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Responses to Questions for the Record from Senator Feingold

1. In the June 2004 decision of *People v. LaValle*, the New York Court of Appeals ruled that the state's death penalty statute was unconstitutional. Nevertheless, the federal government has continued to aggressively seek death penalty convictions in New York. There are a number of other jurisdictions in which the federal government is actively seeking the death penalty where local laws do not authorize capital punishment.

- a) Please explain your view of the propriety of the federal government pursuing federal death penalty cases in jurisdictions where the death penalty is not available under state or local law.**

Response: Courts have held that the federal government may properly pursue federal death penalty cases in jurisdictions where the death penalty is not available under state or local law. In deciding whether to pursue such cases, federal prosecutors are guided by the principles set forth in the United States Attorneys' Manual. Key among them is the need to ensure that there is a federal interest in the matter that substantially outweighs the interests of the state or local authorities. Factors to consider in this regard include the state's interest in prosecuting, the extent to which the criminal activity transcends state boundaries or implicates specific federal interests, and where prosecution will be most effective. Under this analysis, the availability of the death penalty (or its unavailability in the state) may also be a factor.

- b) In some cases, the federal government is pursuing death penalty prosecutions in jurisdictions where there is a specific prohibition against or clear opposition to the death penalty, rather than a mere absence of legal authority, as is the case in New York. For example, the Puerto Rican constitution contains an explicit prohibition on the death penalty, yet the federal government has insisted that it should be allowed to seek the death penalty in cases it brings in Puerto Rico. Similarly, in Arizona, the Attorney General overruled U.S. Attorney Paul Charlton's conclusion that pursuit of the death penalty in a case involving a Navajo defendant and Navajo victims on Navajo land would be inappropriate because the Navajo Nation opposes capital punishment. Does your analysis of this question change at all when the federal government is ignoring an explicit prohibition of or clear opposition to the death penalty in the local jurisdiction at issue?**

Response: As an initial matter, I do not know anything about the case in Arizona, and I am not familiar with the issues regarding the applicability of the federal

death penalty in Puerto Rico. There are important and complex legal, factual and policy issues surrounding the pursuit of a federal death penalty prosecution in the face of an explicit prohibition of or clear opposition to the death penalty in the local jurisdiction. As a result, the issue is difficult to address in the abstract. For example, under the current Federal Death Penalty Act, Congress has specifically exempted from the federal death penalty individuals who are subject to the criminal jurisdiction of an Indian tribal government unless the particular tribe consents to the imposition of the federal death penalty upon its citizens. However, Congress has not carved out a similar exemption for the states. The important and complex issues related to the pursuit of federal death penalty prosecutions in jurisdictions where there is a specific prohibition against or opposition to capital punishment are regularly addressed by the courts. If confirmed, I would look to the law, including Supreme Court and other precedent, and apply it to the facts of the particular case in addressing any such issue.

2. According to the *New York Law Journal*, as of July 2006 the Attorney General had authorized 37 federal death penalty prosecutions in New York. As far as I am aware, only one federal death penalty prosecution brought in the state of New York has resulted in a sentence of death. Death penalty prosecutions clearly require a significant allocation of resources by the U.S Attorney's Office bringing the case. Judge Frederic Block of the Eastern District of New York has publicly criticized the way the federal government seeks death verdicts, claiming that the Department of Justice's decision to pursue the death penalty in a case over which he presided was "a total misappropriation" of resources and was "absurd." Judge Block has detailed the burden that each death penalty prosecution places on the system and contrasted that burden with the budget cuts and resource shortages your office has faced.

a) During your time as U.S. Attorney for the Eastern District of New York, in how many cases have you pursued a death sentence? In how many cases did a death sentence result?

Response: During my tenure as U.S. Attorney for the Eastern District of New York, this office has evaluated evidence of death-eligible crimes against more than 100 individual defendants pursuant to the federal death penalty statute and the relevant provisions of the United States Attorneys' Manual through the process described more fully below in response to Question 2(b). The Attorney General has authorized pursuing the death penalty against 12 defendants, including some who are charged as co-defendants for their participation in the same criminal activity. To date, four defendants have been tried in capital proceedings. All have been convicted; one received a death sentence for his role as the triggerman in the murder of two undercover New York City detectives.

