

Testimony of

The Honorable Michael B. Mukasey

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STATEMENT OF
THE HONORABLE MICHAEL B. MUKASEY
ATTORNEY GENERAL UNITED STATES DEPARTMENT OF JUSTICE
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UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
CONCERNING
"OVERSIGHT OF THE U.S. DEPARTMENT OF JUSTICE"
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Good morning, Chairman Leahy, Senator Specter, and Members of the Committee. Thank you for the opportunity to testify before you today about the important work being carried out by the men and women of the Department of Justice.

I would like to highlight some of the Department's significant accomplishments this past year, and address issues of interest to the Committee. I will also discuss legislative priorities for the Department, most pressingly, the urgent need to make permanent reforms in the area of foreign intelligence surveillance before such provisions expire two days from now. I am ready to answer your questions, and I look forward to a productive discussion.

My tenure at the Department began less than three months ago. Even in this short time, Mr. Chairman, I have confirmed what I had hoped and expected to find at the Department: men and women who are talented, committed, and dedicated to fulfilling its historic mission. This mission is to defend the interests of the United States according to the law; to ensure public safety against threats both foreign and domestic; to seek just punishment for lawbreakers; to assist our State and local partners; and to ensure fair and impartial administration of justice for all Americans. The Department's employees pursue this mission every day. In my view, the Justice Department is the finest group of lawyers anywhere. For that, I can and do take absolutely no credit. They were at the Department, doing an outstanding job, before I arrived, and they will continue to serve the American people superbly long after I am gone.

As you know, Mr. Chairman, I am new to Washington, and my education in the ways of this city - which began during the confirmation process - has continued since I took the oath of office. I have tried to live up to the commitment I made to look for opportunities to work with the Congress, and to keep the Congress informed about the Department's activities and policy positions where possible. I have had constructive discussions with many members of this Committee over the past two months, on topics ranging from reform of the Foreign Intelligence

Surveillance Act, to the Department's new policy governing contacts with White House officials about pending cases.

Of course, we will not always agree. There are policy initiatives that the Department supports that some members of this Committee vigorously oppose, and vice-versa. There also are situations where the interests of the Executive Branch and the Legislature will be in some tension - for example, when Congress seeks to initiate an inquiry related to a matter under criminal investigation, or when Congress seeks information in which the Executive Branch has a legitimate confidentiality interest. These institutional tensions and disagreements are not, as some view it, signs of a broken or flawed political system; they are part of the genius of the Framers' constitutional design, which envisioned a robust separation of powers that would prevent the disproportionate accumulation of power in any one branch of government, and thus help ensure the liberties of the American people. Although these tensions will never disappear, there are many areas of agreement where we can work together on behalf of our common clients, the people of the United States. When we do disagree, these disagreements should be openly and honestly discussed. I have tried to work with the Congress in this spirit.

Before I turn to some of the Department's accomplishments in the past year, there is one area where I need your help. As you know, many key positions in the Justice Department, including most prominently the positions of Deputy and Associate Attorney General--the number two and three officials in the Department, respectively--are vacant. These positions, and others in the Department, are being filled admirably by people of great talent serving in acting capacities; but the absence of Senate-confirmed officials in these key leadership positions creates a tentative atmosphere that is not in the interest of the Department or the American people. Mr. Chairman, I appreciate the steps the Committee has taken in the past two months to schedule and hold hearings for several of the Department's pending nominees, including Judge Mark Filip and Kevin O'Connor, the President's nominees to serve as Deputy Attorney General and Associate Attorney General. I hope you will work to ensure that they are confirmed quickly, so that I can have my permanent leadership team in place.

I would like to use the remainder of my statement to highlight the Department's efforts and accomplishments in recent months in five critical areas: national security, violent crime, civil rights, immigration and border security, and public corruption. I then will turn to some of the high-priority legislative issues currently before the Congress.

