

Senate Judiciary Committee
Hearing on “Executive Nominations”
October 17-18, 2007

Questions Submitted by U.S. Senator Russell D. Feingold
to Judge Michael Mukasey

1. Your testimony indicated that you believe the President may violate statutes such as the Foreign Intelligence Surveillance Act as long as he is acting within his exclusive constitutional authority, and that each branch of government has a sphere of authority that is exclusive to it. You also indicated that the Constitution gives the President the responsibility to “protect the country” and that he has authority “commensurate” with that responsibility. You told Senator Leahy that “if by illegal you mean contrary to a statute, but within the authority of the president to defend the country, the president is not putting somebody above the law; the president is putting somebody within the law.”
 - a. Do you agree with this characterization of your testimony? If not, please specify your precise areas of disagreement.
 - b. Please cite the clauses in the Constitution that in your view grant the President the authority to “protect” or “defend” the country.
 - c. Do you believe that protecting or defending the country is within the President’s exclusive sphere of authority?
 - d. Article I, Section 8 of the U.S. Constitution grants Congress the authority to “provide for the common Defence,” “make Rules concerning Captures on Land and Water,” and “make Rules for the Government and Regulation of the land and naval Forces.” Do these authorities affect your view of whether the President has exclusive authority to “protect” or “defend” the country?
 - e. Is it your position that, as long as the President is acting to protect the country and is not violating another part of the Constitution, such as the Fourth or Eighth Amendments, the President’s action is constitutionally authorized and therefore legal, even if it contravenes an express statutory prohibition? If that is not a correct statement of your position, please explain in detail how the statement should be amended to reflect your view of the scope of the President’s Article II powers.
 - f. Exactly what powers you believe to be incident to the rank of “Commander in Chief”? Is it your position that the constitutional designation of “Commander in Chief” authorizes the President to take any action that is not forbidden by another clause of the Constitution, regardless of whether that action violates a statute passed by Congress, as long as he is acting in his role as Commander in Chief?
 - g. In 1977, David Frost interviewed former President Richard M. Nixon and the following exchange took place:

FROST: So what in a sense, you're saying is that there are certain situations, and the Huston Plan or that part of it was one of them, where the president can decide that it's in the best interests of the nation or something, and do something illegal.

NIXON: Well, when the president does it that means that it is not illegal.

FROST: By definition.

NIXON: Exactly. Exactly. If the president, for example, approves something because of the national security, or in this case because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law. Otherwise they're in an impossible position.

Do you agree with President Nixon? If not, please explain how your view of the President's power to authorize a subordinate to violate a law differs from the view expressed in this interview.

2. You told me at the hearing that when the President authorizes warrantless domestic wiretaps without complying with FISA, his power is at its lowest ebb "to the extent that is not a war-based authority directly involving a war." Is the President employing a "war-based authority directly involving a war" if he authorizes warrantless wiretaps of suspected terrorists without complying with and in violation of FISA?
3. You told Senator Durbin that you do not believe that the McCain amendment is an unconstitutional infringement on the power of the President. In your view, is the Foreign Intelligence Surveillance Act an unconstitutional infringement on the power of the President?
4. On October 23, 2007, Jeb Rubinfeld, a professor of constitutional law at Yale Law School, wrote the following in an oped in the *New York Times*: "As a minimum prerequisite for confirmation as attorney general, a nominee should be required to state plainly whether the executive branch or a federal statute is supreme when the president and the Congress, both acting within their constitutional powers, clash. . . . If Judge Mukasey cannot say plainly that the president must obey a valid statute, he ought not to be the nation's next attorney general."
 - a. Are you prepared to say that a President must obey a valid statute that was within Congress's constitutional power to enact?
 - b. If not, please explain why the Senate should not adopt Prof. Rubinfeld's test in voting on your nomination.
5. If Congress and the President disagree about the proper interpretation or application of a law, the final arbiter of that disagreement is supposed to be the courts, as according to *Marbury v. Madison* it is "emphatically the province and duty of the judicial department to say what the law is." Moreover, insofar as some courts have found certain controversies between the two branches to be nonjusticiable as presented, they have emphasized the tools that Congress has at its disposal to respond to the President's actions. Where the President undertakes to violate the law in secret, he prevents the matter both from being known to Congress and from reaching the courts and thus arrogates to himself the power to adjudicate the disagreement.

