

Senator Edward M. Kennedy
Responses to Questions for the Record
Senate Judiciary Committee Hearing on the Nomination of Kevin O'Connor to be
Associate Attorney General

1. Dual Roles as U.S. Attorney and Associate Deputy Attorney General and, Later, Chief of Staff to Attorney General Gonzales

Last January, you became an Associate Deputy Attorney General here in Washington, but continued to serve as United States Attorney for Connecticut. When you became Attorney General Gonzales' Chief of Staff in April, you signed on for even more intensive "double duty."

As U.S. Attorney for Connecticut, you've been the principal federal litigator for the United States in that state, and you've had full responsibility for the U.S. Attorney's office in the areas of personnel, financial management, and procurement. Yet for many months, you apparently spent only one day a week in Connecticut performing these responsibilities.

A U.S. Attorney position requires enormous time and energy. It seems impossible to do the job adequately from Washington—much less while running the office of the Attorney General during congressional investigations into the politically motivated firings of other U.S. Attorneys.

Questions:

A. How did you manage to run the Attorney General's office and the Connecticut U.S. Attorney's office at the same time?

I was able to manage the United States Attorney's Office while I served as Associate Deputy Attorney General and, later, Chief of Staff, because I have an outstanding leadership team in the United States Attorney's Office who can and did handle matters very effectively when I was in Washington. I stayed in daily contact with the United States Attorney's office when in Washington through regular email exchanges and conference calls. In addition, I traveled back to Connecticut almost every week and spent numerous weekends and weekdays in my Connecticut office during the time I held additional positions in Washington.

B. Did you ever worry that you were compromising the quality of your work in either position?

Yes. Before I agreed to serve as Associate Deputy Attorney General and, later, Chief of Staff, I considered whether accepting additional responsibilities in Washington would negatively impact my work as United States Attorney. After discussions with the leadership team in Connecticut and with other past and present United States Attorneys who have served in dual capacities, I agreed to serve because I had been asked and because I believed there would be benefits from my service to the United States Attorney

community and to my office in Connecticut. I did, however, on both occasions, limit the term for which I would serve in Washington to six months because I wanted to have the option to return full-time to Connecticut if I came to the conclusion that my service in dual roles was negatively impacting my duties and responsibilities as United States Attorney.

C. Do you think being a U.S. Attorney can be done satisfactorily as a part-time job?

I believe that there are real benefits to having United States Attorneys serve in positions in Washington, including the need to bring a local perspective to decisions being made in Washington that will impact operations in the field. That being said, it is my view that such assignments should be done only if (1) there is a need for a United States Attorney's involvement; (2) the United States Attorney's office is operating in a manner that the assignment will not impact negatively the work of the office; and (3) the assignment is for a finite period of time. Under such circumstances, I believe both the Department and the United States Attorney's office can and have benefitted from such service.

D. Did you ever suggest to anyone that it might be inadvisable or inappropriate for you to hold both positions simultaneously for such a long time?

As I discussed in response to Question 1C, I was concerned about holding two positions. Nevertheless, when I was asked to serve, during very difficult times for the Department, I felt it was the appropriate thing to do. On both occasions, I accepted the offer to serve on the condition that I would serve for six months, after which time I would reevaluate whether it was in the best interests of the Department and the United States Attorney's office for me to serve longer. As Associate Deputy Attorney General, my service lasted less than four months. My service as Chief of Staff lasted just over six months, after which I returned to Connecticut full time.

2. U.S. Attorney Firings and Activities While Chief of Staff to Attorney General Gonzales

Last April, you became Chief of Staff to Attorney General Gonzales during our investigation of the firing of U.S. Attorneys. I assume that every document and every decision in the Attorney General's office would have gone through you as Chief of Staff, and that you would have been involved in preparing the Attorney General for congressional testimony.

His testimony before our Committee about the U.S. Attorney firings left many of us convinced that we had been severely misled. Mr. Gonzales was unable to recall numerous important points and contradicted himself on several subjects, including who was responsible for identifying the attorneys to be fired, why they were fired, and what his role was in these events. Yet he expressed confidence that nothing improper had occurred in the U.S. Attorney firings, even though he could not remember key events or the reasons why particular U.S. Attorneys were fired. He couldn't even tell us how names got on the list of U.S. Attorneys to be fired.