National Security

I will tell you that the process of becoming familiar with the intelligence detailing the threats facing this country has been a stark and sobering one for me. There is much that I did not expect, and no shortage of troubling reports. Even unclassified reporting makes clear that America remains a primary target for Islamic terrorists. We have had substantial successes, but our enemy remains dedicated, persistent, and patient. According to the National Intelligence Estimate released last summer, al Qaeda has "protected or regenerated key elements of its Homeland attack capability, including: a safe haven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership." What al Qaeda is looking for, in the words of the NIE, are, "prominent....targets with the goal of producing mass casualties...." That

there has been no attack on American soil since 9/11 should not conceal a fundamental truth: we must remain vigilant in our efforts against al Qaeda.

As with other departments and agencies with national security responsibilities, much is now asked of the Department of Justice. All aspects of what we do, from budget, to allocation of resources, to policies and legislative priorities, must continue to reflect this aspect of our mission and the reality of the world in which we live.

As you well know, since the terrorist attacks of September 11, 2001, the first priority of the Justice Department has been to protect Americans from the threat of international terrorism. As the Attorney General, I plan to continue these efforts, working aggressively to investigate and prosecute terrorists while ensuring that the Department acts with scrupulous regard for the civil liberties and privacy of all Americans.

The Department has enjoyed important national security successes in recent months. For example, on August 16, 2007, a jury in the Southern District of Florida convicted Jose Padilla, an American citizen, and two co-defendants of conspiracy to murder, kidnap, and maim individuals in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists. This prosecution highlights the important role that the material support statutes play in the Department's effort to address terrorism and preparation for terrorist attacks across the spectrum of threats.

The Department has also taken groundbreaking steps to pursue those who would threaten our national security. For example, in 2006, Adam Gadhan, also known as Azzam Al Amriki, was indicted on charges of treason and providing material support to terrorists for making a series of propaganda videotapes for al Qaeda - an effort that he has continued in recent weeks. We have also recently obtained convictions and guilty pleas from, among others, a former engineer with a United States Navy contractor involved in a scheme to obtain and illegally export technical data about the United States Navy's current and future warship technology to China, and a leading manufacturer of night vision technology for illegally exporting restricted data to China, Singapore, and the United Kingdom. We also recently obtained a guilty plea from an individual who installed on a Chinese Navy site a commercial product used for military training. The Department continues to do excellent work in obtaining authorization under FISA to conduct electronic surveillance and searches related to suspected terrorists and spies.

In addition, the Department announced a significant new national security oversight and compliance effort last year. The implementation of a dedicated Oversight Section within the Department's National Security Division and the establishment of an Office of Integrity and Compliance within the Federal Bureau of Investigation involve important innovations in the way the Department conducts business. These efforts reflect a new level of internal oversight designed to ensure that our national security investigations are conducted in a manner consistent with all laws, regulations, and policies, in particular those designed to protect the civil liberties and privacy of Americans. National Security Division lawyers, working with the FBI, conducted 15 national security reviews in field offices across the country and a headquarters component since April 2007 and we plan to conduct a similar number in 2008. These reviews broadly examine the FBI's national security activities, its compliance with applicable laws, policies, and

Attorney General Guidelines, and its use of various national security tools, such as National Security Letters. The reviews are not limited to areas where shortcomings already have been identified; instead, they are intended to enhance compliance across the national security investigative spectrum.

In October, the Department also launched a nationwide export enforcement initiative that includes the formation of Counter-Proliferation Task Forces across the country, the expansion of export control training for investigators and prosecutors, and the appointment of a National Export Control Coordinator. This effort is designed to leverage the counter-proliferation assets of U.S. law enforcement, export control, and intelligence agencies to combat the growing national security threat posed by illegal exports of restricted U.S. military and dual-use technology to foreign nations and terrorist organizations.

