

CONFIRMATION HEARING ON THE NOMINATION  
OF MICHAEL B. MUKASEY TO BE ATTORNEY  
GENERAL OF THE UNITED STATES

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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

—————  
OCTOBER 17 AND OCTOBER 18, 2007  
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**Serial No. J-110-51**

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Printed for the use of the Committee on the Judiciary



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**NOMINATION OF MICHAEL B. MUKASEY, OF  
NEW YORK, TO BE ATTORNEY GENERAL OF  
THE UNITED STATES**

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**WEDNESDAY, OCTOBER 17, 2007**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 10 a.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, Kyl, Sessions, Graham, Cornyn, Brownback, and Coburn.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.  
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Before we start, just so everyone will understand, something that seems to be a relatively new phenomenon, at least in the years I have been in the Senate, are these demonstrations—choreographed, spontaneous demonstrations at hearings.

Just so everybody understands, I want everybody to be able to watch this hearing. I do not want anybody in the audience to be blocked by anyone for any reason whatsoever. I want everybody to be able to watch it comfortably. I am directing the police that if anybody stands up and blocks the view of anybody in this hearing, that person will be removed.

Now, if there are any demonstrations either for or against a position I might take, for or against a position Senator Specter or any other Senator might take, for or against a position that any witness might take, that person will be removed. I just want to make that very clear. I am sure it is not going to be necessary. I am sure everybody is going to treat this hearing with decorum. But I recall seeing Senator Durbin here, we had this situation recently in an Appropriations Committee hearing.

Judge, please feel free to come up and sit there.

Judge, I think I have this wrong. I did not realize on introducing, I think Senator Schumer will introduce you from up here, and Senator Lieberman will introduce you from where you are sitting. So if we could do that musical chair and have you go back.

[Laughter.]

Chairman LEAHY. I will give my statement on this, and then we will have Senator Schumer and Senator Lieberman make introductions.

Early this year, as we began our consideration of the United States Attorney firing scandal, I observed that we faced the most serious threat to the effectiveness and professionalism of the United States Department of Justice since the days of the Saturday Night Massacre, when President Nixon forced the firing of Special Prosecutor Archibald Cox.

But I noted that unlike during Watergate, this time there was no Elliot Richardson, there was no William Ruckelshaus around to defend the independence of Federal prosecutors. Instead, high officials at the Department and their staffs were complicit with White House political operatives. Now the entire senior leadership and their staffs have resigned, as have Karl Rove and his two top aides at the White House.

The crisis of leadership that led to these resignations has taken a heavy toll on the tradition of independence that long guided the Department of Justice and protected it from political influence. I have been here with six Presidential administrations, Republican and Democratic. In every one of them, the Department of Justice was protected from political influence up until now.

The firing of the U.S. Attorneys who are the chief Federal law enforcement officers in their districts sent a message to all U.S. Attorneys and the career prosecutors working in those offices that, as sworn testimony we received said, only "loyal Bushies" would keep their jobs or advance in their careers. This crisis has taken a heavy toll on morale at the Department and in confidence among the American people. As a former prosecutor, I know that the dismay runs deep, from the career attorneys at Justice and in our U.S. Attorney's Offices straight down to the police officer on the beat.

I start this hearing as I did the hearing that this Committee held on the last Attorney General nomination, hoping to be able to support the nominee. After that hearing in 2005, I decided I could not vote for the confirmation of Alberto Gonzales. I did that noting, as Justice James Iredell had in 1792, that the person who serves as Attorney General "Is not called Attorney General of the President, but Attorney General of the United States."

There is good reason why the rule of law requires that we have an Attorney General and not merely a Secretary of the Department of Justice. This is a different kind of Cabinet position. It is distinct from all others. It requires greater independence. The departing Attorney General never understood this. Instead, he saw his role as a facilitator for the White House's overreaching partisan policies and politics.

Now, restoring the Department of Justice—and I want to restore it. I have enormous respect for the Department of Justice. I have from my days as a law student here in Washington at Georgetown. But it begins by restoring integrity and independence to the position of Attorney General of the United States.

The Attorney General's duty is to uphold the Constitution and the rule of law and not work to circumvent it. Both the President and the Nation are best served by an Attorney General who gives sound advice, takes responsible action, without regard to political

considerations—not one who develops legalistic loopholes to serve the ends of a particular administration.

The Attorney General cannot interpret our laws to mean whatever the current President, Republican or Democratic, wants them to mean. The Attorney General is supposed to represent all the American people, not just one of them.

Regrettably, the former Attorney General enabled this administration to continue policies that are in fundamental conflict with American values and decades of law, sound military practice, international law, and human rights. We see it demonstrated yet again in the recent revelation that even after waging and losing a public battle to resist congressional efforts to outlaw torture and honor our obligations, this administration, enabled by the Justice Department, apparently secretly struggled to redefine “torture” and “cruel, inhuman, and degrading treatment” to allow the very conduct of torture that this Congress had outlawed.

We have seen departures from this country’s traditions, practices, and established law in connection with interrogation methods that we condemn when they are used by others. Likewise, we have seen political influence corrupt the Department of Justice when it has departed from its longstanding practices and tradition, practices that historically served to insulate it from partisanship in law enforcement. This lawlessness led to Abu Ghraib, Haditha, and Blackwater. And valuing loyalty over competence and accountability led to the bumbling aftermath of Hurricane Katrina, the failure to care for wounded veterans at Walter Reed, and the purge among U.S. Attorneys.

There is much that has gone wrong that this administration has stubbornly refused to admit or correct. When President Bush ascribed Attorney General Gonzales’s resignation to supposed “unfair treatment” and having “his good name dragged through the mud for political reasons,” ignoring the fact that numerous prominent Republicans had called for his resignation, he mischaracterized the clear facts about the U.S. Attorney firing scandal that decimated morale at the Justice Department. To reclaim our moral leadership, we need to acknowledge wrongdoings. These hearings are about a nomination, but the hearings are also about accountability.

We do need a new Attorney General. We need someone who understands that the responsibilities and duties of that office are not to be a validator for the administration. We are reminded by the examples of Elliot Richardson and William Ruckelshaus from the Watergate era—more recently the examples of James Comey and Jack Goldsmith and Alberto Mora—that law enforcement officials have to enforce the law without fear or favor. and not in reaction to political benefactors but in reaction only to what is the law.

We are the most powerful Nation on Earth. We are the most powerful Nation the world has ever known, a country that cherishes liberty and human rights, a Nation that has been a beacon of hope and freedom to the world. We face vicious enemies, and we need the confidence and the resolve to understand that we can and must defeat them without sacrificing our values and stooping to their level.

So this is a job interview for a big job—a big job that has become even bigger. Along with helping keep Americans safe and pro-

protecting their rights and combating crime and enforcing the law and managing more than 100,000 employees, and a budget that goes into the tens of billions of dollars, the next Attorney General has to begin to regain the public trust. And I think your nomination can begin to repair the process, and I hope all members of the Judiciary Committee, Democrats and Republicans alike, will join to restore the constitutional checks and balances that have been systematically eroded. And I hope we can begin that process this week.

So I welcome the nominee. I appreciate the time, Judge, that you and I have spent in private conversation, and I enjoyed meeting your wonderful family this morning. So I hope you will help us restore the Department of Justice to be worthy of its name. The American people expect that. But you know what? Americans deserve no less.

[The prepared statement of Senator Leahy appears as a submission for the record.]

I have gone over my time, but I think this is an important issue, and I yield to Senator Specter for whatever amount of time he wants.

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman. This is a very important confirmation hearing, I believe more important than most confirmations of the Attorney General, really approximating the importance of a Supreme Court confirmation hearing. And I say that for a number of reasons: first, the Department is dysfunctional; second, there has been a broad expansion of executive power, necessary in part because we are at war fighting a serious international enemy; and, third, because it takes the Supreme Court and the other Federal courts so long to intervene that the opinions of the Attorney General to guide the executive branch on what is constitutional is more important in this setting.

We start with a Department which urgently needs a restoration of integrity and honesty and independence. We have seen a situation where there have been serious allegations of political influence, and it is very important that those matters be cleared up and that the new Attorney General function on the hiring on merit and the firing for cause.

We have seen broad expansion of executive authority, and understandably so when we are at war. But at the same time, there has to be a balancing of constitutional rights and civil liberties.

I supported the PATRIOT Act, chaired the Committee that produced it and managed it on the floor, supported the Protect America Act. But at the same time, I am very concerned about what is happening with constitutional rights. The detainee situation is still a matter of some urgency. It casts a shadow over the administration of justice in America and holds us up for very substantial criticism worldwide.

We have seen a Terrorist Surveillance Program put into effect without telling the Chairman or Ranking Member of the Judiciary Committee. A matter of that constitutional magnitude ought to at least be shared with the top officials, if not us then the Speaker

of the House and the Majority Leader, to have some congressional input and some congressional oversight.

And we have seen the signing statements where the President has agreed when we passed the PATRIOT Act to accommodate detailed oversight, and then on a signing statement says, "I may not have to do that, may not be willing to do that under my Article II powers," or on the celebrated rapprochement between President Bush and Senator McCain over interrogation tactics, carefully negotiated, and then a signing statement.

The conventional understanding of constitutional authority is when the Congress enacts legislation and presents it to the President and he signs it, that that is the law that he has to faithfully execute under the Constitution. And I am awaiting an Attorney General who will tell the President some things he may not like to hear.

We have a judicial system which functions in accordance with our traditions, but we still have not resolved the detainee issue. Congress has legislated on it, and you have Combatant Status Review Tribunals which are a joke. You can have a substitute for habeas corpus, but it has to be meaningful. And now the administration has come forward with yet another effort there, I think, to foreclose a Supreme Court decision which is imminent, with five Justices having granted a petition for re-argument on the detainee issue.

