. It depends, I suppose, on whether they have a good-faith basis on asking for asylum or not. If they have a good-faith basis, they behave themselves. If they don't, they don't.

Mr. KING. I would submit that if someone comes to the United States illegally, they are going to seek to stay here, and if they know that they are automatically granted a stay of deportation, then that would be the natural process to utilize that automatic extended period of time. I think that would be a human nature response.

So I will ask you a legal question then, perhaps. And that is that, looking at this caseload that is here, there are two ways to resolve that, among others, but one of those two ways would be to put more resources in the courts, and the other way would be for Congress to address it from a statutory perspective, to narrow the avenues through which people can appeal.

Would you have any recommendation to the Congress on how we might narrow the avenues through which people could appeal?

Mr. MUKASEY. I don't right now. I mean, I have not thought through that subject, and I can't really make a concrete proposal.

I know, only from having been there, that the Second Circuit has created essentially two dockets, one that gets arguments, one that doesn't. And a lot of these immigration cases goes on the one that doesn't. And that is unusual for that court, which used to grant oral arguments in every case.

But more than that, I can't tell you.

Mr. KING. And when you asked the Congress to take a look at the means by which we would deal with enemy combatants, not a specific legislative recommendation, but a conceptual point that you have made to us, I will just say I appreciate that. I think it is appropriate. It fits what we need to be doing as a Congress.

I would like to go further down that path, but in the time that I have, I think instead I want to make a point here and ask your comment on this.

In the non-border Federal districts, the number of illegal aliens being prosecuted for Federal crimes has increased. And, for example, last year, more than 40 percent of the Federal defendants in Oregon were illegal aliens. And when we go to some of the other internal districts, non-border districts, Colorado, Western District of Arkansas, Middle District of North Carolina, which may have a border actually, and Nebraska, all of those had more than 25 percent of their Federal defendants were illegal aliens. And here are two others in this list: the Northern District of Iowa, the Southern District of Iowa.

So, is this increase, is it reflective of policy of prioritizing prosecution of criminal aliens, or is it reflective of a flood of criminal aliens that we have to deal with?

Mr. MUKASEY. I think we prosecute people who commit crimes, and States prosecute people who commit crimes.

I know that the facts that you have outlined are something of a drain on our resources, because we are obligated to supplement the budgets of those States that have illegal Federal aliens among their prison populations, to help them deal with that problem, because these people are illegal aliens. So we are sympathetic to it and trying to do something about it.

Mr. KING. And you will be aware that in section 642 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which was very much put together by Mr. Smith, our Ranking Member, there is a prohibition in there for sanctuary cities. It prohibits those cities from refusing to allow their employees to cooperate with the Federal immigration authorities.

I would just ask you on that, what are you able to do to enforce section 642, the ban on sanctuary cities?

Mr. MUKASEY. We try to enforce it. We try to prosecute people wherever they are found, whether they are found in sanctuary cities or not. Obviously that complicates the task.

I recognized before that there is a certain conundrum in that you don't want to discourage people who have been the victims of crime from reporting crime and create, essentially, a favored class, favored from the crook's standpoint, of victims who then can't report crimes.

But, by the same token, we obviously oppose the concept of sanctuary cities and are doing everything we can.

Mr. KING. Well, I would point out there was a triple murder in San Francisco, and the alleged perpetrator was a criminal alien who had been encountered by local law enforcement and then released under the sanctuary city policy of San Francisco. And now a father and two sons of lying in their graves out in western California.

And those kind of issues, I would suggest, are paramount to any kind of sensitivity about who might report a crime. And, in fact, I would submit that any analysis of how people will respond with information, if that means suspending enforcing the law, I don't think that is an appropriate consideration with regard to the Department of Justice.

Mr. MUKASEY. I don't think anybody favors suspending operation of the law when you talking about somebody taken into custody. I was talking about somebody reporting a crime. Those are two different things.

Mr. KING. Yeah, I understand. And it is a significant nuance. However, we still have the policy of section 642 that is not being enforced effectively.

And I will point out the way they are getting around it, for the record, is they prohibit their city employees from gathering information. And they have held seminars across the country, provided that as a loophole in this statute.

I would ask if it be your recommendation that we close that loophole?

Mr. MUKASEY. Okay.

Mr. KING. Does that mean it would be?

Mr. MUKASEY. I believe it would be.

Mr. KING. And I thank you very much, Attorney General Mukasey. I thank you for your testimony and for submitting yourself to this very public situation here today. It was a hard job to step into, and you are doing a very good job. I thank you.

Mr. MUKASEY. Thank you very much.

Mr. KING. I yield back.

Mr. CONYERS. Keith Ellison, a member of the defense bar, a Member of the Subcommittees on Immigration and Constitutional Law.

Mr. MUKASEY. Good afternoon.

Mr. ELLISON. Good afternoon, sir.

Could you talk a little bit about the recent reports that have come out regarding FBI investigations and their new policy or guidelines that would allow them to take into consideration issues of race, religion, things like that? Could you just elaborate on that?

Mr. MUKASEY. I think what you are alluding to is reports that there are going to be issued new Attorney General guidelines and speculation about whether or not they would allow that practice.

What I will tell you is that the previous guidelines that forbid the predicating of investigations simply on somebody's race, religion, exercise of first amendment rights, will remain in place. The previous guidelines in all respects on that will remain in place.

The purpose of putting the new guidelines in place is to rationalize and organize a process that has really been going on since after September 11th, 2001, on the recommendation of at least the 9/11 Commission and the Silberman-Robb Commission, that the FBI, in addition to being a crime-solving organization, become an intelligence-gathering organization.

There then ensued essentially two sets of guidelines: one on how to open criminal investigations, the other on how to predicate national security investigations. And, at times, they were cross-cutting. The same behavior was described in different ways and pro-

duced different results. So what we are going to do is put them in order. But the protections I mentioned will remain in place.

I think the new guidelines will also make it apparent that concurrent with the growth in FBI intelligence gathering has been a growth in monitoring, both within the FBI and in the National Security Division of the Justice Department, and oversight, so we can make sure that the FBI is not doing what you suggested the new guidelines would permit.

Mr. ELLISON. Well, I am glad to hear you say that on the record. It is important. I just want to point out——

Mr. MUKASEY. Those guidelines have not yet been released.

Mr. ELLISON. What kind of input can Members of Congress have into what the guidelines might reflect?

Mr. MUKASEY. Members of Congress will be briefed on the guidelines before they go into effect. The guidelines are already in the process of being drafted. They will be signed by me. That said, they are guidelines, they are not statutes, and they can be changed when, as and if there is reason to change them.

What I plan to do is get them in final shape, review them, sign them, and then, before they are implemented, have Congress briefed on them, show them to Congress, so that everybody understands what they are and, more to the point that you just made, what they aren't.

Mr. ELLISON. Okay. Let me move along to another question.

You know, U.S. Attorneys and I guess even States attorneys will sometimes identify certain individuals as unindicted co-conspirators. I think the general practice, at least in the area I am from, is to not release that list of people to the public because there is really no legal way to get yourself off that designation, and yet it doesn't necessarily mean that you are going to be indicted or anything like that.

My question is, there is a case in Dallas that has to do with the HLF case, Holy Land Foundation, 300-some groups and people on an unindicted co-conspirator list. They have been subjected to public derision, and yet they are without any way to, sort of, get off the list.

Can you speak about your views, not about that case, but about in general whether it is appropriate for a U.S. Attorney to publish a list of unindicted co-conspirators, what value to justice it has?

Mr. MUKASEY. U.S. Attorneys are required by law, any time there is a conspiracy charge—and in almost every case involving more than one person, obviously there is—to turn over to the defense a list of unindicted co-conspirators.

Mr. ELLISON. That is right.

Mr. MUKASEY. That is largely because otherwise they can't use those statements as statements in furtherance of the conspiracy, unless they turn over the course. That is why they do it.

Mr. ELLISON. Of course.

Mr. MUKASEY. And, generally, those lists are just as much pleadings, in a way, as any other pleading in a case, and so they become public.

Mr. ELLISON. Well, you know what, thought? If my experience didn't point me in another direction, I wouldn't debate the point with you, but I happen to know and have been involved in cases

where unindicted co-conspirator lists were not made generally available to the public, even if they were made available to the defense.

And my question for you is—I guess here is my basic question to you. What are your views on whether or not it is legitimate to put people on a list that you never end up calling?

I mean, we have the experience of the trial, in this case, where you never end up calling these people as witnesses, you never end up making a claim as to what statements they made could or should have been the subject of a conspiracy, and therefore make them unindicted coconspirators, and yet they are subject to the public derision of being on such a list.

What are your views on that subject?

Mr. MUKASEY. My experience has been that Assistant U.S. Attorneys—and I did this when I was Assistant U.S. Attorney, and I saw it done when I was a judge—take very great care in compiling such a list.

