

**Questions from U.S. Senator Dianne Feinstein
to Michael B. Mukasey, Nominee for Attorney General of the United States**

1. During the hearing, Senator Whitehouse asked you whether water-boarding is constitutional. You answered, “If water-boarding is torture, torture is not constitutional.” As you know, you have received a letter from the Democratic members of the Judiciary Committee, asking you a follow-up question in relation to that testimony. In addition to the question posed in that letter of October 23, please answer the following question:

- Are all credible, physical threats of death torture (and therefore illegal)?

2. During the hearing I asked you about the statement in your *Padilla* opinion that the President would have unreviewable authority to act to repel an aggressive act, even without Congressional authorization. I asked how long that unreviewable authority would last, and you said, “as long as it has to until the other political parties involved in the matter can take the matter up and deal with it.”

- Do you mean that if Congress takes no action, the President’s power could be indefinite? What if Congress doesn’t act for several years – would the President’s power last until then? And how long can the President claim to be acting in response to an attack – could something the President does tomorrow be unreviewable as a response to the attacks on 9/11 (more than six years ago)?
- How broad is the President’s authority during this time? Are there any constitutional limits on that authority?
- What if Congress didn’t act at all? Would the President have unlimited authority, even in contradiction of previous statutes Congress had enacted?
- Once Congress acts, does that immediately terminate the President’s authority?
- Is this power only in response to an attack, or are there other circumstances when the President can act without review by the courts? For instance, could the President use this power to act preemptively?

3. You indicated during your testimony that, under certain circumstances, the President might have authority to decide that a statute is unconstitutional.

- Please describe the parameters of that authority.
- Do you agree that if the President decides to act in contradiction to a statute, the President would have an affirmative obligation to notify Congress of this fact?

4. At the beginning of the *Padilla* case, you signed an arrest warrant for Mr. Padilla as a material witness, and assigned him counsel. Later, the government notified you *ex parte* that it wanted to withdraw the material witness subpoena, and asked you to sign an order vacating the arrest warrant – which you did. The consequence of vacating the warrant was that Padilla would be transferred from New York to South Carolina and would be denied access to a lawyer.

- Did the government tell you, before you signed the order vacating the arrest warrant, that the government would continue to detain Mr. Padilla but move him out of New York and deny him access to the lawyer you had appointed for him?
- If not, would knowing those facts have changed your decision about whether to vacate the arrest warrant?

5. Attorney General Gonzales has testified that “it would be improper to remove a U.S. Attorney to interfere with or influence a particular prosecution for partisan political gain.” That is a very low bar, and it appears that some U.S. Attorneys were fired simply because of disagreements about priorities – like whether to pursue gun cases or public corruption cases.

- Will you implement a standard, either formal or informal, for when U.S. Attorneys may be fired? What will that standard be?
- How will you communicate the Department’s priorities to U.S. Attorneys, and how will you let them know whether they are meeting those priorities?
- Do you agree with Mr. Gonzales that “interfering with or influencing a particular prosecution for partisan reasons” is the only improper basis for firing a U.S. Attorney? If not, what are other improper reasons?

6. As you know, the Preserving United States Attorney Independence Act of 2007 (S. 214) has become law. It repealed the Attorney General's authority to name interim U.S. Attorneys for indefinite periods. When the bill was under consideration in the Judiciary Committee, there was discussion of allowing an Interim U.S. Attorney to serve for 120 days, followed by an Acting U.S. Attorney pursuant to the Vacancies Reform Act. The Committee did not take that approach; instead, the new law limits interim appointments to 120 days, after which the district court must appoint an Acting U.S. Attorney.

- If confirmed, will you commit to sending nominees for U.S. Attorney positions to the Senate soon after a vacancy arises, to allow the Senate to confirm a new U.S. Attorney within 120 days?

7. I am the author of the United States Attorney Local Residency Restoration Act of 2007 (S. 1379), which is now pending in the Senate. Under the law before 2006, U.S. Attorneys were required to live in or near their districts, although exceptions were permitted in special circumstances (such as the appointment of Patrick Fitzgerald as special prosecutor). My bill would restore that law, undoing a change that was made in the 2006 Patriot Act reauthorization that has led to many U.S. Attorneys serving dual roles.

- If confirmed, will you commit to not appoint incumbent U.S. Attorneys to any dual or additional responsibilities that would require an exemption from the residency requirement?

8. During the hearing I asked you about your rulings in the case of *Sorluccho vs. NYPD*. You said that the question before you was whether the NYPD acted unlawfully, not whether it had acted sensibly or humanely.

The question before you was whether the NYPD discriminated against Officer Sorluccho by treating her differently than it treated the perpetrator. Officer Sorluccho was disciplined harshly for, among other things, not safeguarding her weapon properly: she was put on modified duty, then on restricted duty, and then fired. At the same time, nothing happened to the perpetrator. The Department did not promptly interview him or initiate a thorough investigation of him until well over a month after Officer Sorluccho had been fired.

- Why did you substitute your judgment for the jury's finding that the NYPD had discriminated against Officer Sorluccho?"

- What more would have been necessary for you to have found a legal violation by the Department?

9. Since this Administration took over the Department of Justice in January 2001, the Employment Section of the Civil Rights Division has filed 44 Title VII cases, just 34 of which involved individual lawsuits against state or local employers. At this point, the Department of Justice is on track to file 40% fewer cases than under the previous Administration. Yet there is no evidence that complaints of employment discrimination have decreased.

- The Department of Justice provides the initial assessment of whether an allegation of discrimination should proceed. Your decision in *Sorluccho* suggests that you imposed an unusually high bar in determining whether a case merits its day in court. What in your record demonstrates your commitment to fair consideration of civil rights cases? What steps will you take to ensure vigorous Title VII enforcement?

10. Over the past five years, appeals from the Board of Immigration Appeals (BIA) to the circuit courts have increased by more than 600 percent. In the Sixth and Eleventh Circuits they have increased by more than 1000 percent, and in the Second Circuit they have increased by more than 1500 percent. The reason appears to be a 2002 “streamlining” of procedures at the BIA, which has led to a sharp increase in the rate at which cases are appealed to the circuit courts.

- Will you commit to reviewing the 2002 “streamlining” and making any necessary changes to ensure adequate review in the BIA?

11. In 1996, the U.S. Government joined with California and Pacific Lumber Company in an agreement known as the Headwaters Agreement, which led to federal acquisition of the 7,500-acre Headwaters Forest and the implementation of a Habitat Conservation Plan for all 210,000 acres of land owned by Pacific Lumber Company. Earlier this year, Pacific Lumber Company filed for bankruptcy in Corpus Christi, Texas. Depending on the outcome of those bankruptcy proceedings, continuing compliance with the Habitat Conservation Plan may be in doubt.

- Since the federal government is a party to the Headwaters Agreement, will you commit the federal government to defending the agreement and the Habit Conservation Plan?

- Will you commit to taking affirmative steps, such as intervening in the bankruptcy case, if necessary to help defend the agreement and the Habitat Conservation Plan?