In an interview on talk-radio, you said you became an informal advisor to Attorney General Gonzales, and that this led to your becoming Chief of Staff. You acknowledged that you had been advising him for some time even before the announcement that you would become official Chief of Staff last April.

Questions:

A. What role did you have in preparing Attorney General Gonzales for his testimony before this Committee on April 19, 2007 on the U.S. Attorney firings?

In April 2007, Chuck Rosenberg, the acting Chief of Staff to the Attorney General, asked me to assist in the Attorney General's preparation for his upcoming Senate Judiciary Committee oversight hearing. At that time, I was serving as an Associate Deputy Attorney General responsible for violent crime initiatives, a position I assumed in January 2007. Prior to Mr. Rosenberg's request, I was not involved in the Department's response to Congressional inquiries about the firing of United States Attorneys. Pursuant to Mr. Rosenberg's request, I, along with many others in the Department, assisted in preparing the Attorney General for his April 2007 Senate Judiciary Committee oversight hearing. I also reviewed the Attorney General's written introductory statement that was submitted to the committee.

B. Was anyone from the White House involved in the Attorney General's preparation? If so, please describe the nature of that involvement.

Not that I am aware of.

C. While you worked for Deputy Attorney General McNulty, did you participate in his preparation to testify before Congress on the firings?

No.

D. Before or after Mr. Gonzales's testimony, did you investigate the events surrounding the U.S. Attorney firings? If so, what did you find?

No. Because of the joint investigation into this matter being conducted by the Office of Inspector General and the Office of Professional Responsibility, I did not undertake any independent review or analysis of this matter.

E. Do you know how names were put on the list of U.S. Attorneys to be fired?

How names were put on the list of U.S. Attorneys to be fired is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector General and the Office of Professional Responsibility.

F. Do you know who put which names on the list of U.S. Attorneys to be fired?

Who put names on the list of U.S. Attorneys to be fired is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector

General and the Office of Professional Responsibility.

G. Do you know how the false story was developed that the firings were based on the inadequate performance of the targeted U.S. Attorneys?

Whether or not the performance of the individual United States Attorneys who were fired was a factor in their dismissals is a matter about which I have no personal knowledge. It is also the subject of an ongoing investigation by the Office of Inspector General and the Office of Professional Responsibility.

H. Have you been interviewed by the Inspector General or the Office of Professional Responsibility in the course of their ongoing joint investigation into the U.S. Attorney firings and the improper partisan hiring in the Department under Attorney General Gonzales?

a. If no: Were you contacted to be interviewed? If not, have you reached out to investigators?

I was never interviewed, but I, along with numerous other Department employees, received a general questionnaire from the Office of Inspector General which I completed in 2007. I was subsequently asked, in my role as Chief of Staff, to assist the Office of Inspector General in encouraging those Department employees who had not responded to the questionnaire to do so.

b. If yes: When did the interview take place and how long did it last? Did anything occur in the interview that this Committee should know about before acting on your nomination?

3. Bybee “Torture Memo” and the President’s Power to Torture

As you know, the nation is engaged in an intense debate about torture. In 2002, the Justice Department’s Office of Legal Counsel issued the notorious Bybee “torture memorandum,” a legal opinion that redefined torture in such a narrow way that almost nothing would be covered. As the memo stated: “Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Anything that fell short of this standard would not be torture. CIA interrogators called the memo their “golden shield,” because it allowed them to use virtually any interrogation method.

The memo also invented a commander-in-chief exception, which no legal authority had ever recognized, stating that the President and the officials he directs are not bound by laws passed by Congress against torture. The memo stated as well that government officials can avoid prosecution for torture by invoking the defenses of “necessity” or “self-defense”—even

though the Convention Against Torture, ratified by Congress in 1994, states very clearly that “no exceptional circumstances whatsoever” may be used as a justification for torture.

In 2004, we learned that American soldiers had engaged in sadistic acts in the Abu Ghraib prison in Iraq. Shocking photos of such acts created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come.