Mr. ELLISON. Well, what about when they don't? Shouldn't there be a way for your office to say people can somehow be exonerated or expunged off this list? Shouldn't there be some sort of a process?

Mr. MUKASEY. I think we ought to look into that, just as people have raised with me the question of whether, when it is announced that somebody is under investigation, shouldn't be there be away of announcing that they are not? It is, kind of, another version of the same problem. And I agree that it deserves serious consideration.

But I understand the need for such lists, and my experience is that they are drawn carefully and specifically with a view toward assuring the admissibility of statements.

Mr. ELLISON. Well, you probably would agree that sometimes that careful practice is not always followed by everybody.

Mr. MUKASEY. Look, everybody involved in the process is a human being. That means mistakes get made.

Mr. ELLISON. Right. And so there should be some way to clean up those mistakes.

Mr. MUKASEY. I think it bears serious consideration.

Mr. ELLISON. I also want to ask, lastly, about watch lists. What can we do? I have talked to so many people who just get, you know, what I will call the hospitality when they go to airports. These are people who have never done anything wrong, who travel back and forth from other countries and throughout the United States. But sometimes whenever they get to the airport, they are the ones being searched, they are the ones being stopped, they are the ones who are missing flights, they are the ones being delayed.

And, you know, my question is, what are you doing to make sure that you are not getting people stopped and hit on these watch lists that really should not be on there? What is our cleansing process for that?

Because I will acknowledge to you, there is a purpose for a watch list. There are dangerous people out there. The people in 9/11, they got on a plane, and maybe it would be great if they were on a watch list.

But I think we have gone overboard and we need a way to clean up these lists. What are you doing about that?

Mr. MUKASEY. I don't——

Mr. ELLISON. First of all, do you think it is a problem?

Mr. MUKASEY. I have seen reports about people being on watch lists because they have names similar to other people who probably belong on the watch list, being stopped at airports. I know that the airport screening process is not perfect. I know that from personal experience.

When I was a district judge and had marshals accompanying me, despite the fact that they had guns with them and everybody knew that I was a Federal judge, I got stopped and I was the candidate for the kind of search you described. I don't know how that happened, but it happens, and it happened more than once.

That said, I think there ought to be a way of making certain that the list is accurate. There are a lot of names on the list. There are a lot of variations on names, so that there are many fewer actual people on the list than there are names.

But I think you are right, that there ought to be a way of assuring that people who don't belong on the list can get off.

Mr. ELLISON. Well, because one thing, Mr. Attorney General, is that we go through five people who are not supposed to be on the list but are; we waste time and energy working them over. Then it dilutes the impact of the people who we really do need to be keeping an aye on.

Mr. MUKASEY. Amen to that.

Mr. ELLISON. So, I mean, I want to work with you to make sure we deal with that.

Last question, if I may.

Mr. GOHMERT. Regular order, Mr. Chairman. We are about 5 minutes over time.

Mr. CONYERS. The gentleman's time has expired.

The Chair recognizes Trent Franks of Arizona, formerly the Crime Ranking Member, now Ranking Member of Constitution, also a Member of the Commercial and Administrative Law Committee.

Mr. FRANKS. Well, thank you, Mr. Chairman, very much.

And thank you, Attorney General Mukasey, for being here.

I know that you are tasked with one of the most important jobs in any government, which is the administration of justice and protecting the innocent in our society. And it is a profound responsibility.

And I would suggest to you it is my own opinion that those who were predecessors to you in the Justice Department were faced with probably one of the biggest challenges that we have faced in the last century, which is the coincidence of jihadist terrorism and nuclear proliferation. And it is a very sobering job, indeed.

And it occurs to me that the evidence that I have seen indicates that, most of the time, that they simply seem to be trying to do everything they could to protect the American people within the constraints of the Constitution and the law.

And so I am always a little disheartened that our Committee seems to be focused more on trying to paint some of those individuals with recriminations rather than doing what we can to improve our system so that 9/11 and those types of things don't happen again.

With that in mind, I agree with you that Congress should step up to its responsibilities related to the procedures in habeas corpus cases. Sometimes we leave these decisions to unelected judges to somehow balance those procedures with our national security. But, after all, Congress provides for normal habeas cases, you know, these procedures; we do that all the time.

And I am wondering why we should abdicate our response to act in these unusual habeas corpus cases, when these pose such a serious threat to our national security?

Mr. MUKASEY. Well, it was the point of my speech the other day that Congress, working with the executive, is ideally suited to fill in the gaps that were purposely left by the Supreme Court, because it has available to it the kind of knowledge that is needed.

It is not that judges are incapable of deciding cases. They are perfectly capable of deciding cases. It is simply that they don't have access. They can't find facts on their own. Only in very limited circumstances can they acquire the expertise. By and large, they rely on the facts and on the evidence and on the expertise presented to them by the parties, which at times is imperfect. And it is kind of a helter-skelter way of deciding an issue. It is inevitable that, even in the best of circumstances, some of them will come to different conclusions. As a result, different procedures will be followed, and the matter will engender just endless litigation.

Rather than having that, I think the orderly and appropriate way is for Congress, working with the executive, to literally put their heads together, and that is a lot of heads with a lot of knowledge, expert knowledge and classified knowledge, so as to come up with ways to solve these problems so that we have a rational system and we don't get endless delay and, possibly, conflicting decisions with, possibly, some very serious and unpleasant results.

Mr. FRANKS. Well, of course, I agree with you.

General, the Fourth Circuit recently upheld the premise that the United States could detain as an enemy combatant al-Marri, and this is some who Osama bin Laden sent into the United States just 1 day before September 11th.

But I am concerned, of course, that there were dissenting judges that would have concluded we are not at war with al Qaeda and that this was just a law enforcement matter. And, unfortunately, it occurs to me it sound like the old mindset in our country, which, in my mind, should have been put to rest after September 11th.

Are you concerned that some of our judges or legislators or people in general, that we are starting to forget the significance and the grave nature of the struggle that we face?

Mr. MUKASEY. Well, I am not going to single out any people or group of people as more or less mindful of the danger.

I will point out that, as September 11, 2001, recedes into the past, there are some people who have come to think of it as kind of a singular event and of there being nothing else out there. In a way, we are the victims of our own success, our own success being that another attack has been prevented.

There was a newspaper, which I will not name, that, on a recent anniversary of September 11, 2001, said something to the effect that it still creates problems in people's minds to think about September 11, 2001, as if that were a remarkable fact. It is not at all

a remarkable fact. And that was not a singular event, in the sense that the danger has ended. It hasn't. I get reminded of it every morning.

Mr. FRANKS. Yeah. Well, tell me, what can we do to ensure that the Congress and the American people and the courts don't forget the seriousness of the struggle that we are in?

And if you could name any one thing that we could do in this Congress to assist the Justice Department in helping to protect this country and its people, what would that be?

Mr. MUKASEY. That would be to pass the kind of legislation that I have proposed.

And as far as not letting people forget that, that is always kind of a difficult thing. You don't want people to run around scared. You want people to live their lives. That is what everybody was told after September 11th. But you still don't want people to forget that there are a lot of folks out there whose list of things to do includes pretty much killing Americans.

Mr. FRANKS. Yes, sir. Well, thank you for your noble service, General.

And thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

Ms. JACKSON LEE. Mr. Chairman?

Mr. CONYERS. Thank you, Attorney General Mukasey, for your testimony today.

I would like to yield to the gentlelady from Texas for any materials that she would like to introduce into the record.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Thank you, Attorney General Mukasey.

A *Houston Chronicle* article dated July 18, 2008, that recounts, again, the incidents in the Harris County jail. I ask unanimous consent.

I ask unanimous consent for a letter that asks for a full investigation on the FBI watch list regarding CNN reporter Drew Griffin. And I believe it mentions Congressman John Lewis, but I will add him to the letter. I ask unanimous consent.

I ask unanimous consent for a series of questions for this hearing dated 7/23/08 regarding the new guidelines on ethnic and racial criteria for FBI surveillance.

I ask unanimous consent, Mr. Chairman, to include these items in the record, and ask for a response on the full investigation on the FBI watch list.

Mr. CONYERS. Without objection, the documents that have been introduced will be included in the record.

We would like all Members to have 5 days to submit additional questions that may not have been raised.

We appreciate the interest and the concern of the Attorney General and Department of Justice. We have a lot of work to do. There are still a number of hearings scheduled before the Committee that involve parts of DOJ.

Did you want to make any comment before we leave?

Mr. GOHMERT. No.

Mr. CONYERS. Thank you, Judge Gohmert.

The Committee is adjourned.