Violent Crime

Violent crime remains near historic lows in the United States, in large part because of the hard work of our State and local partners, but also through federal law enforcement and initiatives like Project Safe Neighborhoods. Under Project Safe Neighborhoods, federal prosecutors and law enforcement focus their resources on the most serious violent offenders, taking them off the streets and placing them behind bars where they cannot re-offend. Since that project's inception, the number of federal firearms prosecutions has increased significantly, and defendants earn substantial sentences in federal prison. From FY 2001 to 2007, the Department filed 68,543 cases against 83,106 federal firearms offenders - more than a 100% increase over the prior seven-year period. Project Safe Neighborhoods' deterrence and prevention efforts complement this focus on enforcement. Last year new television and radio Public Service Announcements that were developed in partnership with the Ad Council and Mullen Agency debuted. The television announcement, entitled "Babies," demonstrates how the loss of a child to gun violence - whether to injury, death, arrest or jail time - deeply affects the family. The radio announcements similarly show the genuine pain inflicted upon real families when a family member is involved in a gun crime. Since 2001, Project Safe Neighborhoods has committed approximately \$2 billion to federal, state, and local efforts to fight gun and gang violence. These funds have been used to hire more than 700 federal, state, and local prosecutors; provide nationally sponsored training for more than 33,000 task force members, hire research and community outreach support, and develop and promote effective prevention and deterrence efforts. This past year, the Department awarded over \$50 million in grants among the 94 federal judicial districts in support of their Project Safe Neighborhoods programs to combat gangs and gang violence and to reduce and prevent criminal misuse of firearms.

In 2006, the Project Safe Neighborhoods program expanded to combat gangs and gang violence. The Department has taken a number of significant steps to address this problem both domestically and internationally. First, the Department established the Attorney General's Anti-Gang Coordination Committee, to bring all of the Department's wide-ranging efforts to bear in the focus on gangs. Second, each U.S. Attorney appointed an Anti-Gang Coordinator to provide leadership and focus to our anti-gang efforts at the district level. Third, the Anti-Gang Coordinators, in consultation with their local law enforcement and community partners, developed and are implementing comprehensive, district-wide strategies to address the gang

problems in each of America's districts. We are working closely with our international partners, particularly in Central America, to prevent violent gangs in those regions from infiltrating our communities.

Last year, the Department announced the expansion of our "Comprehensive Anti-Gang Initiative" from six to ten sites nationwide. The initiative originally provided a total of \$15 million (\$2.5 million per site) to six jurisdictions experiencing significant gang problems: Los Angeles, Tampa, Cleveland, Dallas/Ft. Worth, Milwaukee, and the Eastern District of Pennsylvania's "222 Corridor", which stretches from Easton to Lancaster. Four additional sites will each receive \$2.5 million in targeted grant funding: Rochester, Oklahoma City, Indianapolis, and Raleigh-Durham. Through the new anti-gang initiative, each of the ten jurisdictions incorporates prevention, enforcement, and reentry efforts to reduce and prevent gang membership and violence in their communities. Focused enforcement efforts under the Comprehensive Anti-Gang Initiative are showing strong early results. In Cleveland, one of the most violent gangs and their associates, operating in and around the target area, has been dismantled through both federal and state investigations and prosecutions. These tough actions have resulted in more than 169 federal and state indictments. Through vigorous prosecutions, 168 defendants have been convicted and one awaits trial. In Cleveland's target area, violent crime is down by more than 15 percent.

In November, in one of my first acts as Attorney General, it was my honor to personally help lead the opening of the new, joint headquarters of the Department's two national anti-gang centers: the National Gang Targeting, Enforcement & Coordination Center (GangTECC) and the National Gang Intelligence Center (NGIC). GangTECC is the national, multi-agency, anti-gang task force created by the Department in 2006. NGIC is an inter-agency law enforcement center, staffed by analysts and created by Congress in 2005, that focuses on information sharing and collaboration in support of the goal of reducing gang membership and violence. Together GangTECC and NGIC work in a unified, national effort to help disrupt and dismantle the most significant and violent gangs in the United States. The agents are supported in this mission by prosecutors across the country in the United States Attorneys Offices and the Criminal Division's new Gang Squad created in 2006, a specialized group of federal prosecutors charged with developing and implementing strategies to target, attack and dismantle the most significant national and transnational gangs operating in the United States. Last year, in the four major GangTECC coordinated takedowns (Baltimore, MD; Dallas, TX; Gadsden, Alabama; Trenton/Newark/Jersey City, NJ), which involved agents from DEA, USMS, FBI, ATF, and ICE, more than 1,480 defendants were arrested and more than 259 of them were documented gang members.