Last October, Attorney General Mukasey added to the controversy by refusing to answer this Committee’s questions on torture. He refused to say whether waterboarding is illegal, or to state his views on other interrogation techniques. He did not reject the legal reasoning behind the infamous Bybee memo.

Also in October, we learned from the media that only months after withdrawing the Bybee memorandum, the Office of Legal Counsel issued two new secret legal opinions in 2005 approving the use of severe interrogation techniques.

Just weeks ago, we also learned the CIA had destroyed videotapes of its employees in the act of torturing detainees. Those tapes were never shown to Congress or any court. They were never shown to the bipartisan 9-11 Commission. Instead, they were destroyed.

If you are confirmed as Associate Attorney General, you’ll obviously be part of the debate on torture. You’ll have a chance to help bring America back to the rule of law and the ideals we hold dear—and say “no” to interrogation techniques that are cruel, inhuman, and degrading.

Questions:

A. Dean Harold Koh of Yale Law School has said that the Bybee memo was “perhaps the most clearly erroneous legal opinion I have ever read.” He called it “a stain upon our law and our national reputation.” Do you agree?

I agree that the Bybee Memo was flawed and that the Department properly withdrew it.

B. Do you agree or disagree with the Bybee memo’s claim that “necessity” can justify the use of torture?

I disagree. My understanding is that neither the President nor the Department of Justice can authorize torture on the grounds of “necessity.”

C. Do you agree or disagree with the Bybee memo’s claim that “self-defense” can justify the use of torture?

I disagree. My understanding is that neither the President nor the Department of Justice can justify the use of torture on the grounds of “self-defense.”

D. Do you agree or disagree with the Bybee memo’s claim that for purposes of the Torture

Act, physical suffering can never be “severe” unless it is of “extended duration or persistence”?

From what I understand, the Bybee Memo did not suggest that physical suffering could not be “severe” unless it is of “extended duration or persistence.” Rather, it concluded that “severe physical suffering” was not a separate concept from “severe pain” under the anti-torture statute. I disagree with that conclusion and, more generally, disagree with the unduly narrow definition of “severe physical pain or suffering” adopted by the Bybee Memo.

E. Do you agree or disagree with the theory—which this Administration has never repudiated—that laws banning torture do not always bind the Executive Branch, because of the President’s inherent powers as commander-in-chief?

I do not believe the President has inherent authority to disregard laws banning torture.

F. During your service in the Department of Justice, have you had any involvement of any kind in any matter relating to interrogation practices or techniques? If so, please describe your involvement.

Yes. In July 2007, I became aware that the President issued an Executive Order concerning the legality of the CIA’s current interrogation program and that the Department of Justice, through the Office of Legal Counsel, had provided legal advice related to the Executive Order. I took no substantive part in that process, however.

4. Waterboarding

As you know, waterboarding has become the worldwide symbol for America’s debate over torture. It became the centerpiece of Attorney General Mukasey’s confirmation hearings. It was the technique apparently shown on the videotapes that the CIA destroyed. Waterboarding, however, is not by any means the only interrogation technique used by the Bush Administration that Congress and legal experts believe to be torture. It’s just the most infamous.

In fact, waterboarding is hardly new. It’s an ancient, barbaric technique. In the fifteenth and sixteenth centuries, it was used in the Spanish Inquisition. In the nineteenth century, it was used against slaves in this country. In World War II, it was used against our own soldiers by Japan. In the 1970s, it was used by the Khmer Rouge and the military dictatorships in Chile and Argentina. It’s being used today against pro-democracy activists in Burma. That’s the company the Bush Administration is keeping when it refuses to give up waterboarding.

Top military lawyers and legal experts across the political spectrum have condemned it as a violation of U.S. law and a crime against humanity. After World War II, the United States helped organize the International Military Tribunal for the Far East, and it prosecuted Japanese soldiers for waterboarding Allied prisoners of war. At one trial, an Army Lieutenant testified that the experience “felt more or less like I was drowning, just gasping between life and death.”

We sentenced Japanese officers to years of hard labor for using waterboarding.

Like many of my colleagues and many Americans, I was troubled by Attorney General Mukasey's evasive answers about waterboarding. He repeatedly refused to acknowledge that waterboarding is torture. Yet as the record makes clear, courts and military tribunals have consistently agreed that waterboarding is an unlawful act of torture.