[Whereupon, at 2:48 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

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HOMELAND SECURITY
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CHAIR:
TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION
BORDER, MARITIME, AND GLOBAL COUNTERTERRORISM
FOREIGN AFFAIRS
SUBCOMMITTEES:
AFRICA AND GLOBAL HEALTH
MIDDLE EAST AND SOUTH ASIA
SENIOR WHIP:
DEMOCRATIC CAUCUS
CHAIR:
CONGRESSIONAL BLACK CAUCUS
CHAIR:
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE COMMITTEE ON THE JUDICIARY

OVERSIGHT HEARING: MICHAEL B. MUKASEY ATTORNEY GENERAL U.S. DEPARTMENT OF JUSTICE

JULY 23, 2008

Mr. Chairman, thank you for your leadership in convening today's very important hearing on the oversight of the Department of Justice. I would also like to thank the ranking member the Honorable Lamar S. Smith, and welcome our extremely distinguished witness, the Attorney General of the United States, the Honorable Michael Mukasey. Welcome Mr. Attorney General.

In addition to holding the seat of my hero, role model, and predecessor, the incomparable Barbara Jordan, one of the reasons that I have been so proud to be a member of the Committee on the Judiciary throughout my seven terms in Congress is that this Committee has oversight jurisdiction over the Department of Justice, which I have always regarded as the crown jewel of the Executive Branch.

In recent years the reputation of that Department, which has done so much to advance the cause of justice and equality for all Americans, has been tarnished. And that is putting it charitably. This Committee has no greater challenge and obligation to the nation than to help restore the Department of Justice to its former greatness.

Anyone who has observed this Committee over the years knows that I have a deep and abiding passion about the subjects within its jurisdiction: separation of powers, due process, equal justice, habeas corpus, juvenile justice, civil liberties, antitrust, and intellectual property. But, Mr. Chairman, today I wish to focus on the record and performance of the Department of Justice in five areas: (1) the Department's civil rights record; (2) the on-going investigation into the firing of the 8 United States Attorneys in December 2006; (3) the CIA's destruction of tapes recording terrorist suspect interrogations;

(4) the enforcement of U.S. federal laws to protect U.S. contractors in Iraq; and (5) the various cuts in the 2009 fiscal year budget. Allow me to describe my substantial concerns and the responses I hope to hear from the Attorney General.

CIVIL RIGHTS ENFORCEMENT

Mr. Chairman, the Department of Justice is the nation's largest law enforcement agency and it is no exaggeration to state that its Civil Rights Division used to be the nation's largest civil rights legal organization. It wields the authority and the resources of the federal government on difficult and complex issues and has helped bring about some of the greatest advances for civil rights. However, the Department's record under this Administration indicates that it is not living up to its tradition of fighting for equal justice under law.

The Bush administration has abdicated its responsibility to enforce the nation's most critical laws. Since January 20, 2001, the Bush Administration has filed 46 Title VII cases, an average of approximately 6 cases per year. In contrast, the prior Administration filed 34 cases in its first two years in office alone, and 92 in all, for an average of more 11 cases per year.

Furthermore, upon examining the types of cases prosecuted by the Department, an even more disturbing fact is revealed, the failure of the Department to bring suits that allege discrimination against African-Americans. According to CRS statistics from May 2007, there were 32 Title VII cases brought by the Bush Administration. Of those, 9 were pattern or practice cases, 5 of which raised allegations of race discrimination but only one case – 1 case – involved discrimination against African Americans. In contrast, the Clinton Administration filed 13 pattern or practice cases, 8 of which involved racial discrimination.

The record is not much better when it comes to the subject of voting rights enforcement. After six years, the Bush Administration has brought fewer Section 2 cases, and brought them at a significantly lower rate, than any other administration since 1982.

The Voting Section filed a total of 33 involving vote dilution and/or other types of Section 2 claims during the 77 months of the Reagan Administration that followed the 1982 amendment of Section 2. Eight (8) were filed during the 48 months of the first Bush Administration and 34 were filed during the 96 months of the Clinton Administration. To date, only 11 have been filed so far during the present Bush Administration.

Additionally, Mr. Chairman, most of the Department's major voting-related actions during this Administration have been beneficial to the Republican Party, including two in Georgia, one in Mississippi and the infamous redistricting plan in Texas, which the Supreme Court struck down in part. For years we have heard stories of current and former lawyers in the Civil Rights Division alleging that political appointees continually overruled their decisions and exerted undue political influence over voting rights cases. Indeed, one-third of the Civil Rights Division lawyers have left the department and the remaining lawyers have been barred from making recommendations in major voting rights cases.

Mr. Chairman, the Justice Department's recent record is deplorable when it comes to enforcement of the federal criminal civil rights law. According to an analysis of Justice Department data by the Seattle Post-Intelligencer, civil rights enforcement no longer appears to be a top departmental priority. An analysis of the data reveals that, between 2001 and 2005, the number of federal investigations targeting abusive police officers declined by 66 percent and investigations of cross-burners and other purveyors of hate declined by 60 percent.

It appears that this downward trend accelerated after the tragic events of 9/11. While there has been a slight increase in enforcement related to human trafficking, which is classified under civil rights, not enough has been done to stop the overall slide.

I am very troubled by this trend. Hate-crimes are too dangerous to ignore, and there is social value in effective federal review of police misconduct. There has been an increase in hate crimes recently, especially with the placement of nooses in public places to instill fear in the hearts and minds of many Americans.

I am also troubled by the recent "Jena Six" case where six black youths attending Jena High School in Jena, Louisiana were arrested and some were initially prosecuted as adults in response to several fights that ensued following white students' hanging a noose on school grounds. Although black students were arrested and jailed, no white students were ever arrested in connection with the incidents.

As you will recall, I worked tirelessly with civil rights activists such as Reverend Jesse Jackson and Reverend Al Sharpton to ensure that the Department play its role in ensuring that Justice is wrought. I implore the Attorney General to continue to conduct an investigation into this matter and to make the Department's findings a matter of public record. Since the Jena 6 incident, there have been

numerous high profile incidents of noose hangings, including one found in a black Coast Guard's bag, one on a Maryland college campus, and on the office door of a black professor at Columbia University in New York, just to name a few. Equally astonishing is the fact that there is no federal application of hate crimes law to noose hangings. I am anxious to hear the Attorney General's responses to these serious problems.

TEXAS JUVENILE AND OTHER CORRECTIONS FACILITIES

Mr. Chairman, another area of concern that I wish to discuss is the care and protection of juvenile offenders in state correctional facilities and the care and safety of those being held in custody in county and municipal jails in Texas and around the country.

In my home state of Texas, certain administrators and officials, past and maybe current, of the Texas Youth Commission (TYC) have obviously neglected their duties. According to published reports and investigations, several TYC administrators abused their authority by pulling young boys out of their dorm rooms and classrooms and sexually molesting them. The allegations of abuse have been a matter of public record since 2000. In 2005, an investigation conducted by

the Texas Rangers revealed that employees of the juvenile facility in Pyote, Texas, had repeated sexual contact with juvenile inmates.

Additionally, several members of the TYC board, who are responsible for the oversight of TYC facilities, admit that they were aware of the finding in the report prepared by Texas Rangers but took no corrective action. The current scandal surrounding TYC is scandalous and outrageous; quite frankly it sickens me. The situation within the TYC disregards every notion of justice and will contribute to the rise of recidivism rates if it is not arrested immediately.

Let me turn to another horrifying area of inmate abuse. Between January 2001 and January 2006, at least 101 persons, an average of about 17 a year, have died while in the custody of the Harris County Jail, located in Houston, Texas. In 2006 alone there were 22 deaths. I find it especially disturbing that of the 101 deaths, at least 72 of the inmates were awaiting court hearings and had yet to be convicted of the crimes for which they were taken into custody.

In our system every accused person is entitled to life, liberty, and the pursuit of happiness, and a presumption of innocence. These 72 individuals, however, were deprived of their life without the due process guaranteed by the Constitution. They will not ever receive their day in court to be judged by their peers because of the

irresponsibility, incompetence, indifference, and perhaps the criminal neglect, of the jail officials to whose care they were entrusted.

I believe the situation in the Harris County Jail System requires national attention. When it is alleged that inmates are sleeping on the floor next to toilets and denied basic medical care, something must be done. The conditions at these jails border on cruel and unusual punishment. Should fault or wrongdoing be found, the persons responsible should be held accountable. Seeing that such authorities are held accountable is ultimately the responsibility of the United States Department of Justice. I am interested to hear the Attorney General's views on these matters.

U.S. ATTORNEY FIRINGS

Mr. Chairman, I would also like to discuss the issue of the on-going investigation into the U.S. attorney firings in 2006. We have found that it is rare for a United States Attorney to prematurely end his or her four-year term of appointment. According to the Congressional Research Service, only 54 United States Attorneys between 1981 and 2006 did not complete their four-year terms. It has now been confirmed that at least eight United States Attorneys were asked to leave the Department in December 2006.