There are so many matters to take up in this hearing that I think it is likely to be longer than most. We need to examine the nominee's attitude on a reporter's privilege. Can the Department of Justice live with a shield for reporters with the exception of national security matters on a balancing test? What would Judge Mukasey have to say about the evolving approach of the Department of Justice to demand waivers, subtly or by virtual compulsion in the face of the attorney-client privilege?

And as we are proceeding in this hearing room, the Senate is engaged in debates on the appropriations process, and there again is a challenge, this time acquiesced in perhaps by the Congress. The Appropriations Committee came up with legislation, a bill for Commerce, State, and Justice, and then there is a move to recommit to the President's figure, not to use the figure established by the Committee or by the Senate. And if we succumb to that, that will be a further enlargement of executive authority.

At 11 o'clock, the Senate will take up the appropriations bill on Labor, Health and Human Services, and Education, where I am the Ranking Member, so I will have to be in and out, but in my absence will be watching closely and participating extensively because this is such a very, very important matter.

Thank you, Mr. Chairman.

Chairman LEAHY. Well, thank you, Senator Specter. I should also note—and I think I mentioned this to you—that Senator Kennedy had surgery over the weekend and is recuperating at home, and that is why he is not here. He called us and made that clear.

What I was going to do is have Senator Schumer, who is from New York, introduce you, and after he does, I am going to ask Senator Lieberman, who was your classmate, and either he helped you

through law school or you helped him through law school, introduce you.

Senator Schumer, go ahead.

**PRESENTATION OF MICHAEL B. MUKASEY, NOMINEE TO BE ATTORNEY GENERAL OF THE UNITED STATES, BY HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman, and thank you for the honor of introducing a fellow New Yorker at today's hearing. I congratulate Judge Michael B. Mukasey on his nomination to be the 81st Attorney General of the United States.

I want to also welcome your family members who traveled here for this important day: your wife, Susan; your children, Marc and Jessica. I am sure you all are very proud of your husband, father, and other relations that I know are here as well.

Judge Mukasey has had a long and illustrious career that I can give only the briefest of highlights here. Born and raised in the Bronx, Judge Mukasey graduated from Columbia College and from Yale Law School, where he served on the Board of Editors for the Yale Law Review. Then he served for a number of years in both private practice and the U.S. Attorney's Office in the Southern District of New York where he rose to become chief of the Official Corruption Unit.

Starting in 1988, and for 18 years, Michael Mukasey was a Federal district court judge for the Southern District of New York, culminating in his serving as chief judge. There he presided over some of the most important and historic cases of the day, including the case of Omar Abdel Rahman, known as the "blind sheikh," Jose Padilla, and many others. All the while, Judge Mukasey earned a reputation for efficiency, fairness, and integrity.

Even those who did not always receive the benefit of a judge's favorable ruling—of a favorable ruling, have been quick to describe the judge's basic fairness and decency. Upon his retirement from the bench, one of Jose Padilla's lawyers said, "I admire him greatly," and described herself as "another weeping fan."

Another Padilla lawyer has said, "I don't always agree with where he comes out, but I'm always happy to draw him as a judge. You are going to get your day in court." He went on to say, "His sense of fairness and due process, it's more than intellectual. It's really down to the genetic level. It's in his DNA."

There are many such testimonials for Judge Mukasey from people he would not agree with politically. But none of Judge Mukasey's experiences, as varied and as valuable as they have been, can prepare him fully for the job that lies ahead. If confirmed, his task will be no less momentous and no less difficult than that facing Edward Levi, when he took the reins of John Mitchell's Justice Department after Watergate, because he will inherit an agency experiencing its greatest crisis since Watergate.

By every account, the Justice Department is leaderless and rudderless. It is dysfunctional and in disarray. It is demoralized and decimated.

Our investigation this year demonstrated the Department's prior leadership sorely lacked credibility, competence, independence.

Against that backdrop, and with only 14 months left, the Department does not now need a series of bold initiatives; rather, it needs steady leadership.

This is, we might say, a rebuilding year. The most important qualities we need in an Attorney General right now are independence and integrity, and looking at Judge Mukasey's career and his interviews that we have all had with him, it seems clear that Judge Mukasey possesses these vital attributes.

The bottom line is this: There have been many conservative Department lawyers who are honorable and showed allegiance to the rule of law. Former Deputy Attorney General Jim Comey comes to mind. So does the former head of the Office of Legal Counsel, Jack Goldsmith. And as we now know, even John Ashcroft, much maligned for so long, showed genuine courage and conviction at important moments when the rule of law might have fallen victim to those, some in the administration, who disrespected the Constitution.

I did not agree with these men on many or even most policy issues—Comey and Goldsmith. I have no illusions about Judge Mukasey either. From talking with him, it is clear that many of us are going to disagree with many of his views, and with some quite strongly. But at this time, the most important question is this: Will Judge Mukasey be independent enough and courageous enough to stand strong, even against the man who nominated him, if that is what the law requires?

Former Deputy Attorney General Jim Comey gave an eloquent speech to the National Security Agency in the spring of 2005, and his words are worth noting as we consider the nomination of Judge Mukasey. Comey said this: "It is the job of a good lawyer to say yes. It is as much the job of a good lawyer to say no. 'No' is much harder. 'No' must be spoken into a storm of crisis, with loud voices all around, with lives hanging in the balance. 'No' is often the undoing of a career. And often 'no' must be spoken in competition with the voices of other lawyers who do not have the courage to echo this.

And so yesterday I asked Judge Mukasey, and I will ask him again today, this question, and I will be one more minute, Mr. Chairman: If confirmed, will you have the courage to look squarely into the eyes of the President of the United States and tell him no if that is your best legal and ethical judgment? Judge Mukasey then looked me in the eye and assured me, "Absolutely. That is what I am there for." He also assured me he will go back and re-examine the legal opinions that underlie various controversial administration policies—

Chairman LEAHY. Senator Schumer, I do not mean to cut you off, but we are going to have to have a break because of the Dalai Lama. Are you going to take much longer? Otherwise—

Senator SCHUMER. No. About 30 seconds, Mr. Chairman.

He also assured me he will go back and re-examine the legal opinions that underlie various controversial administration policies, such as warrantless wiretapping, detention, and torture. Further, he assured me and I trust he will assure this Committee that he will be a voice for working with the Congress rather than going at it alone.

In these answers, Mr. Chairman, lies the hope we have a nominee, albeit conservative, who will put the rule of law first, who will earn the respect of the country, and—

Chairman LEAHY. Thank you, Senator Schumer.

Senator SCHUMER.—who will restore the Department to its full promise. I expect this hearing will demonstrate that this hope is justified.

Chairman LEAHY. Senator Lieberman?

**PRESENTATION OF MICHAEL B. MUKASEY, NOMINEE TO BE ATTORNEY GENERAL OF THE UNITED STATES, BY HON. JOSEPH I. LIEBERMAN, A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator LIEBERMAN. Thank you very much, Mr. Chairman, Senator Specter. It is an honor to introduce Michael Mukasey to this Committee, to follow the excellent introduction of Senator Schumer. One might say that Senator Schumer gets this privilege for reasons of proximity because he is the Senator from New York. Judge Mukasey is from New York. I think I am here for reasons of longevity.

Forty-three years ago this fall, Michael Mukasey and I entered Yale Law School, and as fate would have it, we ended up in the small group, as we called it, in that first semester. Most of our courses were lectures. We were in a small group of 12 or 15 students. We got to know each other very well. It was Contracts. We had a young faculty member named Robert Bocking Stevens, who was from England, and he had a charming way of questioning one of us—tough, demanding. Let's say he was questioning me. He would end his questioning. I would relax, breathe a deep sigh I had survived that round of questioning. He would go to Mike Mukasey. And then when I was least suspecting, he would come back, whirl around and say, "Now, back to you, Mr. Lieberman." It was a hair-raising experience.

I want to say that right there, 43 years ago, I saw Mike Mukasey, and I see essentially the same person today. His answers to that tough law professor were always responsive. You may not agree with him all the time. I am sure members of the Committee will not agree with him on some things. But you will always feel after the hearings that you are beginning this morning that he has given you a reasoned answer, he has thought about it, and he is not hesitant to reach an opinion.

Second, I would say that the person I met 43 years ago was a young man who was smart, who was thoughtful, who was hard-working, who had kind of a solid center about him as a person, who had a great sense of humor and a ready smile. And it is great to be able to say that 43 years later this is exactly the same kind of person who comes before you as nominee for Attorney General—wiser from experience, apparently, slightly older, but nonetheless with the same strengths.

He comes with the experience of more than two decades as a prosecutor, a judge, a private practitioner, which Senator Schumer spoke to, and I will not repeat.

I would say two things about this. First, this is a man of the law, not a man of politics. In fact, as I have thought about it, it is hard

to think in recent memory of a nominee for Attorney General who comes to the office, comes to this hearing with fewer political and personal contacts to the President who has nominated him than Judge Michael Mukasey.

Second, he comes with extraordinary relevant experience in the fundamental questions that challenge us today because of the war we are in against Islamist terrorism, and the challenging questions we have as to how to balance security and liberty. He has some opinions based on experience and judgment that I think will help members of the Committee and I think, insofar as the public as watching, will help members of the public understand better and reach more informed judgments about what we ought to do to protect our lives while also protecting our liberty.

I would say finally, Mr. Chairman, Senator Specter, that this combination of personal excellence, integrity, independence, hard work, commitment to the rule of law and our system of justice puts him in a unique position to do exactly what you, Mr. Chairman, and Senator Specter and Senator Schumer have said, which is to restore the morale and pride of the tens of thousands of people who work at the Department of Justice for us every day with great excellence and integrity to preserve our system of justice.

So I would say in closing, Mr. Chairman, I ask the indulgence of the Committee in saying with some nostalgia now, "Back to you, Mr. Mukasey."

Chairman LEAHY. Senator Lieberman, I might say, one, I appreciate very much especially the personal part. And then I would also tell Judge Mukasey—and I do not think Senator Lieberman will mind me doing this. He spoke to me privately and was just as glowing in his private conversation as he has been in his public, and he was very strongly supportive of both your legal background and your integrity and your honesty.