During his confirmation hearings, Attorney General Mukasey pledged to conduct an inquiry into the legality of torture techniques, including waterboarding. I understand that you have not been given access to some classified information regarding interrogation techniques, but I would like to hear your personal views in response to the following questions.

Questions:

A. As Chief of Staff to the Attorney General or in any other capacity, were you involved in investigating this legal question? If so, please describe your involvement in detail.

No.

B. Is waterboarding torture, as defined by domestic and international law?

I share the Attorney General's personal view that waterboarding is repugnant. I also believe it important to consider when analyzing interrogation methods how the use of any such method might affect the safety of our own servicemen and servicewomen as well as the impact that such methods may have on our relationships with our allies and other nations. However, because waterboarding is not and may not be a part of the CIA's current interrogation program, the Attorney General has decided to refrain from addressing this question in the absence of concrete facts and circumstances that call for an answer. In view of the Attorney General's decision and, as a subordinate to the Attorney General, I must respectfully decline to answer this question.

C. Is waterboarding illegal under United States law?

Please see my answer to Question 4B.

D. Would it be lawful for another country to use waterboarding against an American?

Please see my answer to Question 4B. It should also be noted that an American soldier would be entitled to the full protections afforded by the Geneva Convention for lawful prisoners of war, which exceed the threshold guarantees of Common Article 3.

E. According to *The New Yorker* magazine, in a recent interview the Director of National intelligence, Admiral Mike McConnell, stated: "If I had water draining into my nose, oh God, I just can't imagine how painful! Whether it's torture by anybody else's definition, for me [waterboarding] would be torture."

a. When even our own DNI acknowledges that waterboarding would be torture

“for [him],” doesn’t that call into question the soundness of any legal definition of torture that excludes waterboarding?

Please see my answer to Question 4B.

b. Would waterboarding be torture for you?

I have never experienced it, but by all accounts waterboarding would be a very frightening and traumatic experience for anyone subjected to it.

F. Do you agree with Admiral McConnell that practices that are “excruciatingly painful to the point of forcing someone to say something because of the pain” should be considered torture under our laws, regardless of their duration or persistence?

Please see my answer to Question 4B.

G. Where do you draw the line if you cannot say that waterboarding, a classic method of torture through the ages, is never permissible? If you feel you cannot say whether waterboarding is torture and illegal, what about the rack and the screw? Can we bring them back? What is the legal definition of torture as you understand it?

Please see my answer to Question 4B. Torture has been legally defined by Congress as actions taken under color of law that are specifically intended to inflict severe physical pain or suffering or to cause prolonged mental harm through certain threats or acts. See 18 U.S.C. §§ 2340(1), (2). Torture is also prohibited by the prohibition by the Detainee Treatment Act and the Military Commissions Act, and Common Article 3 of the Geneva Convention.

5. FISA and Executive Power

The scandal over the Administration’s warrantless eavesdropping is still coming to light. But we already know that its surveillance activities were so shocking that up to 30 Justice Department employees threatened to resign because of them. The President’s own head of the Office of Legal Counsel, Jack Goldsmith, testified that he “could not find a legal basis for some aspects of the program.” He called it “the biggest legal mess [he] had ever encountered.”

Here is how Mr. Goldsmith described the Administration’s general approach to FISA: “After 9/11 . . . top officials in the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations.” He said that David Addington, the powerful Counsel to the Vice President, once exclaimed, “We’re one bomb away from getting rid of that obnoxious [FISA] court.”

As you know, Congress is currently debating possible reforms of FISA. The White House has asked that we make the temporary changes made by the Protect America Act permanent, and that we amend FISA in other ways as well. At the same time, the Administration refuses to acknowledge it is bound by FISA. So we have a bizarre situation: the Administration is asking Congress to pass a new law, but it is simultaneously insisting that no such law is necessary and that it will not be bound by it.

The language of FISA is clear. It provides the “exclusive” means by which the Executive can conduct foreign intelligence surveillance. As we know from Justice Jackson’s famous opinion in the Steel Seizure Cases half a century ago, the President’s authority is at its weakest when he acts contrary to a congressional statute. Yet President Bush apparently intends to defy clear statutory language.