On March 6, 2007, the Subcommittee on Commercial and Administrative Law held a hearing entitled, "H.R. 580, Restoring Checks and Balances in the Confirmation Process of United States Attorneys." Witnesses at the hearing included six of the eight former United States Attorneys and William Moschella, Principal Associate Deputy Attorney General, among other witnesses.

Six former United States Attorneys testified that he or she was not told in advance why he or she was being asked to resign. Upon further inquiry, however, several of the terminated U.S. attorneys were advised by the then Acting Assistant Attorney General William Mercer that they were terminated essentially to make way for other Republicans to enhance their credential and pad their resumes.

It is now clear that the manifest intention of the proponents of the provision in the USA PATRIOT ACT Reauthorization regarding the appointment of interim U.S. Attorneys was to allow interim appointees to serve indefinitely and to circumvent Senate confirmation.

We now know that after gaining this increased authority to appoint interim U.S. Attorneys indefinitely, the Administration has exploited the provision to fire U.S. Attorneys for political reasons. A mass purge of this sort is unprecedented in recent history. The

Department of Justice and the White House coordinated this purge. The purge was conducted based in large part on whether the U.S. Attorney "exhibit[ed] loyalty to the President and Attorney General."

Mr. Chairman, the office of the United States Attorney traditionally operated with an unusual level of independence from the Justice Department in a broad range of daily activities. The practice that was in place for less than two years needed to end. That is why I was proud to have voted for its repeal and the restoration of the status quo ante. Mr. Attorney General, I welcome your views on the investigation into the US attorney firings and your views on the Department's political independence from the Administration.

DESTRUCTION OF CIA INTERROGATION TAPES

Mr. Chairman, I am extremely concerned by the recent revelation that tapes of CIA interrogations have been destroyed, and the reports this week that the CIA has engaged in the practice of waterboarding.

There are media reports that at least four top White House lawyers were involved in the discussions within the CIA about the destruction of these tapes, which depict the interrogation of

prisoners by U.S. intelligence agents, raise crucial questions about possible criminality, violation of federal laws and international treaties, and obstruction of justice. I am extremely concerned by the implications of these criminal allegations, as well as our oversight responsibilities, as a Congress, to properly investigate this case and to ensure that similar events do not occur in the future.

In early December, media reports indicated that, in 2005, the CIA destroyed at least two videotapes. The tapes in question are known to have documented the interrogation of two senior al-Qaeda operatives in CIA custody. According to reports, the tapes showed CIA agents subjecting terrorism suspects to severe interrogation techniques, including the controversial practice of waterboarding. After the destruction of the tapes was revealed, CIA director General Michael Hayden stated that the decision to destroy them was made "within the CIA," to protect the safety of undercover officers. According to current and former intelligence

officials, the decision is ultimately attributable to Jose Rodriguez, Jr., who was head of the Directorate of Operations.

Mr. Chairman, the 2005 destruction of these tapes came in the midst of Congressional scrutiny of the CIA's detention and interrogation programs. This raises significant concerns about whether the CIA withheld information from Congress, as well as other entities including the federal courts and the September 11th Commission. It has been suggested that the tapes were destroyed in order to eliminate evidence of potentially criminal activity. In light of the controversy, the Department of Justice initiated an investigation, and, on December 14th, moved to delay Congressional inquiries into the CIA's destruction of the tapes, stating that such a parallel investigation would jeopardize the Department's efforts to investigate the issue.

Mr. Chairman, the Department of Justice itself, having offered legal advice relating to the destruction of the tapes, could be implicated in this investigation. In addition, at least four top White House lawyers — Alberto Gonzales, David S. Addington,

John Bellinger III, and Harriet Miers — were involved in discussions regarding the tapes in question. The destruction of the tapes has raised concerns about both the possibility that the tapes documented unlawful conduct and that their destruction was itself unlawful.

Mr. Chairman, since 9/11, this Administration has consistently questioned the applicability of the Geneva Conventions and the Convention Against Torture to the war on al-Qaeda. While I certainly believe in the necessity of protecting the United States from potential future terrorist attacks, I firmly believe that these international conventions and agreements are not optional; they can not be applied only when it is convenient for the Bush Administration. If the United States is to truly be a leader in promoting human rights and the rule of law, it must apply these standards to its own policies and practices.

In the Supreme Court case *Hamdan v. Rumsfeld*, the Court held that Article 3 of the Geneva Conventions does apply to the conflict with al-Qaeda, contrary to numerous assertions to the

contrary made by the Bush Administration. The United States has long-since ratified all four Geneva Conventions, all of which contain Article 3, which prohibits, among other things, "cruel treatment and torture," "outrages upon personal dignity," and "humiliating and degrading treatment" of prisoners or civilians during armed conflict. Either we must apply the same standards to our own conduct, or else risk the likelihood that other nations will not adhere to these standards when detaining and interrogating our citizens.

Mr. Chairman, all detainees must be treated in accordance with international law as well as the U.S. Constitution, under which we all serve. The United States *must not* make those practices, long the staple of abhorred foreign dictators, part of its own interrogation arsenal. While torture is expressly prohibited by international and domestic law, the Administration has consistently sought to circumvent such restrictions, citing the necessity of the situation and seeking to narrowly define torture.

In addition to possible illegal conduct portrayed on the tapes, the destruction of the tapes has raised separate legal concerns. Title 18, United States Code, Section 1512 (c)(1) and (2) establishes the illegality of tampering with a record "with the intent to impair the object's integrity or availability to use in an official proceeding." The official proceeding need not be actually pending at the time of the acts of obstruction, though it must be foreseeable.

Mr. Chairman, I believe it is our responsibility, as the representatives of the American people, the guardians of the Constitution, and the bastion of America's civil liberties, to be unwavering in our commitment to preserving the rights of the American people and American way of life. I firmly believe that acts of torture represent a grave breach of American values.

ENFORCEMENT OF U.S. FEDERAL LAWS TO PROTECT U.S. CONTRACTORS IN IRAQ

In December 2007, the Crime Subcommittee held a hearing in December on the enforcement of U.S. federal criminal laws to

protect U.S. contractors in Iraq. The hearing was held to address the rape of Jamie Leigh Jones by U.S. contractors employed by KBR/Haliburton. The Department sent no witnesses to the hearing because it indicated that it was investigating the matter and has failed to respond to several letters issued by the Committee in January.

Jamie Leigh Jones, from my hometown of Houston, Texas, testified that in July 2005, she was approximately 20 years old, and was on a contract assignment in Iraq for KBR/Haliburton, when her fellow male contractors drugged, imprisoned, and repeatedly gang-raped her.

The Department has brought no criminal action against the alleged assailants. Despite claims to the contrary Title 18, Part I, Chapter 1, Section 7, of the United States Code, entitled "Special maritime and territorial jurisdiction of the United States defined," the United States has jurisdiction over the following: "any place outside the jurisdiction of any nation with respect to an offense by

or against a national of the United States" does allow for the Department to prosecute Ms. Jones's alleged assailants.

Mr. Chairman, I call for a complete *and entirely transparent* investigation into the recent discovery of the destruction of the CIA tapes, and we must fully investigate *all* incidents of suspected torture by U.S. officials and agents.

FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Chairman, this year this Committee examined legislation that was intended to fill a gap in the Nation's intelligence gathering capabilities identified by the Director of National Intelligence Mike McConnell, by amending the Foreign Intelligence Surveillance Act, FISA. But in reality it eviscerates the Fourth Amendment of the Constitution and represents an unwarranted transfer of power from the courts to the Executive Branch and the Attorney General.

I am aware of the delicate balance that the Department must tread in protecting homeland security and in affording Americans

their full and unfettered rights under the Bill of Rights. The original law protected the civil liberties of all Americans while also granting the President the tools needed to conduct an aggressive campaign against terror. FISA does not make American any safer – rather it allows the Government to pursue an enormous and untargeted collection of international communications without court order or meaningful oversight by either Congress or the courts. Although the legislation passed out of the House and was signed into law by the President, I did not support it because I had serious civil liberty concerns.

Because I recognize that there is a delicate balance between legitimate intelligence needs and the civil rights of American citizens, I was proud to support the RESTORE Act, passed by this House in mid-2007. Mr. Chairman the Jackson-Lee Amendment added during the markup made a constructive addition to the RESTORE Act by laying down a clear, objective criterion for the Administration to follow and the FISA court to enforce in preventing "reverse targeting." "Reverse targeting" is the practice

where the government targets foreigners without a warrant while its actual purpose is to collect information on certain U.S. persons. I introduced the Jackson-Lee Amendment to eliminate the reverse targeting by requiring the Administration to obtain a regular, individualized FISA warrant whenever the "real" target of the surveillance is a person in the United States. It is imperative that the rights enshrined in the Bill of Rights be given effect. Mr. Attorney General, I welcome your comments on this issue.