- a. Do you agree that the Constitution generally grants to the courts, and not the President, the authority to make the final determination about the scope of the President's Article II authority?
 - b. Assuming for argument's sake that there are some disputes between the political branches that cannot be resolved by the courts, do you agree that two other branches together must attempt to resolve the disagreement?
 - c. Do you agree that it upsets the balance of power among the three branches of government for the President to determine, unilaterally and in secret, that he has the constitutional authority to violate a statute?
 - d. Do you agree that if, in the future, the President believes he or she has the constitutional authority to act in a manner that contravenes a statutory limitation, the proper course is for the President to notify Congress so that any disagreement may be resolved by the two branches and/or by the courts?
6. There has been a great deal of controversy about a variety of post-9/11 programs and activities undertaken by the Bush Administration. You have written that civil liberties concerns about the Patriot Act, material witness warrants, and the immigration round-ups of Arabs and Muslims were overblown.
- a. In your view, have there been any valid privacy, civil liberties or human rights complaints about the Administration's actions in the wake of September 11? Please respond yes or no.
 - b. If yes, please specifically identify one or more of the concerns that you think are or were valid and explain what steps you would take as Attorney General to address those concerns.
7. The excesses of American intelligence agencies led, in the 1970s, to a number of reforms, including new legal limitations on intelligence activities and new oversight structures. In that time period, Congress passed the Foreign Intelligence Surveillance Act, it amended the National Security Act, and it created the intelligence oversight committees. Do you think the reforms of the 1970s went too far?
8. In a number of your speeches, you argue that the structure of the Constitution gives primacy to the provisions creating the government, and that the individual rights laid out in the Bill of Rights are secondary. As a result, you have stated that "the hidden message in the structure of the Constitution is that the government it establishes is entitled, at least in the first instance, to receive from its citizens the benefit of the doubt." Does your view change if the executive branch actively tries to consolidate power and to shut out the other two branches of government? Does a single branch of government, acting alone, still deserve that benefit of the doubt?
9. Michael Hayden, the Director of the CIA, has been quoted as saying that after September 11, he was troubled if he was not "using the full authority allowed by law" and that the administration was "going to live on the edge."

- a. Do you think that the Intelligence Community and the Justice Department must “live on the edge” in the post-9/11 world?
 - b. What is the Justice Department’s role in providing legal advice to the President – to provide the best view of the law, or to provide the most aggressive interpretation?
10. When we met privately, you told me that you did not necessarily agree with the argument that the Authorization for Use of Military Force could authorize the President to violate the FISA statutory requirements. As you may know, that argument is featured prominently in a January 2006 Justice Department White Paper laying out the Department’s legal justification for the NSA wiretapping program, as it existed at the time. In your view, did the AUMF authorize warrantless surveillance beyond what is permitted under FISA?
11. According to Jack Goldsmith, former head of OLC, at a meeting in February 2004 at the White House, Vice President Cheney’s counsel David Addington stated, “We’re one bomb away from getting rid of that obnoxious court,” referring to the FISA Court. What is your reaction to that statement?
12. At your hearing, Sen. Feinstein asked you if Congress has the power to set boundaries on military actions. You responded that Congress has the power under Article I of the Constitution to “provide tools to the President” but “[w]here provision of tools leaves off and interference with the use of tools and the way those tools are used” is something that has to be worked out in the “conflict between the two branches.”
 - a. Do you believe that Congress has the constitutional authority to enact legislation setting a deadline for withdrawing troops from a particular military conflict, such as the conflict in Iraq?
 - b. If Congress were to enact such legislation, does the President have to abide by it?
13. Federal Judge John Gleeson, of the Eastern District of New York, wrote a 2003 law review article (89 Va. L. Rev. 1697) expressing his view that the Attorney General should overrule U.S. Attorneys to require them to seek the death penalty only in exceptional circumstances, and that the best way to achieve uniformity in the federal death penalty is to specifically define the types of particularly federal interests that will justify bringing a federal capital case. With respect to the decision to seek the federal death penalty, do you agree there should be a uniquely federal interest to justify the federal government seeking capital punishment?
14. Judge Gleeson’s article also contended that seeking the death penalty could, in some instances, jeopardize prosecutors’ ability to secure a conviction, because jurors hold them to a higher standard in capital cases. Should the Attorney General give any weight to this consideration in his or her decision whether to seek the death penalty?
15. In 2000, Attorney General Reno publicly issued a nearly 400-page report with a great deal of data about federal death-eligible cases, aggregated at the district level, since the federal death penalty was reinstated in 1988. This included, by district, a breakdown of what the U.S. Attorney and Capital Case Review Committee recommended, and what the Attorney General