Building on Project Safe Neighborhoods, the anti-gang program and other efforts, in May 2007, the Department launched a series of new and comprehensive initiatives designed to expand and enhance federal law enforcement efforts aimed at reducing violent crime, providing assistance to state and local law enforcement, strengthening laws, and increasing funding. Through these initiatives, the Department, working with state and local law enforcement, has identified cases that focus on the "worst of the worst" offenders. The Department has conducted coordinated fugitive sweeps and takedowns in cities such as Cleveland, Ohio; Modesto/Bakersfield, California; Trenton/Newark/Jersey City, New Jersey; Dallas, Texas; Gadsden, Alabama; and Los

Angeles, California; and conducted Fugitive Safe Surrender operations in Akron, Ohio; Nashville and Memphis, Tennessee; and Washington, DC. Further, ATF expanded its violent crime impact teams to five additional cities, and the FBI has increased the number of safe streets task forces to 182. This fall the Department also awarded, on a competitive basis, \$75 million to local law enforcement task forces to target specific violent crime challenges; this is a down payment of sorts on the President's request for \$200 million in FY 2009 to support task force efforts in communities that need it the most. As I speak, in Chapel Hill, North Carolina, the Department is launching the Department's comprehensive anti-gang training for state and local law enforcement and other partners from across the country. This training will focus on prevention, enforcement and prisoner re-entry strategies. Besides the Chapel Hill training, the Department will conduct eleven additional training sessions which will take place regionally throughout the United States. These are just some of our efforts in the violent crime arena.

Civil Rights

Recent initiatives have furthered the work of the Civil Rights Division in areas involving religious liberties, human trafficking, and housing discrimination. Launched last year, The First Freedom Project advances the Division's work in protecting against discrimination on the basis of religion through the creation of a Department-wide Religious Liberty Task Force, a series of regional seminars, and a public education campaign. A First Freedom Seminar is being held today in Washington, D.C.

Overall, the Criminal Section of the Civil Rights Division has convicted a record number of defendants for the second year in a row, including *United States v. Seale*, where a former KKK member received three life sentences for his involvement in the brutal 1964 murder of two African-American young men in Mississippi.

The President has made human trafficking, which is a form of modern day slavery, a priority for the Administration. A new Human Trafficking Prosecution Unit was created last year within the Criminal Section of the Civil Rights Division. The unit is staffed by the Section's most seasoned human trafficking prosecutors, who work with our partners in federal and state law enforcement to investigate and prosecute the most significant human trafficking crimes, such as multi-jurisdictional sex trafficking cases. In the last seven years, the Civil Rights Division has increased human trafficking prosecutions by 700 percent and has obtained four straight years of record high convictions. In addition, the Innocence Lost Initiative, in which the Criminal Division is deeply involved, focuses on child victims of interstate sex trafficking in the United States. Since 2003, 238 convictions have been obtained in the federal and state systems. Of those convictions, 106 were in Fiscal Year 2007.

The Department announced Operation Home Sweet Home - an initiative designed to expose and eliminate housing discrimination in America - in 2006. It has resulted in a record number of undercover housing discrimination investigations in fiscal year 2007 - surpassing the previous record by twenty percent. In addition, the Housing and Civil Enforcement Section filed 30 lawsuits alleging unlawful housing discrimination and obtained settlements and judgments requiring the payment of over \$5 million in monetary damages to victims of discrimination and civil penalties.

The Disability Rights Section of the Division continues its important work under Project Civic Access - a wide-ranging initiative to ensure that people with disabilities have an equal chance to participate in civic life. To date, the Division has reached 155 agreements with 144 communities to make public programs and facilities accessible, improving the lives of more than 3 million Americans with disabilities.

In addition to supporting reauthorization of the Voting Rights Act, the Administration is currently defending the statute's constitutionality in federal court. Further, this Administration has initiated approximately 60 percent of all cases the Department has filed in its entire history under the language minority provisions of the Voting Rights Act and approximately 75 percent of all cases the Department has filed under the voter assistance provisions of the Act. Moreover, the 18 new lawsuits filed by the Voting Section of the Civil Rights Division in CY 2006 is more than twice the average number of lawsuits filed by the Division annually during the preceding 30 years. For the 2008 elections, the Civil Rights Division will implement a comprehensive Election Day program to help ensure ballot access, coordinating the deployment of hundreds of federal government employees in counties, cities, and towns across the country to ensure access to the polls as required by our nation's civil rights laws.