THE 2009 FISCAL YEAR BUDGET

Mr. Chairman, the third and final area I wish to discuss concern the reductions in the 2009 fiscal year budget. A review of the Administration's FY 2009 budget reveals drastic cuts to state and local law enforcement. The Administration has requested a total of $404 million where Congress last year appropriated over $1.7 billion

dollars. This is particularly distressing given that violent crime increased in 2005 and 2006 for the first time in a decade, which many believe are a consequence of similar cuts the President proposed in the past. President Bush's budget eliminates critical

anti-crime and anti-terrorism funding for local law enforcement. The Bush budget cuts $137 million from aid to states and localities for bioterrorism preparedness. Additionally, President Bush did not ask for any funding for the Edward Byrne Memorial Justice Assistance Grant program, nor for the Clinton-era Community Oriented Policing Services (COPS) program, among others. The Byrne program received $175 million in fiscal 2008; COPS received $251 million. These cuts will further erode the ability of state and local government to fight crime at a time when states are dealing with budget crises. Prevention and control of crime is critical to ensuring the strength and vitality of our Nation.

I am interested to hear the Attorney General's views on these matters. Again, thank you Mr. Chairman for holding this hearing. I yield the remainder of my time.

PREPARED STATEMENT AND QUESTIONS OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Statement & Questions

of the

Honorable Maxine Waters, D-35th CA

House Judiciary Committee

Department of Justice Oversight Hearing with

Attorney General Michael Mukasey

July 23, 2008

Room 2141, Rayburn Building

11:00 am

Mr. Chairman, thank you for arranging this year's second oversight hearing for the Department of Justice. I'd like to welcome Attorney General Mukasey back to our Committee. Knowing of the extensive questions that have already been posed in writing and discussed by my colleagues here today, I'd like to focus on three areas that need more attention: 1) the persistent complaints of discrimination and violation of civil rights of those working under you at the Department of Justice; 2) a lingering problem of police misconduct in a number of communities across the country, most recently in the Los Angeles area; and 3) fair housing enforcement and prosecution of those criminally responsible for the current mortgage mess.

In the limited time I have today, let's see what information you can provide now and the remainder of my questions will be submitted to you in writing.

Discrimination Complaints at DOJ

Mr. Attorney General, the Department of Justice is responsible for enforcing our civil rights laws, including the Civil Rights Act, Voting Rights Act, Fair Housing Act, Equal Pay Act, Age Discrimination Act, Equal Credit Act, Americans with Disabilities Act, and Title IX, to prohibit discrimination in education based on gender. Notwithstanding this broad responsibility to

ensure that these laws are followed in every jurisdiction across the country, I continue to hear complaints about discrimination against employees that work for you in the in offices and agencies of the Department of Justice. Does this problem cause you embarrassment that civil rights complaints have been filed against the Department responsible for protecting these rights?

Can you tell me how many discrimination complaints are currently pending against the Department today? I'd like a complete list describing the discrimination complaints, including the agency or office that the complaint is made against, the type of discrimination alleged, and whether the complaints are made by individuals or groups of employees. If the complaints are made by groups of employees, I'd like to know how many employees are in the group.

I am particularly concerned about discrimination complaints I heard against the FBI. In the 1990's we held hearings about the Good Old Boys and Roundups, and I was subsequently led to believe that the worst of those problems were addressed. Unfortunately, in May of this year, we heard whistle-blower testimony in the Crime Subcommittee about FBI agents who face discrimination that affects not only their professional careers, but also could jeopardize our national security.

Can you tell me out of the approximately 12,000 agents serving in the FBI, how many are African American? And how many are female?

Please tell me what kind of outreach is being done to recruit minority agents to cure the disparity of agents who are African American and female? Equally important, what's being done to retain these agents?

In earlier hearings, we heard discussion about the Bureau's "up and out" policy. As this policy is currently being carried out, is there a disparate or discriminatory impact on minority agents?

Regarding the whistle-blower complaints, I'd like to know how many whistle-blower complaints are now pending at the Department and what is their status? How many whistle-blower complaints have been filed since 2001 and what is the outcome or status of those complaints?

Police Misconduct

How many investigations into police misconduct are being conducted at this time? How many investigations of police misconduct were launched since 2001? In what cities did the alleged misconduct occur and what was the outcome of the investigations, including criminal charges and convictions, dismissal, civil charges and/or penalties?

Mortgage Fraud Prosecutions

First, related to my work as Chair of the Housing Subcommittee of the Financial Services Committee, I am very concerned about whether or not the Department of Justice is adequately and properly enforcing the laws already on the books – particularly the civil rights statutes to ensure fair housing.

I'm also concerned about press reports indicating that you rejected a proposed national task force to pursue those responsible for mortgage fraud because the problems only involved "limited white collar crimes." Such comments, or the perception of such a lax attitude, are very disturbing, especially coming from the nation's top prosecutor and enforcer of the laws passed by Congress. Considering the enormity of the financial problems we are facing, I am disappointed by the failure to send the strongest message possible to those criminally responsible for this mortgage mess.

I know offices within the Department of Justice have participated, in some degree, with the work of the FBI, the Department of Treasury, the Federal Reserve, SEC, FDIC, and other agencies. But I want to know what more you plan to do before your tenure ends to get to the bottom of this problem in order to prevent more unscrupulous practices before additional damage is done to homeowners and to the communities hurt by this financial crisis? Tell me about the plan to ensure that everyone who broke the law will be aggressively prosecuted for their role in this mortgage crisis? Are additional resources needed in order to see that this is done?

Given the significant role mortgage fraud and predatory lending has played in our nation's current housing crisis, can you explain why you decided against creating a national task force on mortgage fraud?

There have been a number of reports indicating that minorities were targeted for subprime loans. Lower-income African-Americans received 2.4 times as many subprime loans as lower-income whites, while upper-income African-Americans received 3 times as many subprime loans as do whites with comparable incomes. At the same time, lower-income Hispanics receive 1.4 times as many subprime loans as do lower-income whites, while upper-income Hispanics receive 2.2 times as many. Has the Housing Section of the Civil Rights Division brought any Fair Housing Act cases to respond to the growing concerns about predatory lending against minorities? (How many - Is this a priority for the Department?)

Low Number of Lending Cases

Less than ten fair lending cases have been filed between FY2002 and FY2007. This is despite the fact that numerous studies have shown the link between predatory and subprime lending and race. With the current foreclosure crisis being a clear indication of the devastating impact that subprime lending has had on our economy, one would have expected to see an increase in these cases by DOJ. Why has this not been the case?

Decreasing Number of Cases and Changes in Priorities

Over the years, the number of cases that DOJ's Housing and Civil Enforcement Section has filed overall has precipitously decreased. One major drop off in case handling has been with race cases. By contrast, disability cases have retained their numbers, even though the overall number of cases filed by DOJ has decreased.* How do you account for this?

(It's my understanding that between FY02 and FY06, overall case filings decreased by 29%. During the same period of time, the number of race cases the Section filed fell drastically by 43%.

Refusal to Take Disparate Impact Cases

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination - a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases. Disparate impact cases are crucial in the fight against housing discrimination. Many rental,

sales, lending and insurance policies are not discriminatory on their face, but have a disparate impact on members of protected classes, which can have just as detrimental an effect on individuals and families trying to find housing. Can you elaborate on your agency's position, and explain why DOJ will no longer file disparate impact cases?

GULF COAST CONCERNS

Complaints of Race-Based Resistance to Affordable Housing

After Hurricane Katrina, during field hearings of the Financial Services Housing Subcommittee in Mississippi and Louisiana, a number of witnesses complained about local actions to keep African American renters out of their communities (St. Bernard Parish) and local resistance to the development of affordable housing that appears to be based on the racial make-up of the prospective tenants as much as it is to objections to affordable housing. These actions and resistance are having a serious adverse impact on the ability of hurricane-ravaged communities to provide and rebuild the affordable housing stock in their communities and contributing to the ongoing housing crisis for poor and minority people. At least one private Fair Housing Act lawsuit against St. Bernard Parish has been brought. Has the Civil Rights Division initiated any such lawsuits? Is the Civil Rights Division investigating any allegations that such resistance to affordable housing projects violates the Fair Housing Act?