decided. It also included breakdowns by race of the defendant, and by race of each of the victims in a case. This comprehensive report was extremely helpful to the Justice Department, this Committee and others in understanding how the federal death penalty had been implemented since it was reinstated. I have asked the Department whether it would prepare a similar report covering the time period since 2000. I have not yet received a response. Such a report would give the Department an opportunity to demonstrate its commitment to transparency about its death penalty work and provide important statistical information to help understand how it has been implemented. Will you commit to making this information publicly available if you are confirmed, just as Attorney General Reno did?

16. Zachary Carter, former U.S. Attorney for the Eastern District of New York, has argued that any committee, either at Main Justice or in individual U.S. Attorney's offices, that is making death penalty-related decisions should have ideological or philosophical diversity, including individuals who are not avid proponents of capital punishment. He argues this is necessary to ensure a robust debate, in which all sides of the issue are fully considered. Will you ensure ideological or philosophical diversity on the Capital Case Review Committee?
17. Earlier this year, the Justice Department publicly issued draft regulations to implement Section 507 of the Patriot Act reauthorization legislation, Public Law 109-177. A provision of that legislation gave the Attorney General, rather than the Courts of Appeals, the authority to allow states that prove they provide competent counsel in post-conviction proceedings to "opt in" to the procedural rules in Chapter 154 of Title 28, which favor the government and disadvantage the inmate who has filed the habeas petition. Serious concerns have been raised about DOJ's proposed implementing regulations by a number of entities. The Judicial Conference has asked DOJ to reconsider the regulations, stating that the regulations provide "no guidance about the criteria to be considered by the decision maker" in assessing whether a state has provided competent counsel. The American Bar Association has said that the proposed rule "is deeply and fundamentally flawed."
 - a. If confirmed, will you commit to review, personally, the proposed regulations and the critical comments of the Judicial Conference and the ABA, and consider whether the regulations need to be revised?
 - b. Legal ethics experts have argued in comments to the Justice Department that the Attorney General should not be granted this function at all because it creates an inherent conflict of interest for the nation's chief prosecutor to be adjudicating whether states can opt in to prosecutor-friendly procedural rules in habeas cases. Those comments are attached for your review. Do you see any conflict in the Attorney General playing this role?
18. Since 1986, courts have been wrestling with a law that treats 1 gram of crack cocaine as the equivalent to 100 grams of powder cocaine for sentencing purposes. This 100-to-1 disparity has a clear disparate impact on African Americans because crack cocaine offenses are more common among African Americans while powder cocaine offenses are more common among whites. Do you believe the 100-to-1 ratio is appropriate? If not, would you support legislation to equalize the penalties?