Joe, thank you.

Senator LIEBERMAN. Thank you, Pat.

Chairman LEAHY. We are going to make a slight change in chairs. In a baseball game, this is where they would cut to a commercial. But, Judge, please step forward and raise your right hand. Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge MUKASEY. I do.

Chairman LEAHY. Judge, you have heard everybody speak about you, say glowing things about you, but also talk about the very strong concerns that Senator Specter and I and many other members have. And this is the part now where the American people have been waiting to hear from you. Please go ahead, sir.

**STATEMENT OF MICHAEL B. MUKASEY, NOMINEE TO BE  
ATTORNEY GENERAL OF THE UNITED STATES**

Judge MUKASEY. Thank you. Good morning, Chairman Leahy, Ranking Member Specter, and members of the Committee. Thank you for the opportunity to be here today.

When my nomination to be the 81st Attorney General of the United States was announced, I expressed to President Bush my gratitude and deep sense of honor. Since then, I have had the ben-

efit of your graciousness in taking the time to meet with me privately, to express your views and concerns, and to hear my views. I am grateful to each of you for that, as I am to Senators Schumer and Lieberman for their generous remarks in introducing me this morning. And, of course, I am grateful to my family—my wife, Susan, my children, Marc and Jessica—who have been a part of whatever I have done that has been worthwhile.

But what comes most strongly to mind as I deliver these brief remarks is that this isn't about me or even about my gratitude to the many people who helped me get here. This is about the more than 100,000 men and women of the Department of Justice who bear the responsibility to pursue justice through the rule of law in U.S. Attorney's Offices, in investigative field divisions, in Federal prisons and other facilities all over this country and all over the world.

There are in a sense many cultures in those different offices and divisions, and there are differences as well between the culture of the Department as it may appear in the building that occupies a square block here in Washington and as it may appear in each of the 93 United States Attorney's Offices around the country. But all those apparently different cultures are united by shared values and standards. Legal decisions and the progress of cases are decided by facts and law, not by interests and motives.

So too, the Justice Department's mission includes advising the other departments and agencies of Government, including the President, on what choices they are free to make and what limits they face. Here too, the governing standard is what the Constitution and the law permit and require.

I am here in the first instance to tell you, but also to tell the men and women of the Department of Justice, that those are the standards that guided the Department when I was privileged to serve 35 years ago, and those are the standards I intend to help them uphold if I am confirmed.

Because of the times in which we live, it was to be expected—as, in fact, happened—that many of you would discuss with me weighty and serious issues that sometimes seem to raise a conflict between liberty and security. A great Attorney General, perhaps the greatest to serve in the modern era, Robert Jackson, said that the issue between authority and liberty is not between a right and a wrong—that never presents a dilemma.

The dilemma is because the conflict is between two rights, each in its own way important. That is why I have told you during those discussions, and may have occasion to repeat again here today, that protecting civil liberties, and people's confidence that those liberties are protected, is a part of protecting national security, just as is the gathering of intelligence to defend us from those who believe it is their duty to make war on us. We have to succeed at both. It is the honor and the privilege of the men and women of the Justice Department to help us to do that, and if I am confirmed, it will be my honor and privilege to try to help them help us.

As I mentioned a moment ago, you have been generous with your time and your advice in the past couple of weeks. I believe that the Department's relationship with this Committee and with Congress

is vital to fulfilling its mission. I want to assure you that, if confirmed, I will always appreciate and welcome your advice, as I have since my nomination, and that I and others in the Department will try to be available to you. In that spirit, I am ready to answer the questions you have for me today.

Thank you.

[The prepared statement of Judge Mukasey appears as a submission for the record.]

[The biographical information of Judge Mukasey follows:]

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR MICHAEL B. MUKASEY, ATTORNEY GENERAL  
NOMINEE

PUBLIC

1. **Name:** Full name (include any former names used).  
  
Michael Bernard Mukasey
2. **Position:** State the position for which you have been nominated.  
  
Attorney General
3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.  
  
Patterson, Belknap Webb & Tyler  
1133 Avenue of the Americas  
New York, NY 10036
4. **Birthplace:** State year and place of birth.  
  
1941, the Bronx, New York
5. **Marital Status:** (include name of spouse, and names of spouse pre-marriage, if different). List spouse's occupation, employer's name and business address(es). Please, also indicate the number of dependent children.  
  
Married to Susan Elaine Bernstock Saroff Mukasey, née Susan Elaine Bernstock, retired.  
We have no dependent children.
6. **Education:** List in reverse chronological order, listing most recent first, each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.  
  
Yale Law School, September 1963, September 1964 – June 1967, LLB, June 1967  
  
Columbia College, September 1959 – June 1963, BA, June 1963.
7. **Employment Record:** List in reverse chronological order, listing most recent first, all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with

which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or job description where appropriate.

Patterson, Belknap, Webb & Tyler  
1133 Avenue of the Americas  
New York, NY 10036  
Member (September 2006-present)

William Nelson Cromwell Foundation  
Director (1997-present)

Jewish Children's Museum  
Board of Directors (2004-present)

United States District Court for the Southern District of New York  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street  
New York, NY 10007  
United States District Judge (January 1988-September 2006)

Columbia Law School  
435 West 116th Street  
New York, NY 10027  
Lecturer in Law (January 1993-May 2007)

Patterson, Belknap, Webb & Tyler  
1133 Avenue of the Americas  
New York, NY 10036  
Member (1978-1987)  
Associate (1976-1978)

United States Attorney's Office for the Southern District of New York  
One St. Andrew's Plaza  
New York, NY 10007  
Chief, Official Corruption Unit (1975-76)  
Assistant United States Attorney (August 1972-March 1976)

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield  
Firm no longer in existence, formerly at  
One Rockefeller Plaza  
New York, NY 10122  
Associate (September 1967-August 1972)  
Law Clerk (June-September 1966)

Yale Law School  
127 Wall Street  
New Haven, CT 06511  
Assistant in Instruction (September 1966-June 1967)

National Labor Relations Board  
1717 Pennsylvania Ave., NW  
Washington, DC 20006  
Student Assistant (June-August 1965)

United Press International  
1060 Broad Street  
Newark, NJ 07102  
Reporter (May-August 1964)

Echelons Office Temporaries  
485 Madison Avenue  
New York, NY 10022  
Employee (May 1964)

Construction company (unable to recall name)  
Beer distributor (unable to recall name)  
Columbine, CO  
Employee (July 1963-August 1963)

Craig Lumber Company  
Craig, CO  
Employee (July 1963)

8. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received.

I have not served in the military.

9. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

To the best of my recollection, the list below includes the awards and honors I have received that may be of interest to the Committee. This list may not be comprehensive.

Ari Halberstam Award from the Jewish Children's Museum, 2007

Federal Bar Council's Learned Hand Medal for Excellence in Federal Jurisprudence,  
May 2004

LLB (honoris causa), Brooklyn Law School, June 2002

Board of Editors, YALE LAW JOURNAL, 1965-67

Two awards from the Respect for Law Alliance

2 awards from the Seymour Association (organization of AUSAs who served under USA Seymour)

The William Tandy Award from the Fiske Association (organization of AUSAs who served under USA Fiske)

10. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups

Judicial Conference of the United States  
(Committee on Automation and Technology)

American Bar Association

New York State Bar Association  
(Chairman, Committee on Public Access to Information and Proceedings, 1984-1987)

Association of the Bar of the City of New York  
(Federal Courts Committee, 1979-1982)  
(Communications Law Committee, 1983-1986)

Council of New York Law Associates

11. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

New York, December 21, 1967, no lapses in membership

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

New York, December 21, 1967

U.S. District Court for the Southern District of New York, January 23, 1969

U.S. District Court for the Northern District of New York, October 12, 1982

U.S. Court of Appeals for the Second Circuit, October 1, 1975

U.S. Court of Appeals for the District of Columbia Circuit, June 1, 1978  
U.S. Court of Appeals for the Fourth Circuit, June 25, 1982  
U.S. Court of Appeals for the Third Circuit, December 29, 1983  
U.S. Court of Appeals for the Tenth Circuit, February 26, 1986  
Supreme Court of the United States, November 5, 1979

I am currently a member in good standing of each of these courts and am not aware of any lapses in membership.

12. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 10 or 11 to which you belong, or to which you have belonged, or in which you have significantly participated, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Respect for Law Alliance, Inc. (2007-present)

William Nelson Cromwell Foundation (Director, 1997-present)

National Conference on Soviet Jewry (approx. 1980s)

Anti-Defamation League of B'nai B'rith (National Legal Affairs Committee) (approx. 1980s)

University Club (New York) (1971-January 1987)

It is possible that the Senior Society of Sachems, a Senior Society at Columbia, considers me to be a member.

Similarly, it is possible that the Heritage Foundation considers me to be a member based on a small monetary donation that I made to the Foundation.

My firm also makes contributions to a wide variety of organizations. I have no reason to believe that any of those organizations consider me a member as a result of the donations.

- b. Please indicate whether any of these organizations listed in response to 12(a) above currently discriminate or formerly discriminated on the basis of race, sex, or religion – either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

The University Club in New York did not admit women to membership. I tried unsuccessfully to co-sponsor a woman for membership and then resigned in January 1987 after more than one vote by club members to continue the ban on women members.

13. **Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Please supply four (4) copies of all published material to the Committee.

I have listed below those articles and pieces that I wrote since graduating from college that I have been able to recall or obtain.

Shortly after graduating from college, I worked for a brief period of time as a reporter for the now-defunct news organization UPI. I do not have copies of all articles that I wrote; however, I have been able to locate two articles through a diligent search:

“Riots On Again In Jersey City,” *Western Kansas Press*, August 4, 1964, pg. 1

“Streets Calm in Paterson,” *Western Kansas Press*, August 15, 1964, pg. 1

I also recall writing a piece on the return of the body of either Andrew Goodman or Michael Schwerner, one of the three civil rights workers murdered in Mississippi in the summer of 1964, and the near simultaneous arrival at the same airport of a group that had participated in civil rights activities in the South. I cannot locate a copy of the article.