- b) Please provide your views on how to balance the costs and perceived benefits of pursuing death penalty prosecutions, particularly in a jurisdiction like New York where every case but one has not resulted in a death sentence. How have you made the decision whether to recommend to the Attorney General that he authorize you to seek the death penalty in an individual case?**

Response: The decision whether to recommend to the Attorney General that he authorize our office to seek the death penalty rests on a thorough and exacting evaluation of the merits of each individual case, conducted by a committee of highly experienced, senior career prosecutors in this office. The analysis is extremely rigorous and is conducted pursuant to the requirements of the federal death penalty statute itself as well as the principles set forth in the relevant provisions of the United States Attorneys' Manual. While there are many factors that weigh in the analysis, the key criteria include: assessing the strength of the evidence and proof of guilt; determining and weighing the aggravating and mitigating factors to ensure that the aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death as required by law; assessing whether the prosecution entails a substantial federal interest; and assessing any legitimate law enforcement or prosecutorial reason that weighs for or against seeking the death penalty. Costs may be evaluated as a prosecutorial consideration. This process is designed to ensure that death penalty recommendations to the Attorney General reflect the best exercise of the collective prosecutorial judgments of this office based on the merits of each case, and are fair, consistent, without bias or prejudice, and in the best interests of the United States.

- c) Former U.S. Attorney Mary Jo White has publicly commented that pursuit of too many death penalty cases means that other, meritorious prosecutions cannot be pursued because there are simply not enough resources to go around. According to Justice Department Statistics, since 2002, the year you took over the Eastern District of New York office, your office has seen a 44% decrease in overall prosecutions. At the same time, it has pursued a marked increase in death penalty prosecutions. Please comment on the effect that pursuit of multiple death penalty cases has had on your office's ability to prosecute other types of cases.**

Response: Death penalty cases, like other complex prosecutions in areas such as corporate fraud or civil rights, are indeed labor and resource intensive. They have particular impact on the ability of the assigned prosecutors, who largely specialize in these cases, to handle other similar matters, particularly when the cases are being tried. While I am not familiar with the particular statistic cited, I am familiar with how our resources and caseload are affected by myriad

factors including pursuit of multiple complex prosecutions not limited to death penalty cases, budget, and agency referrals, among others. As such, I believe that the pursuit of multiple death penalty prosecutions does not significantly affect our ability overall to prosecute other types of cases, given the size and structure of the office, the range of prosecutorial expertise on our staff, and the dedication of our prosecutors who rise to the occasion to take on more responsibility when resources become stretched.

3. As you know, former Attorney General Ashcroft's decision in 2003 to overrule the recommendation of your office that the death penalty not be pursued in the Jairo Zapata case—thereby invalidating the plea negotiations—garnered significant media attention. A wide range of legal experts commented that Attorney General Ashcroft made a bad policy decision, regardless of the specifics of the individual case. Ultimately, Attorney General Ashcroft relented and a plea agreement was entered.

a) Please provide specific statistics on how many times you recommended for and against pursuing the death penalty in eligible cases, breaking down the data into the time periods before and after the Attorney General's initial decision in the Zapata case? Please include for each time period the numbers on how often your recommendation—either for or against death—was overruled by the Attorney General.

Response: The decision to seek the death penalty in all federal prosecutions rests solely with the Attorney General. As such, I am not at liberty to disclose information concerning the internal deliberations within the Department of Justice relative to death penalty decisions, including the recommendations by a United States Attorney to the Attorney General.

b) Please discuss any effect that the invalidation of the plea agreement in the Zapata case had on your subsequent decisions whether to pursue death penalty prosecutions. To what extent did the initial invalidation of the plea have a chilling effect on your office's willingness or ability to negotiate plea agreements or on your own willingness to submit recommendations against seeking the death penalty in eligible cases?

Response: The Zapata matter presented a unique set of circumstances that had no affect on any other matter or decision. As the public record indicates, the written plea agreement at issue in this case, while signed by the parties, was contingent on the Attorney General's decision whether or not to seek the death penalty. This plea agreement never became valid because the Attorney General initially decided to seek the death penalty. The offer of a contingent plea agreement in death-eligible cases prior to receiving the Attorney General's

decision has never been the practice of my office during my tenure, and this case was a clear anomaly. As such, this case had no effect on my subsequent decision to pursue death penalty prosecutions. Nor did it have any immediate or long-term chilling effect on my office's willingness or ability to negotiate plea agreements, or on my own willingness to submit recommendations against seeking the death penalty.