Race-Based Internet Advertising for Housing

Two years ago, in February 2006, the Housing Subcommittee also heard testimony about an important Fair Housing Act issue concerning whether discriminatory housing advertising on the internet is not actionable because of language in the Communications Decency Act which is alleged to provide broad immunity to internet companies which newspapers do not have. At that time, I expressed my desire to see DOJ weigh in on this issue. Although there are two cases raising this precise issue – one in the 7th Circuit involving Craigslist and one in the 9th Circuit involving roommates – I am not aware of DOJ taking a position on this issue despite the fact that HUD publicly announced at the February 2006 hearing that it would accept and

investigate complaints about such advertising. This lack of action in the fair housing arena is disappointing since DOJ sued an internet company in 2003 for discriminatory advertising and obtained a consent decree. Can you confirm that there have been requests for DOJ to file amicus briefs supporting plaintiffs in these cases but DOJ has not acted? Can you tell us why? Can you tell us whether the Department's position is that the Communications Decency Act protects internet companies from Fair Housing Act cases? If that is the Department's position, would you support an amendment to the Communications Decency Act which would prohibit such discrimination?

LETTERS TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, FROM THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

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July 15, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

I look forward to welcoming you at next week's oversight hearing on the Department of Justice before the House Judiciary Committee on Wednesday, July 23, at 10:00 a.m. in 2141 Rayburn House Office Building. In order to make that hearing as productive as possible, I am writing to ask that prior to the hearing, you address several specific issues, including providing answers to questions asked by the Committee almost six months ago.

Specifically, I had asked on January 29, 2008, prior to your first appearance before the Committee, for you to answer in writing five questions relating to politicization of the Justice Department, waterboarding and torture, selective prosecution, the investigation into the destruction of CIA tapes, and vote suppression and civil rights enforcement. While some parts of these questions were answered at the February 7, 2008, hearing, many were not, and these questions were repeated in the Committee's written follow-up questions after the hearing, which were sent to you on February 29. These also included questions on the FY 2009 budget, protecting overseas contractors, a letter from a federal judge complaining about misconduct by a federal prosecutor, and other important matters. To date, however, we have received no answers to any of these written questions. Please provide answers to these written questions by the end of this week, so that Committee members can prepare for next week's hearing.

In addition, I am very concerned about the July 9, 2008, response from your staff to the subpoena for documents served on you on June 27, 2008. The subpoena concerned documents that the Committee has long requested from the Department, in some cases for more than a year. But not a single document was provided to us by the subpoena's return date of July 7, 2008. Instead, we received a description of the process that the Department is following to search for some responsive documents, a blanket refusal to produce others, and a statement that "serious

consideration" is being given to how to respond to the "request" for an October 23, 2001, Office of Legal Counsel memorandum. With respect, the Department of Justice would clearly consider this kind of response as completely inadequate if offered in response to a subpoena issued by the Department. Although I do hope that our staffs can work in cooperation on this matter, I must insist that you provide by the end of this week a specific schedule as to when the documents due on July 7 will be provided and that you specifically identify and describe each document that you refuse to produce, in accordance with the terms of the subpoena.

I also want to bring to your attention two other outstanding requests that I ask that you address prior to the hearing. On April 29, 2008, Rep. Nadler and I asked that you provide simply a list of classified OLC opinions relating to the war on terror, including the basis for the classification and whether the opinion remains in force today. None of the information in your staff's May 29, 2008, letter in response provides any rationale for refusing to provide no more than a list of such opinions, and I urge that you comply with that request. In addition, please respond to the July 10, 2008, letter from Reps. Delahunt, Nadler, and me calling for the appointment of a special counsel to investigate and prosecute any violation of federal criminal laws related to the removal of Canadian citizen Maher Arar to Syria.

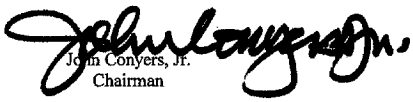
Finally, in recent months, press accounts have raised concerns about the possibility of political appointees transferring to career positions within federal agencies in order to ensure their continuation in employment through the transition to a new administration. This practice, referred to as "burrowing in" or "conversion," is of particular concern to the Committee in light of the documented instances of politicization of the Department during the Bush Administration. Similarly, we are vitally interested in plans with respect to the projected transition to a new Administration in January, 2009, a subject that you have also identified as very important. Accordingly, I ask that you provide the following information prior to next week's hearing:

1. A list of all former political appointees who have transitioned into career positions as of January 1, 2007.
2. Any directives or memos that have been prepared regarding the transition process to occur at the end of the current Administration, whether from the Attorney General's office or other offices within the Department.
3. Any existing guidelines on the Department's process for hiring employees currently serving as political appointees in career or "Schedule A" positions.

The Honorable Michael B. Mukasey
Page Three
July 15, 2008

Please send your responses to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, D.C. 20515 (tel.: 202-225-3951; fax: 202-225-7680). Thank you for your prompt attention to this matter, and we look forward to a frank and productive discussion with you at the July 23 hearing.

Sincerely,



John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith

Congress of the United States
House of Representatives
Washington, DC 20515

July 10, 2008

The Honorable Michael Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Attorney General:

We write to request that you appoint an outside special counsel to investigate and prosecute any violation of federal criminal laws related to the removal of Canadian Citizen, Maher Arar, to Syria.

Mr. Arar's case has generated a great deal of concern in Congress, across the United States, and in other countries. It also has been the subject of a four-year-long investigation by the Department of Homeland Security's Office of Inspector General. The publicly-released report of that investigation has revealed troubling facts that warrant specific investigation into possible criminal misconduct. For example, the DHS OIG concluded that, after finding that it was "more likely than not" that Mr. Arar would be tortured if sent to Syria, INS officials still concluded that the United States could send Mr. Arar to Syria based on "ambiguous" assurances whose validity was not examined.[1] This decision was made by former INS Commissioner James W. Ziglar, with attorneys from the Office of the Deputy Attorney General making key decisions and consulting with INS officials at various stages in the removal process.[2]

During a joint hearing held by the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee and Subcommittee on International Organizations, Human Rights, and Oversight of the House Foreign Affairs Committee on June 5, 2008, current DHS Inspector General Richard L. Skinner and former DHS Inspector General

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[1] *See* Department of Homeland Security Office of Inspector General, The Removal of a Canadian Citizen to Syria, OIG-08-18, March 2008 (released publicly June 5, 2008) ("DHS OIG Report"), at 5, 21-22, 25, available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_08-18_Jun08.pdf.

[2] Id. at 5, 11, 20-1, 25, 32.

Clark Ervin testified that they believe that the removal of Mr. Arar to Syria may have violated criminal laws, including the Convention Against Torture and Federal Torture Statute.[3] In concluding that a criminal inquiry is necessary, Mr. Ervin explained that the DHS OIG report led him to conclude that United States officials intended to render Mr. Arar to Syria, as opposed to Canada, because of the likelihood that he would be tortured in Syria and the certainty that he would not be tortured in Canada. Mr. Skinner agreed that a prima facie case of criminal misconduct could be made based on facts showing that high-ranking U.S. officials intentionally deprived Mr. Arar of the means to challenge his detention and transfer with the knowledge that he would be tortured upon transfer to Syria.

As you are aware, Justice Department regulations require the Attorney General to appoint an outside special counsel when: 1) a "criminal investigation of a person or matter is warranted," 2) the "investigation or prosecution of that person or matter by a United States Attorney's Office or litigating Division of the Department of Justice would present a conflict of interest for the Department" and 3) "it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter."[4] If this test is met, then you must select a special counsel from outside the government who would have the authority to secure resources for the investigation and prosecution and have full investigatory and prosecutorial powers.[5]

These three criteria clearly are met and warrant the appointment of a special counsel to investigate the removal of Mr. Arar to Syria. Inspector General Skinner testified that his office's investigation could not rule out the possibility that Mr. Arar had been sent to Syria because United States officials wanted him interrogated under conditions that our laws would not permit, but noted that criminal investigation was beyond his office's jurisdiction. Mr. Skinner also explained that his office's investigation had been stymied by the lack of power to subpoena witnesses and by the assertion of various privileges to block access to information. As a result, Mr. Skinner's office never interviewed several of the key decision makers, including former INS

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[3]Congress implemented and confirmed the United States's obligation not to transfer any individual to a country where torture is likely through the Foreign Affairs Reform and Restructuring Act of 1998. Pub. L. No. 105-277, div. G, Title XXII, § 2242 (implementing Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment). The Federal Torture Statute, 18 U.S.C. §§ 2340-2340B, criminalizes torture and conspiracy to commit torture outside of the United States.

[4]28 C.F.R. 600.1

[5]28 C.F.R. 600.3-6.

Commissioner James W. Ziglar. Inspector General Skinner and former Inspector General Ervin agreed that criminal laws may have been violated and that further criminal investigation could be warranted.

Second, there appears to be a clear conflict of interest in this matter. Outside special counsel is necessary because of the clear involvement of high-ranking Administration officials, including former Deputy Attorney General Larry D. Thompson and former INS Commissioner James W. Ziglar. It is also clear that attorneys from the Office of the Deputy Attorney General were involved in key decisions and consulted with INS officials at various stages in the removal process. If conflict of interest provisions in your regulations ever apply, they would apply when the Justice Department may have been involved in the abuses that were committed, as is the case here. Thus, the Department has no business conducting the investigation and should instead appoint an outside special counsel.