19. In the wake of *United States v. Booker*, the Supreme Court case holding that the federal sentencing guidelines are only advisory, former Attorney General Alberto Gonzales pushed Congress to enact legislation that would all but remove judges' discretion to impose sentences lower than the sentencing guidelines range. Judge Paul Cassell, Chairman of the Criminal Law Committee of the United States Judicial Conference, strongly criticized the proposal as "one-size-fits-all justice." Do you agree with Judge Cassell that judges should retain discretion to determine sentences in light of the facts of the individual case?
20. I have been very concerned about the increase in the violent crime rate in this country, and in particular in cities like Milwaukee, over the past couple of years.
- a. Your testimony was not clear with respect to your commitment to the Community Oriented Policing Services (COPS) program. Law enforcement agents across my state, and across the country, have been pleading with their elected representatives to increase the level of funding for the COPS program to the levels it was receiving before the current Administration made significant cuts. As funding levels have fallen, violent crime rates have been on the rise. What do you believe is the appropriate level of federal funding for the COPS program?
 - b. Both the House and Senate this year approved increased levels of funding for state and local law enforcement grants, including COPS and the Byrne Justice Assistance Grants. Do you support these increases in funding?
 - c. If confirmed, what else will you do to reduce the violent crime rate?
21. On July 25, 2007, Senators Schumer, Feinstein, Whitehouse and I wrote to Solicitor General Paul Clement, asking him to appoint an independent special counsel to investigate whether then-Attorney General Alberto Gonzales had misled Congress or committed perjury in testimony before the Senate Judiciary Committee. Mr. Clement was the Acting Attorney General in matters from which Mr. Gonzales had recused himself. As of today, we have not received a response to our request. Shortly thereafter, Chairman Leahy asked the Inspector General to investigate the truthfulness of Mr. Gonzales's testimony, and news reports indicate that that investigation is ongoing. Whether the Attorney General of the United States has lied to Congress is obviously a serious matter.
- a. Will you pursue this matter forcefully to a conclusion?
 - b. Under what circumstances would the appointment of a special counsel be appropriate?
22. Sen. Durbin asked you about Stephen Bradbury, who is currently serving as the Principal Deputy for the Office of Legal Counsel. He was nominated several years ago to head that office as Assistant Attorney General, but the Senate did not act on his nomination and the nomination was returned to the President several times. At this point, under the Vacancies Act, he can no longer serve in an acting capacity as the head of OLC. His nomination is still technically pending, but it is highly unlikely that he will be confirmed before the President's term ends. Yet he is currently the most senior person in the office, and as I understand it he is effectively still running it.

A number of us have written to the President and asked that he withdraw Mr. Bradbury's nomination. To continue to have Mr. Bradbury creates tension with Congress that is entirely unnecessary.

- a. Is Mr. Bradbury's continued supervision of the Office of Legal Counsel consistent with the Vacancies Act?
 - b. Will you urge the White House to put forward a new nominee for this important position at the Department?
23. You indicated at the hearing that the President would never have constitutional authority to authorize torture because torture is prohibited, not only by statute, but by the Fifth, Eighth, and Fourteenth Amendments of the Constitution. Do you take the position that any detainee in United States custody anywhere in the world is protected by the United States Constitution?
24. If you believe that, in theory, there could be detainees in United States custody who are not entitled to the protections of the United States Constitution, are there any circumstances under which you believe the President could legally authorize torture of such individuals in violation of the Detainee Treatment Act?
25. When Senator Durbin asked whether you agreed with the Judge Advocates General that certain interrogation techniques would violate the Geneva Convention, you responded that the unlawful combatants with whom we are now dealing are "a very different kind of person" from enemies we have fought in the past.
- a. In your view, does the legal definition of "torture" or "inhumane treatment" depend on the identity of the person administering the technique and/or the identity of the person who is its subject?
 - b. More specifically, are there any circumstances under which you would consider a technique administered by a foreign government official to a citizen of the United States to be torture, but would not consider that same technique to be torture when applied by a United States official to a non-U.S. citizen suspected of terrorism? If you believe that such circumstances exist, please give an example.
26. When Senators Durbin and Graham mentioned the Supreme Court's holding in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Conventions applies to detainees in the conflict with al Qaeda, you indicated that you did not precisely recall that part of the case, but that you believed the Court was referring only to the portion of Common Article 3 pertaining to the opportunity for a hearing. Please review the decision in *Hamdan* and answer the following question: Do you agree that, following the Supreme Court's holding in *Hamdan*, Common Article 3 of the Geneva Conventions applies to detainees in the conflict with al Qaeda?
27. In your 2007 *Wall Street Journal* article, describing the *Quirin* case concerning German agents who were caught on American soil during World War II, you wrote, "Because they were not acting as ordinary soldiers fighting in uniform and carrying arms openly, they were in violation