Questions:

A. I was concerned that in Attorney General Mukasey’s confirmations hearings, he seemed to suggest that the President is free in certain cases to ignore the crystal clear instruction from Congress that FISA is the “exclusive” means by which the Executive Branch can conduct foreign intelligence surveillance. Do you agree that the Executive Branch is bound to conduct all foreign intelligence surveillance according to FISA?

I recognize that this question is currently the subject of much discussion and debate. There are many distinguished and respected legal scholars who agree that the Executive Branch is bound to conduct all “electronic surveillance” a term defined by FISA, pursuant to the procedures set forth in FISA or the domestic wiretap act. These scholars argue that the President has no authority, inherent or otherwise, to operate outside these limitations. *See January 9, 2006 Letter to Congressional Leaders from, among others, Professors Walter Dellinger, Ronald Dworkin, Richard Epstein, Harold Hongku Koh, Philip Heymann, Beth Nolan, Geoffrey R. Stone, Kathleen M. Sullivan and Laurence Tribe.* At the same time, there is significant precedent in the federal courts supporting the argument that the President has “inherent authority to conduct warrantless searches to obtain foreign intelligence information” and that “FISA could not encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002); *see also United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States v. Butenko*, 494 F. 593, 602-06 (3d Cir. 1974)(en banc). It is my hope that the Legislative and Executive branches will arrive at an acceptable legislative solution, in the midst of the current debate over the Protect America Act or otherwise, that will both ensure the safety of the American people and preserve important civil liberties, so that this unsettled and difficult constitutional question be need not be resolved.

B. When if ever, in your view, would the President be authorized to disregard or violate FISA?

As I note in my answer to Question 5A, a difficult constitutional question would arise if FISA's limitations were to be viewed by the President as conflicting with his inherent authority under the Constitution.

6. Political Personnel Practices

Federal law and civil service rules prohibit discrimination against career Justice Department personnel based on political affiliation. Yet in recent months, we've seen many troubling reports of partisanship in personnel decisions at the Department.

--Monica Goodling, a former aide to the Attorney General, admitted that she probably crossed a line in considering candidates for civil service positions.

--Bradley Schlozman, a former high ranking official in the Civil Rights Division, testified before this Committee that he had bragged about hiring Republicans, and the Washington Post has published other reports of his politically motivated personnel decisions.

--In July 2006, the Boston Globe reported that the number of attorneys with civil rights experience being hired in three key sections of the Civil Rights Division had declined sharply, while the number of such attorneys hired who had ties to the Republican National Lawyers Association and conservative groups such as the Federalist Society had increased.

--The head of the Division's Voting Section has been the subject of repeated reports of politically motivated decision-making on both personnel and law enforcement matters, and was recently removed from his position.

The appearance of unlawful political considerations in the hiring process has done enormous damage to the Department's reputation and the morale of its attorneys.

Questions:

A. What steps did you take as Chief of Staff to correct these problems?

When I agreed to serve as Chief of Staff in late April 2007, I viewed it as my primary responsibility to respond to and correct any personnel or other problems of which I became aware. With the assistance of a career prosecutor that I detailed into the Attorney General's office and others in the Department, I oversaw numerous efforts to address such problems. For example, since April 2007 the Department has instituted a number of policy and procedural changes, including: (1) rescission of the hiring authority and delegation order empowering the Chief of Staff to approve all personnel decisions in the Department's leadership offices; (2) revisions to the hiring process for immigration judges that emphasize the role of career employees in the process; (3) revisions to the hiring process for Honors Program and Summer Law Interns Program that also formalize the role of career employees in the process; and (4)

revision of the procedure governing the hiring of Assistant United States Attorneys by interim or acting United States Attorneys so as to preclude involvement in the process by political appointees in senior leadership offices. Additionally, in June 2007, then Assistant Attorney General Wan Kim issued a memorandum to employees of the Civil Rights Division emphasizing that career personnel decisions must be made only on the merits and political considerations should not under any circumstances influence such decisions. In December 2007, Acting Assistant Attorney General Grace Chung Becker reissued this memorandum to reinforce this important point.