Finally, there can be no doubt that the public interest will be served by a broad and independent investigation into the removal of Mr. Arar to Syria. After Mr. Arar returned to Canada in October 2003, the Canadian government agreed to convene a commission to investigate his case (the "Arar Commission"). The Arar Commission spent two years looking into Mr. Arar's case, interviewed 70 government officials, and reviewed approximately 21,500 documents. It ultimately concluded that there is no evidence that Mr. Arar ever was linked to terrorist groups or posed a security threat, and that the Canadian government shared inaccurate information with the United States that led to Mr. Arar's detention by the United States while he was transiting through JFK airport on his way home to Canada.[6] The Canadian government subsequently apologized to Mr. Arar for its role in his detention by the United States and awarded him nearly $10 million dollars in damages.

While the Canadian government may have provided inaccurate information to the United States that led to Mr. Arar's initial detention, United States officials made and executed the decision to remove him to Syria. Yet the United States refused to cooperate with the Canadian investigation,[7] and the individuals involved in Mr. Arar's case have cooperated reluctantly – if at

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[6]Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar, Factual Background, Report of the Events Relating to Maher Arar: Analysis and Recommendations, at 13, 59 (2006), http://www.ararcommission.ca/eng/AR_English.pdf.

[7]*See* Letter from William H. Taft, IV, Legal Adviser, U.S. Dept. of State, Sept. 10, 2004, http://www.state.gov/s/l/2004/78071.htm.

all – with the DHS OIG investigation. Moreover, in response to a civil lawsuit filed by Mr. Arar, the United States has refused to answer his allegations and has sought dismissal of the case based on the state secret privilege.

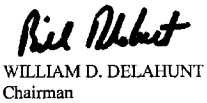
As discussed above, possible misconduct in Mr. Arar's case extends to high-ranking officials within the Executive Branch, and the government's unwillingness to expose how and why this happened has fueled public concern and criticism. Appointing a special counsel would clearly serve the interests of the Department and the public by ensuring that the investigation is thorough, impartial, and independent, and would show that the government is willing to allow fair investigation into serious allegations of wrongdoing.

We look forward to a response to our request at your earliest convenience. Responses and questions should be directed to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, B-353 Rayburn House Office Building, Washington, D.C. 20515 (telephone: 202-225-2825; fax: 202-225-4299).

Sincerely,

JOHN CONYERS JR.
Chairman
Committee on the Judiciary

JERROLD NADLER
Chairman
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary



WILLIAM D. DELAHUNT
Chairman
Subcommittee on International Organizations, Human Rights and Oversight
Committee on Foreign Affairs

cc: Hon. Lamar Smith
Hon. Howard L. Berman
Hon. Ileana Ros-Lehtinen
Hon. Trent Franks
Hon. Dana Rohrabacher
Keith B. Nelson

LETTER TO THE HONORABLE MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, FROM THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:
2435 Rayburn House Office Building
Washington, DC 20515
(202) 225-3816

DISTRICT OFFICE:
1919 SMITH STREET, SUITE 1160
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
(713) 655-0050

ACRES HOME OFFICE:
6719 WEST MONTGOMERY, SUITE 204
HOUSTON, TX 77019
(713) 691-4882

HEIGHTS OFFICE:
420 WEST 19TH STREET
HOUSTON, TX 77008
(713) 861-4070

FIFTH WARD OFFICE:
3300 LYONS AVENUE, SUITE 301
HOUSTON, TX 77020

Congress of the United States
House of Representatives
Washington, DC 20515

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DEMOCRATIC CAUCUS
WHIP
CONGRESSIONAL BLACK CAUCUS
CO-CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

February 7, 2008

Attorney General Michael Mukasey
United States Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Mukasey:

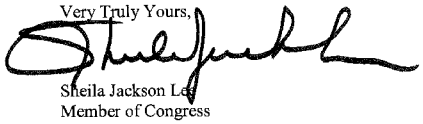
I am writing to request that you take immediate action to ensure a thorough and complete federal investigation into the serious allegations made against District Attorney Chuck Rosenthal of Harris County, Texas, regarding the misuse of government resources and sending of pornographic, racist, and political messages.

On numerous occasions, District Attorney Rosenthal has engaged in conduct that has been criticized as questionable, embarrassing and improper while in office. The fact that Rosenthal's official computer contained dozens of offensive and inappropriate e-mails is a shocking lapse of discretion and lack of responsibility, especially for one of the state's top elected officials. Mr. Rosenthal is alleged to have repeatedly sent racist and sexual emails, and his actions and the cases which he prosecuted need to be reviewed for prosecutorial misconduct and abuse, especially as it relates to the removal of black jurors. Furthermore, an investigation into the Houston Police Department's crime lab revealed that bad management, under-trained staff, false documentation, and inaccurate work has cast doubt on thousands of DNA based convictions. Investigators raised serious questions about the reliability of evidence in hundreds of cases they investigated and asked for further independent scrutiny and new testing to determine the extent to which individuals were wrongly convicted with faulty evidence. However, Mr. Rosenthal rejected the recommendation of the appointment of a special official to oversee the investigation of these cases.

I believe that we have an obligation as Members of Congress and the Judiciary Committee to do all in our power to prevent all forms of racism and bias, especially among prosecutors, who are the very entity entrusted with representing the state and ensuring the preservation of equality and justice in the administration of justice. It is unfathomable that District Attorney Rosenthal has been charged with the preservation of the very laws which he has violated and over which we have oversight.

Thank you in advance for your consideration of this issue. I look forward to working with you to improve the administration of our criminal justice and judicial system and the expeditious handling of this matter. I know you share my commitment to ensuring that our nation's prosecutors epitomize the ideals of equality under the law enshrined in our Constitution.

Very Truly Yours,



Sheila Jackson Lee
Member of Congress

POST-HEARING QUESTIONS* POSED BY THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY; AND THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

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ONE HUNDRED TENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

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November 26, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Mr. Attorney General:

Thank you for your recent appearance before the House Committee on the Judiciary at its July 23, 2008, oversight hearing on the Department of Justice. Enclosed you will find additional questions from members of the Committee to supplement the information already provided at the hearing.

Please deliver your written responses to the Committee on the Judiciary by December 17, 2008. Please send them to the Committee on the Judiciary, Attention: Renata Strause, 2138 Rayburn House Office Building, Washington, DC, 20515. If you have any further questions or concerns, please contact Renata Strause at (202) 225-3951.

Sincerely,

John Conyers, Jr.
Chairman

cc: Hon. Lamar S. Smith
Keith B. Nelson

Enclosure

*Note: The Committee had not received a response to these questions by the time of the printing of this hearing.

Statement & Questions

of the

Honorable Maxine Waters, D-35th CA

House Judiciary Committee

Department of Justice Oversight Hearing with

Attorney General Michael Mukasey

July 23, 2008

Room 2141, Rayburn Building

11:00 am

Mr. Chairman, thank you for arranging this year's second oversight hearing for the Department of Justice. I'd like to welcome Attorney General Mukasey back to our Committee. Knowing of the extensive questions that have already been posed in writing and discussed by my colleagues here today, I'd like to focus on three areas that need more attention: 1) the persistent complaints of discrimination and violation of civil rights of those working under you at the Department of Justice; 2) a lingering problem of police misconduct in a number of communities across the country, most recently in the Los Angeles area; and 3) fair housing enforcement and prosecution of those criminally responsible for the current mortgage mess.

In the limited time I have today, let's see what information you can provide now and the remainder of my questions will be submitted to you in writing.

Discrimination Complaints at DOJ

Mr. Attorney General, the Department of Justice is responsible for enforcing our civil rights laws, including the Civil Rights Act, Voting Rights Act, Fair Housing Act, Equal Pay Act, Age Discrimination Act, Equal Credit Act, Americans with Disabilities Act, and Title IX, to prohibit discrimination in education based on gender. Notwithstanding this broad responsibility to

ensure that these laws are followed in every jurisdiction across the country, I continue to hear complaints about discrimination against employees that work for you in the in offices and agencies of the Department of Justice. Does this problem cause you embarrassment that civil rights complaints have been filed against the Department responsible for protecting these rights?

Can you tell me how many discrimination complaints are currently pending against the Department today? I'd like a complete list describing the discrimination complaints, including the agency or office that the complaint is made against, the type of discrimination alleged, and whether the complaints are made by individuals or groups of employees. If the complaints are made by groups of employees, I'd like to know how many employees are in the group.

