1. The Department of Justice suggests that it could be helpful to put "inside trading offenses" on a firmer statutory footing than they now stand. Assuming no necessity of deferring to case law as it has developed over the past sixty years, but instead building on definitions the SEC has promulgated through its regulatory process, what articulation of the elements of the crime or offense of unlawful insider trading, or misappropriation or misuse of material non-public information would best produce more certainty for prosecutors and others for whom clarity in this area is important?

As you note, the current prohibitions against insider trading have been developed largely through SEC and judicial opinions construing the antifraud provisions of the federal securities laws. It is certainly appropriate to consider whether the current approach has generated a lack of clarity and certainty about the scope of insider trading law. In my view, however, the application of current law to the vast majority of insider trading cases is clear-cut. It is only in a relatively few unusual situations that there are serious questions about how insider trading law applies, and even in those situations the questions often arise because the legal issues are inherently fact-specific.

If we were to construct a new statutory definition of insider trading, it might be possible to address some of the uncertainties and anomalies in existing law, but I am far from certain that even the best drafting effort could put all the difficult issues to rest. Some of the key elements in any insider trading prohibition – for example, when is information "material" so as to trigger insider trading liability? What level of intent or knowledge is required in a case against a trader, a "tipper," or a "tippee"? – will continue to present potentially difficult and fact-dependent questions, as to which a statutory definition would not necessarily provide greater certainty. While the current Commission has not considered the need for a new statutory definition of the offense of insider trading, I should note that this issue was the subject of much debate roughly twenty years ago. At that time, the relevant Congressional committees, the SEC, and prominent securities law practitioners devoted extensive efforts to trying to craft an appropriate legislative definition of insider trading. Ultimately, however, because of a lack of consensus about certain elements of the definition, Congress did not go forward with a legislative definition of insider trading, but instead adopted the Insider Trading and Securities Fraud Enforcement Act of 1988, which included remedial and procedural provisions to strengthen insider trading enforcement.