Additionally, in my role as Chief of Staff, when I became aware of allegations concerning improper personnel practices, I referred the allegations to the Office of Inspector General and the Office of Professional Responsibility for inclusion in their joint investigation.

a. Did you insist that hiring decisions be based on merit, not politics?

Yes.

B. As you know, these allegations are also part of an internal Justice Department investigation. Will you commit to reviewing the findings of the Inspector General and the Office of Professional Responsibility and taking whatever steps are needed to correct any of the problems that are identified?

Yes.

7. Poor Record on Race and National Origin Discrimination

As Associate Attorney General, you will oversee the Civil Rights Division. I'm very concerned about the Department's priorities on civil rights. Throughout this Administration, the Department seems to have downgraded its long-standing commitment to vigorous enforcement of the nation's civil rights laws. In particular, the number of cases alleging discrimination against African Americans and Latinos has declined.

In seven years under the Bush Administration, the Civil Rights Division has filed only two voting rights cases alleging race discrimination against African Americans, and very few national origin cases on behalf of Latinos under the Voting Rights Act. By comparison, the Clinton Administration filed at least 18 cases under the Voting Rights Act alleging race discrimination against African Americans alone.

On job discrimination, the Department's own data show that the Division has filed and resolved far fewer cases than in the Clinton Administration, despite an increase in the number of Division attorneys handling such cases. In fact, the Division has filed nearly as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined.

Questions:

A. Clearly, no one should suffer discrimination, regardless of their race or national origin. However, the Department's civil rights enforcement should also reflect the cases of greatest need. Do you have any reason to believe that vigorous enforcement of the nation's laws against discrimination based on race or national origin is needed any less today than it was in the late 1990s?

No.

B. As a former Chief of Staff, what do you know about why the Department shifted resources away from pursuing race and national origin cases?

As Chief of Staff, this issue was not one that I encountered, nor am I aware of whether or not the Department shifted resources away from such cases.

C. If you are confirmed, will you commit to work with the Attorney General, the Deputy Attorney General and Assistant Attorney General for Civil Rights, to determine whether the Department's civil rights priorities appropriately respond to existing civil rights problems?

Yes.

D. If you conclude that the decline in enforcement in the areas of race and national origin discrimination is due to a lack of resources, will you promptly inform Congress of that fact? It would surprise me if that were the case, but if so, we'd want to know immediately.

If I identify such a decline and conclude that it is attributable to a lack of resources, I will work with others in the Department of Justice as well as with Congress to address and correct it.

8. Hate Crimes

Hate crimes violate everything our country stands for. They send the poisonous message that some members of our society deserve to be victimized because of who they are. The FBI reported that nearly 10,000 Americans were victims of hate crimes last year – up 8% since 2005. We know that these statistics show only a small part of the problem, because hate crimes routinely go unreported.

Current law covers only hate crimes based on race, color, religion, or national origin. We've been trying to pass stronger legislation on this issue for the past ten years. We came close this year to extending protection to victims of hate crimes based on gender, sexual orientation, disability or gender identity. The bill also would have updated current law by removing the outdated requirement that a victim be engaging in one of a limited number of federal activities, such as traveling in interstate commerce, before the federal government can intervene.

Despite the fact that such a large number of hate crimes occur every year, there has been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the department charged 45 individuals with hate crimes and convicted 38. In 2006, the Department charged 20 individuals with hate crimes and convicted 19. This trend is disturbing, particularly in light of the increase in hate crimes. It's obvious that hate crimes are a national problem, and should be a higher priority of the Department. As Associate Attorney General you would oversee the Civil Rights Division's prosecution of hate crimes.

Questions:

A. What is your opinion of these trends in hate crimes and race-related incidents?

I believe that the Department of Justice must play an active role in investigating and prosecuting hate crimes. In Connecticut, where I serve as United States Attorney, I personally participated in the prosecution of a hate crime case involving an African American victim targeted at his workplace. The defendant was convicted and received a term of imprisonment. Should I be confirmed, I would bring the same level of commitment to aggressively investigating and prosecuting hate crimes in my capacity as Associate Attorney General overseeing the Civil Rights Division.