In addition to my work for UPI, I have published the following works:

Note, “Confrontation and the Hearsay Rule,” 75 *YALE L.J.* 1434 (1967)

“The Last of the Big-Time Bosses [Book Review]” *NEW YORK TIMES*, October 17, 1971

“In Defense of a Vigorous United States Attorney,” *NEW YORK TIMES*, Dec. 2, 1985

“Dealing with the Prosecutor,” chapter in *BUSINESS CRIMES: A GUIDE FOR CORPORATE AND DEFENSE COUNSEL*, Practising Law Institute (1986)

“The Discovery Phase of Libel Litigation,” chapter in *LIBEL LITIGATION 1986*, Practising Law Institute (1986)

“The Spirit of Liberty,” THE WALL STREET JOURNAL, May 10, 2004

“Jose Padilla Makes Bad Law: Terror trials hurt the nation even when they lead to convictions,” THE WALL STREET JOURNAL, August 22, 2007

- b. Please supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, please give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

The Judicial Conference and the Judicial Conference Committee on Automation and Technology issue two reports each per year. Copies of the reports issued during the time period I served on the Conference are attached. The Federal Courts and the Communications Law Committees of the Association of the Bar of the City of New York issued reports during the time period I served on these committees. I do not have any copies in my possession, but am attempting to obtain copies. It is also possible that the Committee on Public Access to Information and Proceedings of the New York State Bar Association did produce four reports during the time I served as Chairman, 1984-1987. I do not recall any specific reports and do not have any copies in my possession.

- c. Please supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

While serving as Chief Judge of the United States District Court for the Southern District of New York, I did present remarks on at least two occasions: the dedication of the Constance Baker Motley jury room and the Charles L. Brieant conference room, and the dedication of the Daniel Patrick Moynihan United States Courthouse. I do not have copies of the remarks that I gave and have been unable to locate any transcripts. The remarks generally consisted of praise of the honored individuals and references to the history of the court itself.

I also testified on October 20, 1987 at a hearing entitled “Confirmation Hearing On: Robert E. Cowen, Michael B. Mukasey, and George C. Smith.”

- d. Please supply four (4) copies, transcripts or tape recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Please include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or tape recording of your remarks, please give the name and address of the group before whom the speech was given, the date of the

speech, and a summary of its subject matter. If you did not speak from a prepared text, please furnish a copy of any outline or notes from which you spoke.

The following is a list of speeches that I was able to locate after a review of my records.

In addition to the specific remarks listed below, from time to time I gave remarks when presiding over naturalization ceremonies, or when swearing in new attorneys. When speaking at naturalization ceremonies, I generally discussed the importance of their citizenship as a personal achievement and the rights they came to enjoy as citizens (particularly the right to vote), and would express my hope that they celebrate the day with their families. When speaking to newly sworn in lawyers, I encouraged them to do pro bono work, as it would help the lawyers and the legal system as a whole. I also had the opportunity on occasion to address alumni groups from Columbia Law School and student groups from different institutions. I do not know the dates or frequency of those remarks, and do not have notes or transcripts of those remarks. In general, I would discuss my experiences on the bench, which could have included recent cases or developments in the law. I do not have any specific recollections of any particular subject matters or cases.

I am confident that there are additional speeches or remarks that I have given, but the list below reflects what I have been able to recollect.

Remarks given, likely in 1984, in Queens, NY, as part of my work with the Victory '84 campaign, on behalf of President Reagan's position with a particular emphasis on defense issues (No notes or remarks available)

Remarks given, likely in 1996 or 1997, to the Respect for Law Alliance in New York, NY (Remarks, as prepared, provided)

Remarks at Brooklyn Law School in 2002 upon receipt of honorary degree (Remarks, as prepared, provided)

Jethro Sabbath Speech, given at The Central Synagogue, New York, NY, likely in 2003 (Remarks, as prepared, provided)

Remarks on the Occasion of Receiving the Federal Bar Council's Learned Hand Medal for Excellence in Federal Jurisprudence at its Law Day Dinner, New York, NY, May 5, 2004 (Remarks, as prepared, provided)

Eulogy for District Judge Milton Pollack, 2004 (Remarks, as prepared, provided)  
Remarks given upon presentation to Judge Feinberg of the 22nd Annual Devitt Distinguished Service to Justice Award, October 22, 2004, New York, NY (Remarks, as prepared, provided)

Kol Nidrei—A Judicial Perspective, remarks delivered likely in 2005 at the 92nd Street YMHA (Remarks, as prepared, provided)

Remarks given on May 26, 2005, in New York, NY, upon receipt of a Jurist Award from the Respect for Law Alliance (No remarks or notes available, comments were very limited in time and scope)

I also participated on January 24, 2007, in a panel discussion hosted by the Foundation for the Defense of Democracies on the occasion of the inaugural event of its Center for Law & Counterterrorism. The following is a link to a video of the panel: <http://fora.tv/fora/showthread.php?t=641>.

Remarks given in 2007, upon acceptance of the Ari Halberstam award from the Jewish Children's Museum (Remarks, as prepared, provided)

Remarks on "Terrorists and Unlawful Combatants" delivered on April 25, 2007, to a physician's organization during their annual banquet (Remarks, as prepared, provided)

"Injunctions after *e-Bay*" given at the Intellectual Property Owners' Association Conference in September 2007 (Outline, as prepared, provided)

On October 5, 2006, I moderated a panel sponsored by the New York chapter of the Federalist Society entitled "After *Hamdan*: The Supreme Court and the Future of U.S. Responses to Terrorism." (No notes or remarks available). I believe that I have moderated one other panel for the New York chapter of the Federalist Society, although I do not recall the date or topic.

I have spoken at least twice to the Senior Society of Sachems, a student organization at Columbia, once in 1988 about my confirmation process, and once more recently on terrorism-related issues. (No notes or remarks available)

- e. Please list all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

While I was an Assistant United States Attorney and a United States District Court Judge, I had a policy of not giving interviews. Shortly before retiring from the bench, I did give two interviews. The articles based on those interviews are listed below. It is possible that I spoke with a writer for a magazine published by the Federal Bar Council at some point during my tenure as a District Judge, but I do not recall the subject matter, there was no transcript, and I do not have a copy of the article.

“As Judge Leaves for Law Firm, His Legacy Is Remembered” THE NEW YORK SUN, July 26, 2006

“Unassuming Chief Oversaw Court’s Adjustment to Terrorism,” N.Y.L.J., August 1, 2006

14. **Judicial Office**

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

I believe that I have presided over upwards of 100 cases that have gone to verdict. I cannot estimate how many have gone to judgment in the sense of a grant of summary judgment.

- i. Of these, approximately what percent were:

jury trials: 95%  
bench trials: 5%

civil proceedings: 10%  
criminal proceedings: 90%

- b. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number (if not reported).

Please see Appendix A

- c. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

Please see Appendix B

- d. Provide a brief summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings

Please see Appendix C

- e. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Please see Appendix D

- f. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

Please see Appendix E

- 15. **Recusal:** Please provide a list of any cases, motions or matters that have come before you as a judge in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest, or for any other apparent reason, or in which you recused yourself sua sponte. (If your court employs an “automatic” recusal system by which you may be recused without your knowledge, please include a general description of that system.) Please identify each such case, and for each provide the following information:
  - a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
  - b. a brief description of the asserted conflict of interest or other ground for recusal;
  - c. the procedure you followed in determining whether or not to recuse yourself;
  - d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

In three cases in which a party moved for my recusal, I wrote responsive opinions, and those cases are described directly below. In addition, I believe that the clerk of the court would automatically (and without notifying me) reassign any case in which my son represented the government as an Assistant U.S. Attorney if the case had been initially assigned to me through the court’s normal assignment process. My son served as an Assistant U.S. Attorney in the Southern District of New York from September 14, 1997, through September 15, 2005. Moreover, I made it a practice to recuse myself from, *inter alia*, any cases that were assigned to me if any party to the case was represented by my then former (and now current) law firm, Patterson, Belknap, Webb & Tyler, if I or anyone to whom I was immediately related might have a significant financial stake in the outcome, or if I had a significant relationship with a party. On the last ground, I recused myself from cases to which Mayor Giuliani was more than a nominal party in his official capacity as Mayor of New York. Whenever I would recuse myself on my own motion, I would submit a memorandum to the court’s Assignment Committee requesting reassignment of the case to another judge of the court. I do not specifically recall the

names of all cases in which I requested reassignment. Based on my recollection, and after a diligent search, I have listed below all of the cases of which I am aware. If I become aware of any other such cases, I shall apprise the Committee accordingly.

Cases in which a party moved for my recusal:

1. *United States v. El-Gabrowny*, 844 F. Supp. 955 (S.D.N.Y. 1994)
  - a. The named defendant in this matter moved through counsel for my disqualification under 28 U.S.C. §§ 144 and 155.
  - b. The defendant was charged (along with fourteen co-defendants) with seditious conspiracy to conduct a war of urban terrorism against the United States. Based on requests for disclosure in the defendant's motion, it appeared that my disqualification was sought due to my hypothesized support for political Zionism and the State of Israel. In addition, the defendant's counsel pointed to four rulings that, *inter alia*, purportedly supported an inference of my bias against Muslim defendants such as the defendant: (1) my denial of a request that the Metropolitan Correction Center (the "MCC") be directed to permit communal prayer by the Muslim defendants, which was alleged to indicate that I was not concerned with "quality of life issues," (2) my scheduling of a court appearance on a Friday "over the defense objection that a long appearance would interfere with defendants' Juma observance," which allegedly betrayed an insensitivity to the Muslim defendants' religious observances, (3) my statement (in an opinion denying the defendant's release on bond) that he was taking the position he could not return to Egypt because of his opposition to the government of Egypt rather than that he would be persecuted there, which allegedly reflected my lack of concern with the Egyptian government's human rights record, and (4) my allegedly harsh response to leaks by defendants as compared to my response to leaks by the government, which reflected bias against the Muslim defendants.
  - c. In ruling on the motion, I reviewed the factual bases for the motion and determined that they were without merit. I also considered what appeared to be the underlying rationale for the motion (my alleged support for the State of Israel, based on, among other things, my ethnicity), and determined after reviewing a variety of precedents that such generalized considerations did not support a motion for disqualification under the controlling authorities.
  - d. Because I concluded that there was no indication of bias or potential conflict of interest as contemplated in the controlling statutes, I took no further action in response to the defendant's request for my disqualification.