of the laws of war and not entitled to Geneva Conventions protections.” As I understand the history, that’s not correct. The German agents were indeed in violation of the laws of war, but that simply meant they were not prisoners of war and were subject to military trials – not that they were removed from the protections of international law. Do you agree that violating the laws of war does not, by itself, take someone outside the protection of the Geneva Conventions?

28. In response to questions by Senator Kohl and Senator Durbin, you said that you believed Guantanamo detainees were “humanely treated” and that you don’t think Guantanamo detainees have been “mistreated.” In 2004, in response to a Freedom of Information Act request, the FBI released documents in which FBI agents detailed incidents at Guantanamo that they personally witnessed, including wrapping a detainee’s head in duct tape for reciting the Koran, shackling detainees to the floor in a fetal position, the use of “growling dogs” during interviews, deliberate frequent interruption of sleep for detainees deemed “non-cooperative,” subjecting detainees to extremes of heat and cold, and what appeared to be a common practice of subjecting detainees to blaring music and strobe lights. One agent summarized his/her observations (the name of the agent was redacted) as follows:

“On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food, or water. Most times they had urinated or defecated on themselves, and had been left there for 18, 24 hours or more. On one occasion, the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MPs what was going on, I was told that interrogators from the prior day had ordered this treatment, and the detainee was not to be moved. On another occasion, the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occasion, not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.”

- a. Were you aware of these FBI documents, the release of which was extensively covered in the news media, at the time of your hearing testimony?
 - b. If you were aware of such documents or had heard reports of them at the time of your hearing testimony, did you discount their veracity or did you consider what they described not to be mistreatment or inhumane?
 - c. If you were not aware of these documents, do you consider the treatment described above to be humane?
29. In our private meeting you told me that the DOJ mishandled the fallout of the U.S. Attorney firing scandal. You stated that the President has the right to fire a U.S. Attorney simply because he would prefer that someone else serve, but that outgoing U.S. Attorneys should be dignity and not later accused of being incompetent when it simply isn’t true. Please comment on the following specific grounds for firing.

- a. Would it be appropriate to fire a U.S. Attorney for not prosecuting enough immigration cases, if no notice is ever given that the administration found inadequate the number of immigration cases that were pursued by that U.S. Attorney?
 - b. Would it be appropriate to fire a U.S. Attorney for wanting to speak to the Attorney General directly about a death penalty decision?
 - c. Would it be appropriate to fire a U.S. Attorney for seeking additional resources to investigate the murder of an assistant in his office?
 - d. Would it be appropriate to fire a U.S. Attorney based on complaints from members of Congress that he or she has not pursued investigations of alleged political corruption by members of the opposing party or has not sought indictments fast enough?
30. In response to questions about insulating Department investigations and prosecutions from political influence, you stated that any elected official who wishes to discuss a pending matter will have to call one of a small group of people at the Department. My understanding is that while elected officials may properly discuss general Department policies and priorities with senior Department officials, it is *never* appropriate for them to attempt to influence a specific investigation or prosecution, regardless of whether they attempt to exert that influence on a line attorney or through the Attorney General himself. Please clarify: If you are confirmed, what will be your policy and the policy for the Department of Justice for responding to a phone call from a member of Congress or someone from the White House who wants to discuss an ongoing criminal case or investigation?
31. Last year, the Boston Globe reported that a major change in hiring procedures took place in the Department of Justice in 2002. Before that time, career attorneys played a key role in hiring decisions; after 2002, those decisions were made or closely vetted by political appointees, with little or no input from career staff. The result in the Civil Rights Division, according to documents obtained under the Freedom of Information Act, was a sharp decrease in the number of attorneys who had civil rights experience, and a sharp increase in the number of attorneys with conservative credentials, such as membership in the Federalist Society. As Attorney General, will you ensure that the pre-2002 hiring procedures are restored, or, if a different set of procedures are adopted, that these procedures will give career attorneys the same amount of input that they had prior to 2002?
32. What will you do if you learn that certain attorneys now working at the Department were hired based on an improper political test?
33. In response to a question by Senator Leahy, you testified that a United States Attorney could not take steps to enforce a congressional subpoena unless he or she concluded that the subject of the subpoena was unreasonable in relying on the President's assertion of executive privilege. That, of course, is a different standard than whether the assertion was valid. In a situation where it is deemed reasonable for the subject of a subpoena to have relied on the President's assertion of privilege, what legal avenue then exists for Congress to obtain a judicial ruling on whether or not the President's assertion of privilege is, in fact, valid?
34. The Supreme Court first recognized the so-called "state secrets privilege" in a 1953 case called *United States v. Reynolds*. The lawsuit was brought by the widows of three men who