B. What role does the Department have in assisting states in dealing with hate crimes?

The Department has an obligation because of its responsibilities to enforce and protect civil rights to work very closely with our state and local law enforcement counterparts who also in many cases have jurisdiction over hate crimes. With every reported hate crime, it is crucial that the Department work closely with state and local law enforcement to investigate such matters and select the most appropriate forum, state or federal court, to prosecute anyone charged with committing such crimes.

C. One complaint that we have heard recently is that current law makes it difficult to prosecute individuals who use nooses to threaten people because of their race. Will you support efforts to expand current law to protect more victims of such crimes?

I am unaware of the basis for complaints that current law makes it difficult to prosecute individuals who use nooses to threaten people because of their race. I believe the display of a noose constitutes a potential hate crime that can be investigated and prosecuted under current federal civil rights laws. Indeed, as United States Attorney I participated in a joint press conference with the FBI and the Connecticut Chapter of the NAACP to emphasize that any display of a noose would be treated as a potential hate crime and investigated and prosecuted vigorously.

9. Voting Rights Enforcement

The Department of Justice's Voting Access and Integrity initiative, adopted in the early years of the Bush Administration, was a major change from previous policy, and put high emphasis on combating fraudulent voting or registration by persons who are ineligible for the franchise. As a result, the Department shifted many of its priorities and resources away from efforts to increase access to voting, and toward the prevention of voter fraud.

Everyone agrees that only eligible citizens should vote, but the evidence shows that the Department's recent emphasis on fraudulent efforts to impersonate voters is unjustified. Voter fraud at the polls simply hasn't been a problem. In the past five years, despite the Administration's strong focus on voter fraud, there have been only 86 convictions nationwide – mostly involving poor, immigrant, or minority voters who had no intention of violating the law, but didn't know that they were not legally allowed to register to vote.

By contrast, strong evidence exists of discriminatory efforts to limit access to the ballot based on race, national origin, and language minority status, as the extensive record collected during last year's reauthorization of the Voting Rights Act makes clear. Obviously, there is a far greater need for the Department to protect against attempts to limit ballot access than to prevent the exceedingly rare occurrence of fraudulent voting by those impersonating other voters.

A. Do you agree that the lack of evidence of fraudulent voting by persons impersonating other voters means that a large commitment of resources by the Department to such cases is unwarranted?

I am unaware of the current resource allocation by the Department to voter fraud cases. Moreover, most election crimes are prosecuted by the Criminal Division and the United States Attorney's offices, components which do not report to the Associate Attorney General. Should I be confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

B. The role of the Civil Rights Division has been to increase ballot access. Prosecution of election-related crimes largely has been left to the Criminal Division, although the Civil Rights Division has authority to prosecute those who restrict voters' access to the ballot on the basis of race. This distinction in roles is important. If the Civil Rights Division is perceived as prosecuting those who vote erroneously, citizens will be less likely to report access problems to the Division, and it will be unable to maintain the community relationships that are essential to its mission of preventing discrimination. Do you agree that the Civil Rights Division's traditional emphasis on ballot access should be maintained?

Yes.

C. The shift in priorities to combating voter fraud has affected the Civil Rights Division's work. The Division has failed to file cases to enforce provisions of the National Voter Registration Act that increase voters' access to the ballot. Instead, it has attempted to use the Act to force states to purge voters from registration lists.

- a. **The Department brought one such case in Missouri, but it was thrown out because there was no evidence that any inaccuracy in Missouri's registration lists would affect the outcome of an election. This focus on non-existent voter fraud has been an enormous waste of resources. Now that we know there's no evidence to support the Department's focus on voter fraud, will you restore the Division's proper focus on ballot access rather than continuing to spend resources on voter fraud?**

As stated above, should I be confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

D. The Bush Civil Rights Division has developed and filed only two cases to protect African Americans against racial discrimination in voting (one under Section 2 of the Voting Rights Act, the other under Section 5 of the Act). In answers to written questions received January 24, 2008, the Department pointed to two other cases as cases filed in this Administration to protect African Americans from race discrimination in voting – *U.S. v. Crockett County*, and *U.S. v. Miami-Dade County* – but neither of those is apposite. The Crockett County matter was investigated and approved for filing during the Clinton Administration; negotiations delayed resolution of the case until a few months into the Bush Administration. The Miami Dade County case alleged discrimination based on language minority status, but did not include a claim of race discrimination. Do you believe that this record – two cases of race discrimination in voting against African Americans in seven years – adequately reflects the voting rights problems in the country?