2. *Williams v. Josephs*, No. 91 CIV 8178 (MBM), 1993 WL 403969 (S.D.N.Y. Oct. 7, 1993)
  - a. The plaintiff, who appeared pro se, moved for my recusal.
  - b. The above-referenced order granted summary judgment to the final defendant named in this action involving constitutional and civil rights claims arising from the reassignment of the plaintiff, a temporary employee, within a New York City agency after an altercation with her immediate supervisor. The plaintiff had moved for my recusal on the grounds that that my prior rulings—which included orders of summary judgment for the other two defendants in the case—justified my disqualification. I denied the motion.
  - c. In ruling on the motion, I reviewed the controlling authorities, including the decision of the Court of Appeals for the Second Circuit in *Hodgson v. Liquor Salesmen's Union Local No. 2*, 444 F.2d 1344 (2d Cir. 1971). That case among others made clear that prior adverse rulings could not, without more, support a motion for recusal, so I denied the motion.
  - d. Because I concluded that there was no indication of bias or potential conflict of interest as contemplated in the controlling authorities, I took no further action in response to the defendant's motion for my recusal.
  
3. *Lewis v. Tuscan Dairy Farmers, Inc.*, 829 F. Supp. 665 (S.D.N.Y. 1993)
  - a. One of the defendants in this case, the president of the defendant union, moved for my recusal.
  - b. The above-referenced opinion and order affirmed a finding of liability against the defendant union on grounds that the union had breached its duty of fair representation to union members. In a separate and unrelated matter, I had ruled that the president of the defendant union had not testified credibly and had ordered him jailed on contempt charges for refusing to order striking union members back to work. The president, who was an individual defendant in this case, filed an affidavit of bias on the grounds of these earlier rulings, but I denied the motion for recusal in an unpublished ruling.
  - c. In ruling on the motion, I reviewed the controlling authorities, which made clear that prior adverse rulings could not, without more, support an allegation of bias and motion for recusal, so I denied the motion. The ruling was challenged on appeal, and the Court of Appeals for the Second Circuit affirmed. *See Lewis*, 25 F.3d 1138, 1141 (2d Cir. 1994).
  - d. Because I concluded that there was no indication of bias or potential conflict of interest as contemplated in the controlling authorities, I took no further action in response to the defendant's motion for my recusal.

Cases from which I recused myself on my own motion:

1. *Dresner Co. v. First Fidelity Bank, N.A.*, No. 95 CV 1924 (S.D.N.Y.)

The award of attorneys' fees in the case could have affected the financial interest of a friend of both my wife's and mine. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

2. *Argonaut Partnership L.P. v. Bankers Trustee Co. Ltd.*, 96 CV 1970, *Argonaut Partnership L.P. v. Bancomer, S.A.*, No. 96 CV 2222 (S.D.N.Y.)

Counsel for the plaintiff in these cases advised that a friend of my wife's and mine had a financial interest in the outcome of the litigation. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

3. *Stewart v. Munnich et al.*, No. 98 CV 3256 (S.D.N.Y.)

I had an ongoing relationship with an attorney who had represented the plaintiff in another matter, and I had thus become familiar with some facts relating to this case. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

4. *Int'l Action Ctr. v. Safir*, No. 98 CV 6012 (S.D.N.Y.)

This case involved a claim against the Commissioner of the New York City Police and the government of the City of New York. Because Mayor Giuliani was (and remains) a good friend and because he was more than a nominal defendant in the case, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety. I believe that counsel for the New York Civil Liberties Union raised the issue of recusal in court.

5. *Reynolds v. Giuliani*, No. 98 CV 8877 (S.D.N.Y.)

This class action involved a claim against Mayor Giuliani and other defendants in their official capacities as officers of the City of New York. Because Mayor Giuliani was (and remains) a good friend and because he was more than a nominal defendant in the case, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

6. *Griffin v. Ambika Corp.*, No. 98 CV 8985 (S.D.N.Y.)

My then former (and now current) law firm represented the defendants in this case. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

7. *Nat'l Congress for Puerto Rican Rights v. City of New York*, No. 99 CV 1695 (S.D.N.Y.)

This case involved claims against the government of the City of New York. Because Mayor Giuliani was (and remains) a good friend and because he was more than a nominal defendant in the case, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

8. *Daily News v. Newspaper & Mail Deliverers Union*, No. 99 CV 2011, 99 CV 2117 (S.D.N.Y.)

While I was in private practice, I occasionally handled legal matters for the *Daily News*, one of the principal parties in this litigation. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

9. *J.L.B. Equities, Inc. v. Ocwen Fin. Corp.*, No. 99 CV 10000 (S.D.N.Y.)

I owned stock in the defendant corporation when this case was assigned to me and thus had an indirect financial interest in the outcome of the litigation. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any appearance of impropriety.

10. *Fletcher v. A&E*, No. 99 CV 10151 (S.D.N.Y.)

The defendant in this case was represented by my then former (and now current) law firm, Patterson, Belknap, Webb & Tyler. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

11. *SEC v. Windgate Fund, et al.*, No. 96 CV 2502 (S.D.N.Y.)

This case involved an SEC order that provided for reimbursement of expenses to the law firm of which my son was then a member. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

12. *Showers v. Pfizer, Inc.*, No. 04 CV 9866 (S.D.N.Y.)

This case involved claims about the safety and marketing of a prescription drug that my wife had used for some time. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

13. *United States v. Sakhai*, No. 04 CR 584 (S.D.N.Y.)

The defendant in this case was a personal acquaintance of my wife's and mine. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

14. *DRF Jeweler Corp. v. American Express Co.*, No. 03 CV 9517 (S.D.N.Y.); *Italian Colors Restaurant v. American Express Co.*, No. 03 CV 9592 (S.D.N.Y.)

At the time these cases was assigned to me, I had an outstanding (albeit minor) billing dispute with American Express, the defendant, so I concluded that my impartiality might be questioned if I were to preside over the matter. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case.

15. *In re Hilly Realty Corp.*, No. M-47 (S.D.N.Y.)

One of the parties to this case was represented by my then former (and now current) law firm, Patterson, Belknap, Webb & Tyler. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

16. *Sandhaus v. McCann-Erickson, Inc.*, No. 03 CV 6743 (S.D.N.Y.)

One of my former law clerks represented a party in this matter. In order to avoid any appearance of partiality or impropriety, I wrote a memorandum to the Assignment Committee seeking reassignment of the case.

17. *Dow Jones & Co. v. Harrods*, No. 02 CV 3979 (S.D.N.Y.)

I had represented the plaintiff in this case on matters when I was in private practice. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

18. *Zanowicz v. Reno*, No. 97 CV 5292 (S.D.N.Y.)

This case involved claims against the United States Marshals Service. At the time this case was assigned to me, I was under the protection of the Marshals Service and had a full-time protective detail provided by the Marshals Service. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

19. *Kaufman v. City of New York*, No. 98 CV 2648 (S.D.N.Y.)

This case involved a challenge to a practice of the City of New York with which Mayor Giuliani has been personally identified. Because Mayor Giuliani was (and remains) a close friend, I concluded that it might appear improper for me to preside over the matter. As a result, I wrote a memorandum to the Assignment Committee seeking reassignment of the case in order to avoid any claim of partiality or appearance of impropriety.

16. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Student Assistant  
National Labor Relations Board  
(Chairman Frank W. McCulloch)  
June 1965-August 1965

Assistant United States Attorney  
Southern District of New York  
1972-1976  
Appointed by Attorney General Richard Kleindienst

United States District Court Judge  
Southern District of New York  
January 1988 – September 2006  
Appointed by President Ronald W. Reagan after confirmation by the United States Senate

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I was involved in the campaign of Rudy Giuliani for President of the United States. Mr. Giuliani filed as a candidate for President in February 2007. From the beginning I have distributed information on his behalf and encouraged individuals to support his candidacy. From July to partway through September, 2007, I served as a member of his Justice Advisory Committee. I have not collected money on behalf of his campaign or hosted any fundraiser on behalf of his campaign.

In 1984, I was involved in the Victory '84 campaign. This was a campaign sponsored by the New York Jewish Coalition (Speaker's Bureau), which conducted speeches and debates in the New York area on behalf of the Reagan-Bush ticket, including debates against Democratic candidates and office holders. I recall giving at least one speech in 1984, in Queens, on behalf of President Reagan's position, with a particular emphasis on defense issues.

I was Treasurer of a campaign committee for Elliot G. Sagor in a campaign for New York State Supreme Court Justice in 1982. I likely collected donations in that capacity, although I have no specific recollections and I am aware of no complaints concerning the campaign's finances.

17. **Legal Career:** Please answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

- i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Patterson, Belknap, Webb & Tyler  
1133 Avenue of the Americas  
New York, NY 10036  
Member (September 2006 – present and 1978-1987; Associate, 1976-1978)

United States District Court for the Southern District of New York  
 Daniel Patrick Moynihan United States Courthouse  
 500 Pearl Street  
 New York, NY 10007  
 United States District Judge (January 1988 – September 2006)

United States Attorney's Office for the Southern District of New York  
 One St. Andrew's Plaza  
 New York, NY 10007  
 Assistant United States Attorney (August 1972 – April 1976)  
 Chief, Official Corruption Unit (1975-76)

Webster, Sheffield, Fleischmann, Hitchcock & Brookfield  
 Firm no longer in existence, formerly at  
 One Rockefeller Plaza  
 New York, NY, 10122  
 Associate (July 1967 – August 1972).