I am particularly concerned about discrimination complaints I heard against the FBI. In the 1990's we held hearings about the Good Old Boys and Roundups, and I was subsequently led to believe that the worst of those problems were addressed. Unfortunately, in May of this year, we heard whistle-blower testimony in the Crime Subcommittee about FBI agents who face discrimination that affects not only their professional careers, but also could jeopardize our national security.

Can you tell me out of the approximately 12,000 agents serving in the FBI, how many are African American? And how many are female?

Please tell me what kind of outreach is being done to recruit minority agents to cure the disparity of agents who are African American and female? Equally important, what's being done to retain these agents?

In earlier hearings, we heard discussion about the Bureau's "up and out" policy. As this policy is currently being carried out, is there a disparate or discriminatory impact on minority agents?

Regarding the whistle-blower complaints, I'd like to know how many whistle-blower complaints are now pending at the Department and what is their status? How many whistle-blower complaints have been filed since 2001 and what is the outcome or status of those complaints?

Police Misconduct

How many investigations into police misconduct are being conducted at this time? How many investigations of police misconduct were launched since 2001? In what cities did the alleged misconduct occur and what was the outcome of the investigations, including criminal charges and convictions, dismissal, civil charges and/or penalties?

Mortgage Fraud Prosecutions

First, related to my work as Chair of the Housing Subcommittee of the Financial Services Committee, I am very concerned about whether or not the Department of Justice is adequately and properly enforcing the laws already on the books – particularly the civil rights statutes to ensure fair housing.

I'm also concerned about press reports indicating that you rejected a proposed national task force to pursue those responsible for mortgage fraud because the problems only involved "limited white collar crimes." Such comments, or the perception of such a lax attitude, are very disturbing, especially coming from the nation's top prosecutor and enforcer of the laws passed by Congress. Considering the enormity of the financial problems we are facing, I am disappointed by the failure to send the strongest message possible to those criminally responsible for this mortgage mess.

I know offices within the Department of Justice have participated, in some degree, with the work of the FBI, the Department of Treasury, the Federal Reserve, SEC, FDIC, and other agencies. But I want to know what more you plan to do before your tenure ends to get to the bottom of this problem in order to prevent more unscrupulous practices before additional damage is done to homeowners and to the communities hurt by this financial crisis? Tell me about the plan to ensure that everyone who broke the law will be aggressively prosecuted for their role in this mortgage crisis? Are additional resources needed in order to see that this is done?

Given the significant role mortgage fraud and predatory lending has played in our nation's current housing crisis, can you explain why you decided against creating a national task force on mortgage fraud?

There have been a number of reports indicating that minorities were targeted for subprime loans. Lower-income African-Americans received 2.4 times as many subprime loans as lower-income whites, while upper-income African-Americans received 3 times as many subprime loans as do whites with comparable incomes. At the same time, lower-income Hispanics receive 1.4 times as many subprime loans as do lower-income whites, while upper-income Hispanics receive 2.2 times as many. Has the Housing Section of the Civil Rights Division brought any Fair Housing Act cases to respond to the growing concerns about predatory lending against minorities? (How many - Is this a priority for the Department?)

Low Number of Lending Cases

Less than ten fair lending cases have been filed between FY2002 and FY2007. This is despite the fact that numerous studies have shown the link between predatory and subprime lending and race. With the current foreclosure crisis being a clear indication of the devastating impact that subprime lending has had on our economy, one would have expected to see an increase in these cases by DOJ. Why has this not been the case?

Decreasing Number of Cases and Changes in Priorities

Over the years, the number of cases that DOJ's Housing and Civil Enforcement Section has filed overall has precipitously decreased. One major drop off in case handling has been with race cases. By contrast, disability cases have retained their numbers, even though the overall number of cases filed by DOJ has decreased.* How do you account for this?

(It's my understanding that between FY02 and FY06, overall case filings decreased by 29%. During the same period of time, the number of race cases the Section filed fell drastically by 43%.

Refusal to Take Disparate Impact Cases

In 2003, DOJ announced that it would no longer file disparate impact cases involving housing discrimination - a sharp break from DOJ's decades-long, bipartisan policy to aggressively litigate these cases. Disparate impact cases are crucial in the fight against housing discrimination. Many rental,

sales, lending and insurance policies are not discriminatory on their face, but have a disparate impact on members of protected classes, which can have just as detrimental an effect on individuals and families trying to find housing. Can you elaborate on your agency's position, and explain why DOJ will no longer file disparate impact cases?

GULF COAST CONCERNS

Complaints of Race-Based Resistance to Affordable Housing

After Hurricane Katrina, during field hearings of the Financial Services Housing Subcommittee in Mississippi and Louisiana, a number of witnesses complained about local actions to keep African American renters out of their communities (St. Bernard Parish) and local resistance to the development of affordable housing that appears to be based on the racial make-up of the prospective tenants as much as it is to objections to affordable housing. These actions and resistance are having a serious adverse impact on the ability of hurricane-ravaged communities to provide and rebuild the affordable housing stock in their communities and contributing to the ongoing housing crisis for poor and minority people. At least one private Fair Housing Act lawsuit against St. Bernard Parish has been brought. Has the Civil Rights Division initiated any such lawsuits? Is the Civil Rights Division investigating any allegations that such resistance to affordable housing projects violates the Fair Housing Act?

Race-Based Internet Advertising for Housing

Two years ago, in February 2006, the Housing Subcommittee also heard testimony about an important Fair Housing Act issue concerning whether discriminatory housing advertising on the internet is not actionable because of language in the Communications Decency Act which is alleged to provide broad immunity to internet companies which newspapers do not have. At that time, I expressed my desire to see DOJ weigh in on this issue. Although there are two cases raising this precise issue – one in the 7th Circuit involving Craigslist and one in the 9th Circuit involving roommates – I am not aware of DOJ taking a position on this issue despite the fact that HUD publicly announced at the February 2006 hearing that it would accept and

investigate complaints about such advertising. This lack of action in the fair housing arena is disappointing since DOJ sued an internet company in 2003 for discriminatory advertising and obtained a consent decree. Can you confirm that there have been requests for DOJ to file amicus briefs supporting plaintiffs in these cases but DOJ has not acted? Can you tell us why? Can you tell us whether the Department's position is that the Communications Decency Act protects internet companies from Fair Housing Act cases? If that is the Department's position, would you support an amendment to the Communications Decency Act which would prohibit such discrimination?

OVERSIGHT HEARING ON THE DEPARTMENT OF JUSTICE
QUESTIONS FOR THE RECORD
Submitted by Lamar Smith, Ranking Republican Member
Committee on the Judiciary
Submitted July 30, 2008

Question # 1: Does the Department of Justice have in place any programs to encourage individual whistleblowers or companies to come forward and report the intentional sharing of false information and fraudulent manipulation of share prices in the securities markets?

Question # 2: On July 13, 2008, the Securities and Exchange Commission (SEC) announced that it "and securities regulators will immediately conduct examinations aimed at the prevention of the intentional spread of false information intended to manipulate securities prices." Such practices have caused tremendous harm to share prices and hurt firms, employees, shareholders, and retirees all over America.

a. What is the Department doing to assist the SEC and investigate criminal securities fraud related to the intentional spreading of false information about companies in an effort to manipulate securities prices?

b. Is the FBI involved?

c. What role does the Corporate Fraud Task Force have?

Question # 3: Would you agree that intentionally spreading false information to manipulate securities prices can cause grave harm to the victimized firm, its employees, our securities markets, and ultimately our economy?

Question # 4: Would you agree that intentionally spreading false information to manipulate securities prices is in fact criminal securities fraud and should be prosecuted?

Question # 5: Is the Department working with the SEC and tracking this fraudulent manipulation of share prices using the spread of false information, the use of phony "independent" analysts, and the use of various other techniques to drive share prices down? What specifically is the Department doing in this regard? Does the Department have any views on how widespread these types of fraudulent activities are?

Question # 6: What action has the Department taken to investigate and prosecute hedge funds who pay so-called "independent" stock analysts to spread false information about companies?

a. How many indictments has the Department brought within the past year alleging this type of fraudulent activity?

b. How many convictions has it obtained in such cases?

c. How many referrals of such cases has it received from the SEC?

d. How many such cases are pending?

Question # 7: In light of its focus on terrorism and law enforcement priorities, does the Department have the resources to address this problem at this time? If not, what can Congress do to help provide these resources?

Question # 8: Have you asked the head of the Corporate Fraud Task Force to focus Department resources on investigating and prosecuting individuals or entities – whether they be individual traders, brokerage firms or hedge funds – who take short positions in a company's securities and then engage in fraudulent market manipulation by intentionally spreading false information in an effort to drive the company's share price down or drive the company out of business entirely?

Question # 9: Are the laws covering this type of activity sufficient to address this conduct or does the Department believe it need additional legislation to enhance its ability to investigate and prosecute this type of fraud?

○