- c) In your statements to the press about the Zapata matter, you endorsed Ashcroft's decision to overrule the recommendations of your office. As you know, Governor Pataki provided strong support to your bid to become a U.S. Attorney, and is himself a strong proponent of the death penalty who made that issue a central theme of his first campaign for governor. This led to a suggestion that your statements did not reflect an evaluation of the merits of the individual case but instead reflected an ideological affiliation with or loyalty to death penalty proponents. Can you appreciate why, under the circumstances, your statements endorsing Ashcroft's decision to overrule your own earlier recommendation could have seemed suspect to some observers?**

Response: The press statements in this matter, conveyed through an office spokesman, articulated two facts: 1) that the decision to seek the death penalty is solely the province of the Attorney General, and 2) that the death-eligible case would rely on specific aggravating factors related to the heinousness of the crime and the defendant's significant prior history of violence. The full record in this matter, including the facts of the case, its anomalous procedural history including the contingent plea agreement, and its ultimate resolution by plea, clearly demonstrates that the press statements and my decisions in this matter were entirely proper and appropriate, based wholly on an evaluation of the merits of the case, and not based on any ideological affiliation with or loyalty to death penalty proponents.

- d) What can you point to in your record to demonstrate that, if confirmed, you could fairly adjudicate a death penalty case? Can you understand why a defendant in such a case might be concerned about your record?**

Response: Over 25 years of service as a prosecutor and public servant, I have earned among the bench, the bar and the community a solid reputation for fairness, honesty, integrity, professionalism, skill as a lawyer, good judgment, and respect for the rule of law and the rights of others. Throughout my career, I have always listened to differing views of the law and the facts from defense attorneys and their clients, victims, law enforcement professionals, colleagues and others. I have always considered these views fairly and reasonably in evaluating guilt or innocence, bringing cases, making charging decisions,

litigating on the merits, and recommending sentences that are just and appropriate. I have been a tenacious advocate for the interests of justice in all cases and I have never hesitated to exercise compassion where the interests of justice so require. My reputation has been earned through my work in all types of cases, including over 100 death-eligible matters that have been handled during my tenure as United States Attorney, the overwhelming majority of which were not pursued as capital cases. My record and my reputation clearly demonstrate my strong commitment to ensuring that the federal death penalty is applied in the exceptional cases that truly justify a sentence of death as required by law, and that my decisions in all death-eligible cases have been made on the merits of each individual case, fairly and honestly, pursuant to the rule of law, with compassion, and with the utmost of respect for the rights of all. I understand that if confirmed as a United States District Judge, my role would be different. Guided by the same core values, skills and traits through which I have earned my reputation, I would adjudicate all cases including death penalty cases fairly, honestly, and objectively, with compassion and integrity, based solely on the merits of the case and pursuant to the rule of law and applicable precedent, through careful and thoughtful deliberation after listening to differing views, ensuring always that the rights of all are fully respected and scrupulously honored.

4. As you may know, the Department of Justice has indicated that one of the main reasons why Paul Charlton, the U.S. Attorney for the District of Arizona, was fired was because of his opposition in two cases to the Department's decision to seek the death penalty over his objections. In essence, Charlton was seen as obstructing the Department's objective of expanded use of the federal death penalty. According to a recent news report, New York is second in the country for authorized federal death penalty cases since 1988, with the U.S. Attorney's Office for the Eastern District of New York generating a large portion of those cases. Moreover, New York has the greatest number of potential death penalty cases awaiting the Attorney General's decision on whether to seek the death penalty.

a) Please discuss whether you ever received pressure or encouragement, directly or indirectly, from the Department of Justice or others in the Administration to pursue more federal death penalty prosecutions.

Response: I have never received pressure or encouragement, directly or indirectly, from the Department of Justice or others in the Administration to pursue more federal death penalty prosecutions.

b) Please discuss whether your office's record of seeking the death penalty was ever a topic of discussion in interviews or discussions you had with the

Administration or Department of Justice officials regarding whether you would be nominated for a position on the federal bench.

Response: My office's record of seeking the death penalty was never a topic of discussion in interviews or discussions I had with the Administration or Department of Justice officials regarding whether I would be nominated for a position on the federal bench.

- c) Can you understand why one might draw the inference that—just as Charlton was punished for not vigorously pursuing federal death penalty prosecutions—you now are being rewarded for vigorously pursuing federal death penalty prosecutions?**

Response: As discussed more fully in response to Question 3(d), my record and my reputation as a lawyer, prosecutor and public servant, built in this community over the past 25 years through my handling of many different types of cases, clearly demonstrate my qualifications for service as a United States District Judge. I have earned a reputation for fairness, honesty, integrity, compassion, skill as a lawyer, solid judgment, professionalism, and respect for the rule of law and the rights of others. It is through these core traits, skills and values that I have achieved a significant record of accomplishment and have garnered the respect of the bench and bar, and my peers and adversaries alike. And it is these same core traits, skills and values that I would bring to the bench should I be confirmed as a United States District Judge.