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

From 1967-1972, as an associate at Webster Sheffield, my practice initially included corporate work, securities work, and litigation. I drafted contracts, engaged in negotiations, and participated in public offerings representing both issuers and underwriters. From 1969-1972, my practice focused increasingly on civil litigation, including participation in products liability and securities fraud trials, labor and stock exchange arbitrations, and motions practice in state and federal courts.

From 1972-1976, I served as an Assistant United States Attorney for the Southern District of New York. My practice consisted of criminal litigation on behalf of the government, including investigation and prosecution of narcotics, bank robbery, interstate theft, securities fraud, fraud on the government and bribery cases. My responsibilities included supervision of federal agents in investigations, presentation of cases before grand juries, trials, appeals to the United States Court of Appeals for the Second Circuit, and supervision of other Assistant United States Attorneys. For the period during which I served as Chief of the Official Corruption Unit (1975-76), I specialized in public corruption prosecutions. From time to time, I would also coordinate, on a case-by-case basis, with other components of the Department of Justice. Overall during this period, I tried approximately 20 cases and argued approximately 15 appeals to United States Courts of Appeals.

From 1976 until I took the bench in 1988, I practiced at Patterson, Belknap. I became a member of the firm in 1978. My practice during this period centered on litigation, including both civil litigation and counseling, and criminal defense litigation and counseling. I had principal responsibility for virtually all of the cases in which I participated and supervised other lawyers.

From 1988-2006, I served as a United States District Judge for the Southern District of New York.

From August 2006 to the present, I have practiced at Patterson, Belknap. My practice consists of providing strategic advice to clients with respect to litigation. I have also done arbitration and mediation.

- ii. your typical clients and the areas, if any, in which you have specialized.

At the two law firms where I have worked, typical clients have included major corporations and other institutions, as well as smaller companies and individuals. Several clients from 1983 through 1988 were attorneys. After working as an Assistant United States Attorney, I also served as a defense lawyer intermittently, including pre-indictment and post-conviction representation. I also specialized in defense of libel cases.

As an Assistant United States Attorney, I represented the United States.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Approximately 90% of my legal practice has been in litigation.

From 1967 to 1972, I appeared in court only occasionally. As an Assistant United States Attorney, from 1972 to 1976, I appeared in court frequently. From 1976 to 1987, I continued to appear in court, although not as frequently as I had as an Assistant United States Attorney. Since my return to Patterson, Belknap in 2006, I have appeared one time in court.

- i. Indicate the percentage of your practice in:
1. federal courts: 60%
  2. state courts of record: 40%
  3. other courts.
- ii. Indicate the percentage of your practice in:
1. civil proceedings: 80%
  2. criminal proceedings: 20%

- d. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I have tried approximately 27 cases to verdict or judgment; five as associate counsel and 22 as chief or sole counsel.

- i. What percentage of these trials were:

1. jury: 89%
2. non-jury: 11%

- e. Describe your practice, if any, before the Supreme Court of the United States. Please supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I do not recall any Supreme Court practice and a search of the Supreme Court databases did not reflect any Supreme Court practice.

18. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Nemeroff v. Abelson*, 704 F.2d 652 (2d Cir. 1983) (appeal).  
U.S. Court of Appeals for the Second Circuit; Honorable Jon O. Newman, Honorable Lawrence W. Pierce, and Honorable William H. Timbers

This appeal, which I argued and for which I wrote the brief, established the right of Alan Abelson and other defendants to recover attorneys' fees from a Boston firm, then-named Hale and Dorr, and its plaintiff client, for prosecuting a stock fraud claim after it became apparent the claim was baseless. This case preceded the existence of Federal Rules of Civil Procedure, Rule 11, which provides explicitly for the recovery of attorneys' fees in such cases.

Opposing counsel:

Honorable Simon H. Rifkind (deceased),  
Paul, Weiss, Rifkind, Wharton & Garrison  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

Honorable Robert S. Smith  
New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207-1095  
(518) 455-7700

Co-counsel:

Andrew C. Freedman  
Fulbright & Jaworski  
666 Fifth Avenue  
New York, NY 10103-3198  
(212) 318-3000

2. *Udell v. New York News Inc.*, 124 A.D.2d 656, 507 N.Y.S.2d 904 (N.Y. App. Div. 1986) (libel trial and appeal)  
Trial court: Supreme Court, Kings County; Honorable Irving S. Aronin (deceased)  
Appellate court: Appellate Division, Second Department; Honorable Guy J. Mangano, Honorable Moses M. Weinstein, Honorable James F. Neihoff, and Honorable Isaac Rubin.

This case involved a libel claim by an attorney against my client, New York News Inc., based on an article that reported the plaintiff had pleaded his client guilty in a criminal case without knowing "the first thing" about the underlying facts. I was chief counsel for the defendant, and argued the appeal. The jury rendered a verdict for the plaintiff in the amount of \$650,000, reduced on appeal to \$75,000. The case was tried from June 3, 1985, to June 21, 1985. After my nomination to the Southern District of New York, the New York Court of Appeals dismissed a motion for leave to appeal. 70 N.Y.2d 745 (N.Y. 1987).

Opposing counsel:

Albert J. Brackley  
16 Court St  
Brooklyn, NY 11241-0102  
(718) 625-5884

3. *Peacock v. New York News Inc.*, Index No. 18616/79

Trial court: Supreme Court, New York County; Honorable Martin Evans (ret.)

This was a libel trial in which I was chief counsel representing the defendant. The plaintiff's name had been identified in a newspaper article as the alias of a notorious Harlem drug dealer—a description conceded at the trial to have been false. The plaintiff claimed damage to reputation and psychological injury. The jury returned a verdict for the defendant following a six-day trial in March, 1983. This case presented substantial difficulties from the defense standpoint, including the subsequent firing of one of the reporters for allegedly falsifying a story. That fact was kept out of evidence through a motion *in limine*.

## Opposing counsel:

Steven J. Hyman  
McLaughlin & Stern, LLP  
260 Madison Avenue  
New York, NY 10016  
(212) 448-1100

4. *United States v. Stirling*, 571 F.2d 708 (2d Cir. 1978)

Trial court: U.S. District Court for the Southern District of New York; Honorable Marvin E. Frankel (deceased)

The case was a major stock fraud prosecution at the time, and posed problems for the defense in that certain defendants had a defense strategy that put them in conflict with other defendants, notwithstanding efforts to minimize such conflicts.

I represented, as chief counsel, a Mississippi lawyer who was a defendant in this criminal stock fraud prosecution. The jury returned guilty verdicts against all defendants following a trial that lasted approximately three weeks in December 1976 and January 1977. I tried the case and argued the appeal.

## Opposing counsel:

W. Cullen MacDonald  
Hawkins, Delafield & Wood  
One Chase Manhattan Plaza  
New York, New York 10005-1401  
(212) 820-9333

## Counsel for codefendants:

Albert J. Gaynor (deceased)  
White Plains, New York 20603

Sidney Feldshuh (deceased)  
47 Penn Blvd  
Scarsdale, NY 10583

Honorable Douglas F. Eaton  
 U.S. Magistrate Judge  
 U.S. District Court for the Southern District of New York  
 Daniel Patrick Moynihan United States Courthouse  
 500 Pearl St., Room 1360  
 New York, New York 10007  
 (212) 805-6175

5. *SafeCard Servs, Inc. v. Dow Jones & Co.*, 537 F. Supp. 1137 (E.D. Va. 1982), *aff'd*, 705 F.2d 445 (4th Cir. 1983), *cert. denied*, 464 U.S. 831 (1983).  
 U.S. District Court for the Eastern District of Virginia; Honorable Richard L. Williams

The plaintiff in this action claimed that Dow Jones and other defendants had conspired to lower the price of the stock and to promote the fortunes of its chief competitor through, *inter alia*, a series of articles in *Barron's*, all in violation of federal securities and antitrust laws. The case was essentially a libel claim brought as securities and antitrust claims. I was chief counsel for Dow Jones and its editors. Summary judgment was granted in favor of the Dow Jones defendants on the eve of trial. The case was significant in that plaintiff sought to avoid the burden of proof in a libel case by pursuing securities fraud and antitrust theories.

Opposing counsel:

Hugo L. Black, Jr.  
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 Two South Biscayne Boulevard  
 Miami, Florida 33131  
 (305) 358-5700

Counsel for codefendants:

David G. Fiske  
 Bankers Square, 100 N Pitt Street, Suite 206  
 Alexandria, Virginia 22314  
 (703) 518-9910

6. *Triad Financial Establishment v. Tumpane Co.*, 611 F. Supp. 157 (N.D.N.Y. 1985).  
 U.S. District Court for the Northern District of New York; Honorable Neal P. McCurn

The plaintiff in this action, an entity owned by Saudi arms merchant Adnan Khashoggi, sued for a commission based on alleged services rendered to assist the defendant in procuring a contract to supply arms-related services to the Saudi government. I was chief counsel for the defendant, took and supervised discovery, and argued the motion that resulted in partial summary judgment for the defendant. The case was settled shortly afterward. The case was significant in that it involved

some intricate choice-of-law issues and turned on an interpretation of a Saudi royal decree barring commission payments of the type by plaintiff.