The Division also has sought proactively to provide information to members of the military about their civil rights, launching a website for service members explaining their rights under the Uniformed Service Employment and Reemployment Rights Act of 1994, the Uniformed and Overseas Citizen Absentee Voting Act, and the Servicemembers Civil Relief Act.

Public Corruption

Public corruption prosecutions remain a high priority for the Department. Our citizens are entitled to honest services from all public officials, regardless of their political affiliation. Our citizens are also entitled to know that their public servants are making their official decisions based upon the best interests of the citizens who elect them and pay their salaries, and not based upon the public official's own financial interests. The Department's achievements during the past year in this area show a steady commitment to fighting public corruption wherever it is found and on a non-partisan basis. The Department has devoted substantial resources to its efforts in this area. The FBI, for example, now has 639 agents dedicated to corruption matters, as compared to 358 in 2002.

The Department continues its vigorous pursuit of corruption within the Executive Branch. Those cases have ranged from a former Deputy Secretary of the Interior, J. Steven Griles, who obstructed a congressional investigation, to other executive branch officials, such as former Department of Health and Human Services Special Agent Scott Gompert, who stole \$1.1 million.

The Department has also devoted significant attention to procurement and other corruption within the Iraq and Afghanistan war theaters and related endeavors. To date, these efforts have resulted in criminal charges against 40 individuals and two corporations for public corruption and government fraud involving government contracts valued at over \$269 million. This effort includes cases against U.S. military officials, such as Major John Rivard, who pled guilty to accepting \$400,000 in bribes; Major John Cockerham, charged in August, 2007 for accepting

\$9.6 million in bribes; and Captain Austin Key, charged in August, 2007 for accepting \$50,000 to steer contracts.

Additionally, in order to more effectively investigate and prosecute procurement fraud generally, the Department formed the National Procurement Fraud Task Force in October 2006. These efforts are just the latest manifestation of the Department's longstanding commitment to combating corruption both at home and abroad. The Department continues to enforce vigorously the Foreign Corrupt Practices Act (FCPA), and since 2001 the Department has substantially increased its focus and resources on enforcing this important law. In 2007, we brought 16 FCPA enforcement actions against individuals and corporations who violated the statute, including filed charges against seven individuals. These 16 enforcement actions represent a 100 percent increase over the 8 enforcement actions brought in 2006, which was itself the largest total in the FCPA's 30 year history.

Of course, public corruption is not limited by political party, or to Executive Branch officials. This Committee is well-aware of the Department's efforts to prosecute public corruption by Members of Congress and their staffs. You have my commitment that, where warranted, these investigations and prosecutions will continue without regard to politics or political affiliation.

The Department has also pursued corruption investigations at the state and local level. For example, the Department convicted three former Alaska state legislators in separate trials (the most recent occurring in November) as part of its Operation Polar Pen; two former state senators in Rhode Island have pled guilty as part of Operation Dollar Bill; and 16 defendants, including a state legislator, were indicted for extortion and other charges in Dallas, Texas.

In the area of election crimes, the Department continued its national educational and training programs for both prosecutors and FBI agents in the area of election law in 2007. Where willful violations of our election and campaign finance laws have occurred, the Department has brought charges.

Immigration and the Southwest Border

Enforcing the Nation's immigration laws remains an important priority for the Department. Earlier this month, I visited the Southwest Border and met with some of the prosecutors and law enforcement officers who serve on the front lines of the effort to secure our borders. They have a tough job to do, and they are doing it well. In the last seven years we've increased the total number of prosecutors in that region by 29 percent, leading to a dramatic increase in case filings and convictions. Nationwide, we've seen more than a 43 percent increase in immigration filings between 2001 and 2007. Our U.S. Attorneys' Offices have pursued not only immigration violations, but also serious immigration-related offenses such as aggravated identity theft and passport fraud.

With the \$7 million Congress appropriated last month to support our federal prosecutors on the Southwest Border we will be able to do more. We expect to use this funding to deploy up to 40 new prosecutors and 20 much-needed support staff, based upon the needs of the district. In addition, through funding provided by the Department of Homeland Security, 10 attorney positions and 10 contract support staff are being sent to the border offices in order to respond to

civil litigation related to the border fence project. In total, up to 50 attorneys and 30 support positions will be deployed by December 2008.