- a. If you become Attorney General, will you agree to submit any documents for which DOJ lawyers have asserted the “state secrets” privilege to the judge in the case, to inspect privately, with appropriate security precautions?
- b. If your answer to that question was anything other than “yes,” please fully explain the reason for not allowing a United States District Judge to examine the document. For purposes of this question, assume that the highest security precautions would be taken, that proceedings to resolve the assertion of privilege would be *ex parte*, and that the judge would be required to give a high degree of deference to the government’s assessment of the national security interests involved.

35. In 2001, in his first address to a joint session of Congress, President Bush declared that racial profiling is wrong and pledged to end it in America. He then directed his Attorney General to undertake this task. Two years later, the Civil Rights Division issued guidelines to federal law enforcement banning racial profiling. These guidelines only apply to federal law enforcement, not state and local law enforcement. While this guidance is useful, it still falls short of fulfilling the President’s pledge. Federal legislation banning racial profiling, would carry the force of law, and would apply to state and local law enforcement, as well as federal law enforcement. Will enacting federal legislation be a priority item on your agenda? Will you commit to working with Rep. Conyers and me on our bill, the End Racial Profiling Act?

36. In a 2002 speech, you dismissed as “nonsense” the idea that there was a systematic round-up of Muslims and Arabs after 9-11. In fact, the Department of Justice’s Office of the Inspector General found that several hundred Muslim and Arab immigrants were detained and held on immigration charges between September and November 2001 for the express purpose of allowing the FBI to investigate their possible connections to 9-11. The Inspector General found that government officials “made little attempt to distinguish” between immigrants who were legitimate subjects of the 9-11 investigation and those who were not. Immigrants were arrested on leads such as “anonymous tips called in by members of the public suspicious of Arab and Muslim neighbors who kept odd schedules.”

You defended these detentions on the grounds that these individuals had overstayed their visas, and that “it made a certain amount of sense to enforce the law” against them after 9-11. Is it your position that, as long as those targeted have violated the law, it is acceptable and appropriate to target immigration and law enforcement efforts at Muslims and Arabs?

37. At the hearing, you told Senator Cardin that “opening up access to the vote and preventing people who shouldn’t vote from voting are two sides of the same coin.” But just because preserving the integrity of the electoral process is as important as protecting the right to vote doesn’t mean that voter fraud is as prevalent or as serious a problem as voter suppression.