Opposing counsel:

James D. St. Clair (deceased)  
Hale & Dorr  
Boston, Massachusetts 02109

Thomas M. O'Connor  
O'Connor, Carnathan and Mack, LLC  
30 Rowes Wharf, Suite 410  
Boston, Massachusetts 02110  
(781) 359-9000

7. *Gaeta v. New York News, Inc.*, 115 Misc. 2d 483, 454 N.Y.S.2d 179 (N.Y. Sup. Ct. 1982), *aff'd*, 95 A.D.2d 315, 466 N.Y.S.2d 321 (N.Y. App. Div. 1983), *rev'd*, 62 N.Y.2d 340, 465 N.E.2d 802 (1984).  
Court of Appeals, State of New York; Honorable Judith Kaye, Honorable Matthew Jasen, Honorable Theodore Jones, Honorable Sol Wachtler, Honorable Bernard Meyer and Honorable Richard Simons

This libel case arose from a *Daily News* article reporting the case history of a released mental patient. The article reported – falsely – that the patient had become insane after his son's suicide which was precipitated, in turn, by the extra-marital affairs of the patient's wife, who was the plaintiff. The Court of Appeals entered summary judgment for my clients, the *Daily News* and its reporter and editor, reversing the decisions below. The case clarified the applicability of standards governing summary judgment in libel cases arising from articles on matters of public concern.

Opposing counsel:

Frank C. McDermott  
188 Montague Street  
Brooklyn, New York 11201-3609  
(718) 858-3395

8. *Shapiro v. Ferrandina*, 352 F. Supp. 641 (S.D.N.Y. 1973), *aff'd*, 355 F. Supp. 563 (S.D.N.Y. 1973), *modified*, 478 F.2d 894 (2d Cir. 1973).  
Trial court: U.S. District Court for the Southern District of New York; Milton Pollack (deceased); Habeas corpus judge: Murray I. Gurfein (deceased)  
Appellate court: U.S. Court of Appeals for the Second Circuit; Honorable Henry Friendly (deceased), Honorable James Oakes, and Honorable Oscar Davis (of the U.S. Court of Claims, by designation) (deceased)

I represented the government of the United States, acting on behalf of the government of Israel in this extradition case. The case was tried initially before Judge Milton

Pollack, sitting as a committing magistrate. It was then appealed by habeas corpus to Judge Gurfein, and his denial of the writ was appealed to the Court of Appeals.

The case refined several principles of international extradition, including the principle of specialty that permits extradition by the asylum state to the demanding state solely for trial on specified offenses.

**Opposing counsel:**

Nathan Lewin  
Lewin & Lewin, L.L.P.  
1828 L Street NW, Suite 901  
Washington, DC 20036  
(202) 828-1000

9. *United States v. Carlin Communications, Inc.*, 815 F.2d 1367 (10th Cir. 1987)  
(argued on appeal by Harold R. Tyler, Jr.)  
Trial court: United States District Court for the District of Utah; Honorable Bruce S. Jenkins  
Appellate court: U.S. Court of Appeals for the Tenth Circuit; Honorable Bobby R. Baldock, Honorable Monroe McKay, and Honorable Wesley E. Brown (of the District of Kansas, by designation)

This was a criminal prosecution of Carlin Communications, which was operating a so-called "dial-a-porn" service in New York, for alleged interstate transportation of obscene materials. I represented the defendants, Carlin Communications, Inc. and two of its executives. I directed the strategy and legal research, drafted major portions of the papers, and gave the principal argument in support of the motion to dismiss the indictment for failure to charge a federal crime. In essence, the government had charged violation of three statutes that did not apply to the defendants' conduct; they had not violated the one statute that did apply to their conduct. The significance of the case lies in the principles of statutory construction it involved, notably the rule of lenity.

**Opposing counsel:**

Richard N. Lambert,  
Van Cott, Bagley, Cornwall & McCarthy  
50 South Main Street, Ste 1600  
P.O. Box 45340  
Salt Lake City, Utah 84144  
(801) 532-3333

**Counsel for co-defendants:**

Frank H. Wohl  
Lankler, Siffert & Wohl  
500 Fifth Ave  
33rd Floor

New York, New York 10110  
(212) 921-8399

John H. Weston  
Weston, Garrou & DeWitt  
Suite 900  
12121 W. Wilshire Blvd  
Los Angeles, California 90025-1176  
(310) 442-0072

Local counsel:

Stephen R. McCaughey  
McCaughey & Metos  
10 West Broadway Suite 650  
Salt Lake City, Utah 84101  
(801) 364-6474

Christine F. Soltis  
Utah Attorney General's Office, Appeals Division  
160 East 300 South, 6th Floor  
P. O. Box 140854  
Salt Lake City, Utah 84114-0854  
(801) 366-0180

10. *Matter of Roy M. Cohn*, 118 A.D.2d 15, 503 N.Y.S.2d 759 (N.Y. App. Div. 1986)  
Trial tribunal: Departmental Disciplinary Committee First Judicial Department;  
John L. Amabile, Andrew J. Connick, Donald Diamond, Charles J. Hynes, Eliot A.  
Lumbard, Dean George W. Shea, & Irwin Zlowe (deceased).  
Appellate court: Appellate Division, First Department; Honorable Leonard H.  
Sandler, Honorable Arnold L. Fein, Honorable J. Robert Lynch, Honorable Ernst H.  
Rosenberger and Honorable Betty Weinberg Ellerin

This was an attorney disciplinary proceeding in which I was co-lead counsel for the respondent, along with my partner, Harold R. Tyler, Jr. We both presented evidence by examination and cross-examination of witnesses, and argued to the panel. I was the principal author of the briefs. The case was tried intermittently over approximately nine months, from April through December 1984, with post-hearing submissions thereafter and a subsequent appeal to the Appellate Division, First Department. Three of the four charges were sustained by the hearing panel. On cross-appeals, the Appellate Division affirmed the findings sustaining three charges, and reversed the finding that failed to sustain the fourth. The respondent was disbarred. The case was protracted and complex, and notable for the kinds of problems that accompany representation of a highly visible and vocal client, including public disclosure of the proceeding before it reached the Appellate Division.

**Opposing counsel:**

Departmental Disciplinary Committee  
 41 Madison Avenue  
 New York, New York 10010  
 (212) 685-1000

Michael A. Gentile  
 The Chrysler Building  
 405 Lexington Avenue, 26th Floor  
 New York, New York 10174  
 (212) 907-6453

Sarah Diane McShea  
 260 Madison Avenue, 22nd Floor  
 New York, New York 10016  
 (212) 679-9090

Howard Benjamin  
 260 Madison Ave, 19th Floor  
 New York, New York 10016  
 (212) 832-3006

19. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. Please list any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As an Assistant United States Attorney, I was consistently in a position to determine whether charges should be brought and a prosecution pursued. As the Chief of the Official Corruption Unit, I had an integral role in determining whether or not to pursue investigations or bring charges in numerous cases, some of them high profile. Additionally, part of my job as an Assistant United States Attorney was to see that the law was uniformly enforced.

From 1976 until I became a United States District Judge, I represented several clients in connection with criminal or disciplinary investigations that ended without the initiation of litigation or the bringing of charges. Such representation consisted of ongoing contact with prosecutors or disciplinary authorities and, at times, the submission of detailed factual memoranda outlining why charges or litigation would be inappropriate.

In addition, in 1986 and 1987, I participated with my partner Harold R. Tyler, Jr., and two lawyers from another firm in preparing a report for the Metropolitan Transportation Authority dealing with the 1983 arrest and subsequent death of a young African-American man. Allegations of racially-motivated brutality had been made against the Transit Authority police involved, although a criminal trial of six of the officers had ended in acquittal on all charges. We interviewed all Transit Authority police patrol personnel and superior officers involved, conducted other investigatory activity, and submitted to the Transit Authority a 30-page report, later made public. I participated in all aspects of the investigation and preparation of the report, including witness depositions, legal research, and writing of the report.

While I was a United States District Judge, I participated in the Judicial Conference of the United States. The Judicial Conference serves to make policy with regard to the administration of the U.S. Courts, and serves to supervise the Director of the Administrative Office of the United States Courts. While I served on the Conference, it considered a number of resolutions relating to the management and operation of the federal courts, including a resolution calling for enhancements to judicial security in the wake of violent and highly-publicized assaults on state and federal judges and their families. The Judicial Conference Committee on Automation and Technology, on which I also served, developed and provided recommendations on specified subjects to the Judicial Conference. Overall, the Committee was responsible for updating the Long-Range Plan for Automation in the U.S. Courts and formulating recommendations on issues relating to, among other things, Internet access to judicial materials, and electronic docketing and case management, and using electronic interfaces to facilitate access to the courts by individuals with hearing impairment.

I also presided over numerous naturalization ceremonies during my time as a District Court Judge, and I took that opportunity to speak to new citizens about the importance of their achievement and the rights to which they were now entitled, particularly the right to vote. Similarly, I also swore in new attorneys on a fairly frequent basis. When swearing in the new attorneys, I would encourage them to do pro bono work, as doing so would help both the legal system and the attorneys themselves. Additionally, I served as a judge for numerous moot court competitions, at schools such as Fordham Law School and Brooklyn Law School. While I served as Chief Judge, I worked to ensure that the federal courthouse could host appropriate educational and civic activities, such as commemorating Dr. Martin Luther King, Jr.

Part of my role as Chief Judge included management of the Southern District of New York, one of the busiest and largest of the United States District Courts. The Southern District has averaged in recent years over 15,000 civil cases a year, has 28 active district court judges, and employs upwards of 750 people. As Chief Judge, I was involved in all facets of management, including the fiscal aspects of administering the court, resolution of personnel conflicts, space allocation, and security. My duties included ultimate responsibility for the designation of judges and assignment of cases, and I served as the chair of the court's assignment committee. Similarly, I determined who should be appointed to the approximately 20 committees within the court, which focus on issues

ranging from technology to criminal law. I presided over meetings of the court's Board of Judges, during which we discussed topics ranging from the appointment of magistrate judges to general policy issues. I also served as the court's liaison to bar associations.

During my tenure, the court transitioned to an electronic case filing system, which was a significant administrative challenge. Similarly, while I served as Chief Judge, the court began to install modernized technological courtrooms. I was ultimately responsible for ensuring that the court continued to run, even in the face of events such as the attacks of September 11, 2001, and a later blackout. I authorized the continuity of operations (COOP) plan that is still operative today. I was charged with managing another logistical and strategic challenge, namely the commencement of the comprehensive renovation of the Thurgood Marshall United States Courthouse.