In addition to overseeing the Department's efforts in these and other priority areas, I have worked with the Committee on several legislative issues since my confirmation. I would like to address three of these issues today.

FISA Reform

First, in the area of national security, I urge you to work with me to pass legislation making permanent the authorities provided by the Protect America Act, which is set to expire in just two days. Since Congress passed the Protect America Act last year, officials from the Justice Department and the Intelligence Community have testified before Congress on many occasions about the needed authorities; we have held briefings on our implementation of the Act and oversight of our use of these authorities; and we have met with Members and staff on these issues, including providing substantial technical advice and comments on the text of the legislation. Permanent reauthorization of the Protect America Act's authorities allowing our intelligence professionals to surveil targets overseas without individual court orders is the top legislative priority of the Department of Justice.

I also want to make clear why it is our top priority. We have all seen what happens when terrorists go undetected. We must do everything possible, within the law, to prevent terrorists from translating their warped beliefs into action. To stop them, we must know their intentions, and one of the best ways to do that is by intercepting their communications. Modernization of FISA is a critical part of that effort.

The Department would have grave concerns about any legislative proposal taking a short-term approach to modernizing FISA. Sunset provisions create uncertainty in the Intelligence Community regarding the rules governing critical intelligence collection practices. Intelligence professionals cannot focus on their work in protecting America from terrorist attacks while concentrating on learning new procedures and policies that may change in a few years. A sunset provision also burdens our private sector partners by requiring them to invest their limited resources in complying with a legal framework that is in constant flux. We need the help of these private partners to use these authorities effectively to keep the country safe. We should not be discouraging them from assisting us by burdening them with an ever-changing legal regime. The threat of terrorism to this country is persistent and ongoing, and we should strive for long-term institutional changes that increase our ability to meet that threat.

It is also critical that Congress provide liability protection to electronic communication service providers in enacting a reauthorization bill. First, this is the fair and just thing to do. After reviewing the relevant correspondence between the Executive Branch and the companies that assisted with communications intelligence activities after the September 11th attacks, the Senate Select Committee on Intelligence found that these companies acted on a good faith belief that their assistance was lawful. Second, retroactive immunity serves our national security interests. As the Senate Intelligence Committee determined, "without retroactive immunity, the private

sector might be unwilling to cooperate with lawful Government requests in the future," resulting in a "possible reduction in intelligence" that the committee concluded is "simply unacceptable for the safety of our Nation."

The liability protection offered in the Intelligence Committee bill is not blanket immunity, as it only applies in the limited circumstances where the Attorney General certifies to a court that the company either (1) did not provide the alleged assistance, or (2) did provide assistance between September 2001 and January 2007 with communications intelligence activities designed to detect and prevent a terrorist attack, and only after receiving a written request from a high-level Government official indicating that the activity was authorized by the President and determined to be lawful. A court must review this certification before an action may be dismissed, and the immunity does not extend to the Government, Government officials, or any criminal conduct. In short, the provision in the Intelligence Committee's bill would provide protection only in circumstances where such protection is appropriate.

A proposal that would allow lawsuits to continue by substituting the Government as a defendant in place of the telecommunications company is an unsatisfactory solution. Even if the Government is substituted for the company in the lawsuit, the company remains vulnerable to third party discovery requests, litigation costs, and reputational harm that could deter its future cooperation with the Intelligence Community. The information that comes to light through litigation--whether certain companies provided assistance, and, if they did, what that assistance entailed--would not only hurt the companies, it would threaten national security.

I also want to address a recent proposal that offers an alternative to the Congress deciding on the issue of immunity. This proposal would grant authority to the FISA Court to decide, under a multi-part test, whether the provider's assistance was appropriate. I know that some members of this Committee have expressed an interest in this proposal, and I have spoken personally with them about it. Respectfully, I think it is the wrong approach to the problem we face. Such a proposal would simply shift likely protracted litigation on these matters to another venue, with the companies still subject to the burdens of litigation to determine how and why they assisted the Government.