I do not know. If confirmed, I will aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

E. The low number of suits in this area is extremely troubling. Enforcing the Act on behalf of African Americans and other minorities should be a central part of the Division's work on voting rights. If confirmed, will you examine the work of the Voting Section to ensure it's enforcing all of the Voting Rights Act, including the prohibition in Section 2 of the Act against racial discrimination? Will you also look into the reasons why the Division has filed so few cases to protect African Americans from racial discrimination in voting, and provide an explanation to the Committee?

If confirmed, I will work with the Civil Rights Division to aggressively enforce all laws designed to protect the right to vote and the integrity of the voting process.

10. Personnel Practices in the Civil Rights Division

There has been a flood of disturbing reports of improper personnel practices in the Civil Rights Division, particularly in the Voting Section. In addition to the involuntary transfer of Robert Berman, I'm concerned about reports of low morale in the Department's Section 5 Unit.

At least thirteen of the analysts who review Section 5 requests have left since 2003 – that’s more than are now in the Section. Recently, Teresa Lynn, an African American civil rights analyst who served for 33 years in the Section 5 unit, said in a National Public Radio interview that she had retired because of "fear of retaliation" and "disparate treatment of civil rights analysts based on race."

Ms. Lynn also spoke of low morale among the Section 5 analysts and identified the now ex-Chief of the Voting Section, John Tanner, and the former Deputy Chief for the Section 5 unit as responsible. When she retired, Ms. Lynn sent an email to her colleagues saying that she left “with fond memories of the Voting Section I once knew” and was “gladly escaping the plantation it has become.” Those are very serious charges from a person who spent decades in the Department under both Republican and Democratic administrations. It is encouraging that Mr. Tanner and his Section 5 Deputy have been removed from their positions, but clearly the Voting Section needs significant attention.

Question:

A. Will you agree to look into the allegations of racial discrimination and low morale in the voting Section and press for appropriate remedies?

I have no knowledge of these allegations or whether morale is a problem. Should I be confirmed, I will work with the leadership of the Civil Rights Division to determine whether such problems exist and, if so, address and correct them promptly.

11. “Pattern or Practice” Discrimination Cases

The number of cases brought by the Department alleging a pattern or practice of discrimination against women, African Americans, or Latinos, is also troubling. Pattern or practice cases have a huge potential to improve the workplace, because they root out broad, systemic discrimination that generally affects many workers, not just a few. The Department’s role in bringing such cases is particularly important, because the cases usually require far more time and resources than civil rights organizations or even many private attorneys have available. If the Department fails to bring these cases, serious workplace problems are likely not to be addressed. Since 2001, the Division has filed 13 complaints alleging a pattern or practice of discrimination, roughly half the number filed by the Clinton Administration each year.

Question:

A. If confirmed, will you look into the Department’s record in pattern or practice cases, and ensure that the Department is doing all it can in this area?

Yes.

12. Jena Six

The racially charged prosecution of six African American high school students in Jena, Louisiana has raised concerns throughout the nation. Six African American youths were expelled and then charged with attempted second-degree murder in 2006 after they were alleged to have fought with a white student. In the months before the fight, there were heightened racial tensions at the school, which began when white students hung nooses from a tree in the schoolyard. The white students who hung the nooses, however, received only a slap on the wrist.

Question:

A. The circumstances in Jena suggest a large discrepancy in the level of discipline that African American students and white students received from the school.

Unfortunately, the problem of disparate discipline in schools is not unique to Jena. If confirmed, will you work with the Civil Rights Division, the Community Relations Service and the Department of Education to determine whether the Department of Justice is doing all it can to address this problem?

Yes.

A. The Jena controversy has also raised concerns that local prosecutors may be engaged in selective prosecutions based on race. Has the Division commenced an investigation into this issue? If not, will you examine whether such an investigation is appropriate if you are confirmed?

While I cannot comment on whether or not there is an ongoing investigation, if confirmed I will ensure that the Civil Rights Division takes appropriate action if it finds a violation of any federal civil rights laws in Jena.