- a. Do you agree that the Department’s voting rights enforcement resources should be directed in ways that will have the most impact on protecting the right to vote?
 - b. In your view, which is a more prevalent and serious threat to American elections today: voter fraud or voter suppression?
 - c. In my view, all available nonpartisan evidence clearly shows that, while there are very few cases of voter fraud, our elections continue to be undermined by organized efforts to disenfranchise voters. If, either at this time or after further review of the evidence, you agree with that assessment, will you ensure that more of the Department’s limited resources are directed to voter suppression cases than voter fraud cases?
38. The Department of Justice is charged with enforcing Section 7 of the National Voter Registration Act, which requires states to designate all offices that provide public assistance as voter registration agencies. Despite evidence of widespread Section 7 violations, the Department has brought only one Section 7-related case since 2001. Will you ensure that the Department of Justice enforces Section 7 of the NVRA if you are confirmed?
39. Section 2 of the Voting Rights Act prohibits practices that result in a denial or abridgement of the right to vote based on race, color, or membership in certain language-minority groups. In the last five years, the Voting Rights Section has only filed seven Section 2 cases; by comparison, during the last two years of the Clinton administration, the Voting Rights Section filed fourteen Section 2 lawsuits. Will you commit to vigorously enforcing Section 2 of the Voting Rights Act if you are confirmed?
40. Congress enacted the federal material witness statute in 1984 to permit the brief detention of witnesses who may have information material to an ongoing criminal proceeding. The statute makes detainment unlawful if the desired testimony could be obtained through deposition, suggesting that Congress intended to preclude investigative or preventive detention.
- a. Do you believe that the material witness statute, properly read, precludes investigative or preventive detention?
 - b. Are there statutory or constitutional problems with using the material witness statute to hold someone indefinitely? What if the individual being held is never actually called to testify before any court?
 - c. Do you think that a preventive detention statute that authorized the indefinite detention of individuals without charging them with any crime would be constitutional?
 - d. Do you believe that the President has the constitutional authority to authorize indefinite material witness detentions even if prohibited by Congress?
41. In your capacity as a judge in the Southern District of New York, you presided over multiple material witness hearings. However, the New York Times recently published excerpts from the transcript of a material witness hearing over which you presided in October 2001. *See* “Post- 9/11 Cases Fuel Criticism for Nominee,” NYT, September 24, 2007.

- a. How do you respond to charges that you did not appear to be objective in your consideration of this particular case, and that your tone was inappropriately dismissive of the arguments of the detainee and his lawyer? I am particularly concerned about reports that you dismissed a defense counsel's claim that his client was beaten while in custody by saying "he looks fine to me," that you expressed no concern over the defense counsel's claim that he, based in San Diego, did not receive notice that his client was transferred to New York until the day before the hearing, and that you mocked the competence of a prominent New York defense attorney whom defense counsel wished to assist him in the case.
 - b. In retrospect, do you think you handled this case appropriately? Looking back on it, is there anything you would have done differently, or any statement in the transcript that was excerpted in the *Times* that you regret making?
 - c. Would you be willing to release to this Committee the transcripts of all the material witness hearings over which you presided?
 - d. As a judge, did you ever deny a request for a material witness warrant? How many material witness warrants did you deny and how many did you grant?
42. In *Padilla v. Bush*, you ruled that the President has authority to designate individuals, including American citizens, as enemy combatants, and that the government need only show "some evidence" to support that contention to hold someone without trial. In *Hamdi v. Rumsfeld*, the Supreme Court rejected the "some evidence" standard and found that citizens detained as enemy combatants have the right to challenge their detention before a neutral decision-maker.
- a. Do you agree with the Supreme Court's decision in *Hamdi*? If not, please explain.
 - b. What do you make of the government's decision, after its *Hamdi* opinion was issued, to release Hamdi and send him back to Saudi Arabia without charging him with any crime?
43. In a Wall Street Journal piece in 2007, you wrote that "the rules that apply to ordinary criminal cases . . . do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means." The following questions pertain to procedures for prosecuting and punishing those accused of crimes related to terrorism, not the procedures for reviewing the detention of enemy combatants pending hostilities.
- a. One of the rules that apply to ordinary criminal cases is the rule against using evidence obtained by coercion. In your view, should the government be able to use evidence obtained by coercion when prosecuting suspected terrorists?
 - b. In criminal cases, the government is required to prove guilt beyond a reasonable doubt. In your view, should this standard of proof be relaxed in cases where the crime is related to terrorism?
 - c. In your view, should a person charged with a terrorism-related crime be permitted to see all of the evidence against him or her?
 - d. Do you believe a person charged with a terrorism-related crime should have access to a lawyer on the same terms as a person charged with a crime unrelated to terrorism?