Transferring those cases to the FISA Court after the Congress's extensive review of the underlying facts could be read as sending a signal that Congress doubts the actions of the companies who are believed to have assisted us--the very sort of companies the Intelligence Committee recognized that we rely on to help us protect the Nation. The new proposal could also lead companies to feel compelled to make an independent finding that before complying with a lawful Government request for assistance, they have to conduct their own investigation. That could cause dangerous delays in critical intelligence operations and put the companies in the impossible position of making the legal determination without access to the highly classified facts that they would need to do so.

I urge Congress, and the Members of this Committee, to reauthorize those authorities set forth in the Protect America Act--a prime example of Congress, the Executive, and the Judiciary working together--with liability protection for deserving companies.

Media Shield

Also in the area of national security, I would like to discuss the Department's position on the proposed media shield legislation, the Free Flow of Information Act of 2007. I was asked about this bill during my confirmation hearings, and my instinct was that this bill could cause great mischief. Having been a journalist, and having represented media entities in civil litigation, I understand the critical role that the media plays in our society. Nevertheless, the Department of Justice joins the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the Federal Bureau of Investigation, and others in strongly opposing the Free Flow of Information Act.

First, in practical effect the bill would eliminate our ability to prosecute leaks of classified information to the media. Certainly, throughout the last several years we have seen significant leaks of classified information that have had a detrimental impact on national security. Particularly given the threats we face, and what seems to be a constant shrinkage in our inventory of useful techniques that remain useful because they remain secret, now is not the time to give license to those who leak classified information in violation of our laws, and place at risk our military and intelligence professionals.

Second, this bill would dramatically alter the appropriate balance between the prosecution of criminals and the needs of a free press that has been the standard in the Federal courts at least since 1972 when the Supreme Court decided *Branzburg v. Hayes*. Under the current system, DOJ guidelines determine in any specific case whether it is appropriate to issue a subpoena to a reporter. These internal guidelines provide a series of standards and checklists, including my specific approval, before any reporter is subpoenaed. As a result, since 1991, the Department has authorized the issuance of fewer than two dozen subpoenas seeking source-related information--an average of less than two per year. By contrast, under the Media Shield bill, even in an investigation of a past terrorist attack the bill would have a judge decide whether the Department's need for the information to the investigation outweighs the "public interest" in the free flow of information. No standard for decision is provided in the bill. But even if one views these factors as capable of being balanced, this is not a determination that can reasonably be asked of a judge, particularly in cases involving national security. The case law applying *Branzburg* is still evolving to a degree, but we ought to think carefully before we discard it wholesale. Respectfully, that is what this bill appears to do.

Finally, although much of the discussion has centered on a few high-profile subpoenas to journalists, by its terms the Free Flow of Information Act of 2007 has a much broader reach. Its impact is not limited to subpoenas, but instead applies to core national security authorities, including FISA. I fear that the bill, rather than striking an appropriate balance between the interest of prosecutors and that of the press, would lead to unintended consequences, for example, impeding investigations of terrorists.

I am not alone in my concerns. I believe that this Committee recently received a letter signed by 12 key members of the Intelligence Community. Each signed on because of the concerns about what this bill could do to our ability to safeguard critical information and the American people. I would urge that Members of this Committee carefully consider the concerns set forth in that letter, as well as concerns that the Department has expressed.

In the end, we believe that this bill is not just deeply problematic, but unnecessary. Please do not let a focus on a few cases blind this Committee to the damage that this bill could do.

McNulty Memorandum/Waiver of Attorney-Client Privilege

I would also like to take this opportunity to reaffirm the Department's endorsement of the McNulty memorandum on attorney-client communications and the principles it embodies. Having been a prosecutor, a defense attorney, and a judge, I can see the debate over corporate prosecutions from many different sides. With that experience, I believe the McNulty memorandum strikes the appropriate balance, and that legislation could do serious harm to our ability to prosecute corporate wrongdoers--privileging those defendants over the host of defendants with which this Department deals on a daily basis, from drug dealers to fraudsters. We feel confident that the additional procedures set forth in the memo will be effective in supporting the sanctity of the attorney-client privilege.

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today, and I look forward to working with you to advance the priorities and mission of the Department of Justice.