

**Senator Specter's Written Questions for Lanny Breuer,
Nominee to be Assistant Attorney General, Criminal Division**

1. In what ways do you expect the priorities of the Criminal Division during this administration to differ from those of the last administration?

If confirmed, I will review the allocation of resources within the Division and meet with the career attorneys before developing the full slate of the Division's priorities moving forward. Without prejudging that review, if confirmed, I expect that the Criminal Division will focus heavily on pursuing financial fraud in all its guises, domestic and international organized crime, public corruption, child exploitation, gang violence, and drug-related crime, among other priorities. I also would expect to build on the many important law enforcement partnerships—including with state, local and federal agencies—to ensure that we are effectively coordinating and ferreting out criminal activity, and vigorously enforcing the law.

2. In an August 25, 2008 op-ed in the *Washington Times*, you wrote the following:

“Extremism in the name of security is no vice” may well be the operating philosophy for which the Bush administration is remembered. There is a growing list of U.S. government actions, both domestic and abroad, that show abuse of law and blatant indifference to human rights—all in the name of security.¹

- a. Regarding which policies do you consider the Bush Administration to have been extremist?

My recollection is that I was referring to the reported use of waterboarding and the initial indefinite detention of terrorism suspects at Guantanamo Bay without due process, which was struck down by the Supreme Court.

- b. As you probably know, this Committee recently held a hearing on the question of whether Congress should create a “Truth Commission” to review the alleged abuse of executive power during the Bush Administration. Do you think this proposal is well advised? Is the Justice Department not capable of handling this issue on its own?

Without having seen or studied any specific proposals related to a “Truth Commission,” it would be premature for me to judge the advisability of such a commission. That said, if Congress pursues such a commission and if I am confirmed, I would look forward to working with Congress and to sharing my views regarding specific proposals. Leaving aside the issue of a “Truth Commission,” if confirmed, consistent with what the Attorney General has said on this issue, the Criminal Division will follow the evidence, the facts, and the law where they lead.

3. It is a matter of public record from the Independent Counsel's Report issued in 1998 and from President Clinton's answers to questions posed by the House Judiciary Committee that you invoked executive privilege during your testimony before the grand jury

¹ Lanny A. Breuer and Mark Brzezinski, “Repairing America's Image Abroad Will Take Time,” WASH. TIMES, Aug. 28, 2008.

connected with the independent counsel's investigation. What were the grounds for your invocation of executive privilege? Why do you believe executive privilege was justified?

My assertion of executive privilege with respect to certain categories of communications was based on – and, I believe, justified by – my understanding of the law of executive privilege at the time of my appearance before the grand jury, and an instruction from White House Counsel Charles Ruff – at the direction of the President – to assert the privilege.

4. The Department of Justice's policy of seeking waiver of the attorney-client privilege from organizations under investigation originated under the memorandum that then-Deputy Attorney General Holder signed on June 16, 1999.
 - a. Is there any real justification for having a waiver on anything other than a purely voluntary basis?

I firmly believe that any waiver of attorney-client privilege should be voluntary. The right to counsel depends on the privilege, and no one should be coerced into waiving it.

- b. Doesn't it undermine the voluntariness of a waiver when a company's representatives have reason to believe the charges against it will be reduced in exchange for such a waiver?

Yes. However, I do not believe the right to counsel is undermined when a suspect – corporation or individual – is offered some criminal justice benefit for cooperating in an ongoing investigation or prosecution. Cooperation benefits have long been recognized by Congress and are codified in the U.S. Code. It is critical, though, that any such benefit not be contingent on a waiver of privilege, but rather on disclosure of facts that assist in some investigation or prosecution.

- c. Should a refusal to waive the attorney-client or work-product protections voluntarily ever be a factor prosecutors consider in deciding whether to indict a corporation?

No. However, as I stated above, I do believe the level of cooperation is generally a legitimate factor for prosecutors to consider.

- d. Attorney General Mukasey stated in his hearing during discussion of this question, "Absent privilege, the right to counsel is nearly meaningless. You can't get counsel – you can't be expected to disclose the facts to your lawyer so as to get good counsel if what you think you're doing is disclosing them, ultimately, to the prosecutor." Do you agree with that statement?

Yes.

5. I recently introduced the Free Flow of Information Act, which provides a qualified privilege for reporters to withhold from federal courts, prosecutors, and other federal entities, confidential source information and documents and materials obtained or created under a promise of confidentiality. The bill recognizes that, in certain instances, the public's interest in law enforcement and fair trials outweighs a source's interest in remaining anonymous through the reporter's assertion of a privilege. Thus, it allows courts to require disclosure where certain criteria are met. Under the legislation, in most criminal investigations and prosecutions, the federal entity seeking the reporter's source information must show that there are reasonable grounds to believe that a crime has occurred, and that the reporter's information is essential to the prosecution or defense. In noncriminal actions, the federal entity seeking source information must show that the reporter's information is essential to the resolution of the matter. If you are confirmed, would you support this legislation? If not, is there an alternate form of a media shield you would support?

I support a qualified reporters' privilege for journalists. Like the Attorney General, I believe there are circumstances where reporters should be able to withhold from federal prosecutors and other federal court litigants confidential source information, documents, and other materials obtained or created under a promise of confidentiality. However, I believe it is critically important that such legislation be crafted with recognition that any privilege must give way when important national security or other critical public policy or law enforcement matters are at stake. Furthermore, the legislation must be written in a way that protects legitimate journalists, while not providing an inappropriate shield for others who, for example, simply post material somewhere on the Internet. Finally, I believe that any legislation must provide an enforcement mechanism so that when a court finds the public's interest in law enforcement outweighs a source's interest in remaining anonymous through the reporter's assertion of a privilege, that court's disclosure order will be followed.

While I have not studied the legislation you have introduced, if confirmed, I will talk to the career prosecutors in the Division and work with the other relevant components of the Department of Justice to develop a considered view on your particular proposal. My goal would be to work with you to craft media shield legislation that protects both a free and robust media, as well as the core functions of the Department.