Since my return to private practice, I have participated in efforts to establish a formal grievance committee within the United States Court of Appeals for the Second Circuit. I have also been a member of the Respect for Law Alliance, Inc., having joined in 2007. This non-profit association promotes respect for law and law enforcement through recognition at an annual banquet of achievements by law enforcement officers, an essay contest for students, and other activities including monthly breakfasts with featured speakers.

I have not performed any lobbying activities on behalf of any clients.

20. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, please provide four (4) copies to the committee.

From January 1993 through May 2007, I was a part-time Lecturer at Columbia School of Law. I taught trial advocacy.

I also taught a few classes of a seminar at Yale Law School.

I was also an instructor at an ALI-ABA Trial Practice Seminar in Philadelphia, PA, in October 1982. I do not have a syllabus or notes from that course and do not recall which part of the course I taught.

21. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

As a retired United States District Judge, I am entitled to payment of my full salary until my death.

Pursuant to my partnership agreement with Patterson, Belknap Webb & Tyler, I will receive payment for my capital account (approximately \$103,000) and shares of undistributed firm net income attributable to the period when I served as a partner. This will be made in five equal installments, completed by approximately September 2008.

22. **Outside Commitments During Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service in the position to which you have been nominated? If so, explain.

I have no such plans, commitments, or agreements.

23. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding \$500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Report.

24. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached Net Worth Statement.

25. **Potential Conflicts of Interest:**

- a. Identify any affiliations, pending litigation, financial arrangements, or other factors that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.
- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

In the event of a potential conflict of interest I would consult with the Department of Justice Ethics Official and would follow their guidance.

26. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in

serving the disadvantaged.” Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each. If you are not an attorney, please use this opportunity to report significant charitable and volunteer work you may have done.

While in private practice, I participated myself and have supervised others in representing Federal and state prisoners at the trial and appellate level, and in protecting the rights of such other litigants as discharged servicemen and a Social Security claimant. When an apparently deserving and indigent mental patient declined the services of publicly paid counsel and requested instead that private counsel represent him, I volunteered my own services and those of my firm to try to secure his placement in a less restricted facility and to protect his meager assets from seizure by the state.

In addition, I worked with associates at my firm to help relieve the burden on the New York City Corporation Counsel’s Office in civil cases and the New York County District Attorney’s Office in criminal cases by supervising those associates in pro bono civil trials and criminal appeals on behalf of those public offices.

Finally, prior to joining the bench, I worked to help formulate policies of the B’nai B’rith Anti-Defamation League, through its National Legal Affairs Committee. Although I have not always agreed with every position that the organization has adopted, I believe it is firmly committed to helping achieve equal justice for all citizens under the law.

As a United States District Judge, when I would swear in new attorneys, I would take the opportunity to encourage those attorneys to engage in pro bono representation, as it would benefit both the legal system and the attorneys themselves.

Since my return to private practice, I have advised an associate in my law firm regarding an asylum petition. In addition, I assisted in the development of a formal grievance committee in the United States Court of Appeals for the Second Circuit.

**Executive Branch Personnel PUBLIC FINANCIAL DISCLOSURE REPORT**

Form Approved  
OMB No. 3295-0001

5F 278 (Rev. 03/2004)  
U.S. Office of Government Ethics

Date of Appointment, Candidacy, Election or Nomination (Month, Day, Year)		Reporting Status (Check Appropriate Boxes)		Incumbent <input type="checkbox"/>		Calendar Year Covered by Report		New Entrant, Nominee, or Candidate <input checked="" type="checkbox"/>		Termination Date (If Applicable)		Termination Date (If Applicable)		<p><b>Fee for Late Filing:</b> Any late filing of this report and does so more than 30 days after the date the report is required to be filed, or, if an extension is granted, more than 30 days after the last day of the reporting period, shall be subject to a \$200 fee.</p> <p><b>Reporting Periods:</b> Incumbents: The reporting period is the preceding calendar year, except Part I, Schedule A, and Part II, Schedule D which are for the calendar year up to the date you file. Part II of Schedule D is not applicable. Termination Filers: The reporting period begins at the end of the period covered by your previous filing and ends at the date of termination. Part II of Schedule D is not applicable. Nominees, New Entrants and Candidates for President and Vice President: Schedule A—The reporting period for income (BLOCK C) is the preceding calendar year and the current calendar year up to the date you choose that is within 31 days of the date of filing. Schedule B—Not applicable. Schedule C, Part I (Liabilities)—The reporting period is the preceding calendar year and the current calendar year up to the date you choose that is within 31 days of the date of filing. Schedule C, Part II (Agreements or Arrangements)—Show any agreements or arrangements as of the date of filing. Schedule D—The reporting period is the preceding two calendar years and the current calendar year up to the date of filing.</p>
Reporting Individual's Name		Last Name		First Name and Middle Initial		Department or Agency (If Applicable)		Telephone No. (Include Area Code)		Telephone No. (Include Area Code)		Telephone No. (Include Area Code)		
Position for Which Filing		Title of Position		Attorney/General		Department of Justice		Telephone No. (Include Area Code)		Telephone No. (Include Area Code)		Telephone No. (Include Area Code)		
Location of Home Office (for forwarding address)		Address (Number, Street, City, State, and ZIP Code)		1433 Ave of the Americas NY 10006		Title of Position(s) and Date(s) Held		Name of Congressional Committee Considering Nomination		Do You Intend to Create a Qualified Divorced Trust?		Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		
Presidential Nominee Subject to Senate Confirmation		Signature of Reporting Individual		Date (Month, Day, Year)		Signature of Other Reviewer		Date (Month, Day, Year)		Signature of Designated Agency Ethics Official/Reviewing Official		Date (Month, Day, Year)		
Certification I CERTIFY that the statements I have made on this form and all attached schedules are true and correct to the best of my knowledge.		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		
Office of Government Ethics Use Only		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		
Comments of Reviewing Officials (If additional space is required, use the reverse side of this sheet)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		
Agency Use Only		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		Signature		Date (Month, Day, Year)		

Supersedes Prior Editions, Which Cannot Be Used.

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NSN 75-40-01-070-8444  
GPO: John A. Lewis printer: 1-21 (10/2004)





SE 279 Rev. 03/2000  
 5 CFR Part 2634  
 U.S. Office of Government Ethics

Reporting Individual's Name: \_\_\_\_\_ Page Number: 4 of 7

### SCHEDULE A continued (Use only if needed)

Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.

Assets and Income	BLOCK B Valuation of Assets at close of reporting period												BLOCK C Amount												Date (Mo, Day, Yr.) Only if Nonrecurring
	BLOCK E												BLOCK D												
	Type												Amount												
1 PBWT Money Purchase Plan Vanguard Star Fund (V)	None (or less than \$1,001)	\$1,001 - \$500,000	\$500,001 - \$100,000	\$100,001 - \$250,000	\$250,001 - \$500,000	\$500,001 - \$1,000,000	\$1,000,001 - \$5,000,000	\$5,000,001 - \$25,000,000	\$25,000,001 - \$50,000,000	Over \$50,000,000	None (or less than \$201)	\$201 - \$1,000	\$1,001 - \$2,500	\$2,501 - \$5,000	\$5,001 - \$15,000	\$15,001 - \$50,000	\$50,001 - \$100,000	\$100,001 - \$1,000,000	Over \$1,000,000	Over \$1,000,000	Over \$5,000,000				
2 PBWT Money Purchase Plan Total Stk Indx (V)	X										X														
3 PBWT 401K Vanguard 500 Indx Fund (V)	X										X														
4 PBWT 401K Vanguard Star Fund (V)	X										X														
5 PBWT 401K Vanguard Total Stock Indx Fund (V)	X										X														
6 (S) IRA Investment Co of America Fnd (AMF)		X																							
7 (S) IRA New Economy Fund (AMF)		X																							
8 (C) TIAA-CREF - annuity - value not readily ascertainable																						\$14,488,824			
9 (S) tuloping income																									

\* This category applies only if the asset/income is solely that of the filer or spouse or dependent children. If the asset/income is either that of the filer or jointly held by the filer with the spouse or dependent children, mark the other higher categories of value, as appropriate.

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SF 278 (Rev. 03/2005)  
 SCHEDULE A continued  
 U.S. Office of Government Ethics  
 Reporting Individual's Name: \_\_\_\_\_ Page Number: 5 of 11

**SCHEDULE A continued**  
 (Use only if needed)

**Assets and Income**  
 BLOCK A

**Valuation of Assets at Close of Reporting Period**  
 BLOCK E

**Income: type and amount. If "None (or less than \$201)" is checked, no other entry is needed in Block C for that item.**  
 BLOCK C

1	2	3	4	5	6	7	8	9	BLOCK C	
									Type	Amount
		None (or less than \$1,000)								
		\$1,001 - \$15,000								
		\$15,001 - \$50,000								
		\$50,001 - \$100,000								
		\$100,001 - \$250,000								
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**SCHEDULE C**

Page Number: **7** of **11**

Reporting Individual's Name: **Mokassy, Michael B.**

**Part I: Liabilities**  
 Report liabilities over \$10,000 owed to any one creditor at any time during the reporting period by you, your spouse, or dependent children. Check the highest amount owed during the reporting period. Exclude accounts:  
 None  a mortgage on your personal residence unless it is rented out; loans secured by automobiles, household furniture or appliances; and liabilities owed to certain relatives listed in instructions. See instructions for revolving charge accounts.

Examples	Creditor (Name and Address)	Type of Liability	Date Incurred	Interest Rate	Term if applicable	Category of Amount or Value (A)
1	First National Bank, Washington, DC 700 15th St. N.W., Washington, DC 20004	Mortgage on main property, 2130 14th St. N.W., Washington, DC 20004	1999	8%	21 yrs. from inception	\$10,001 - \$15,000
2						\$15,001 - \$50,000
3						\$50,001 - \$100,000
4						\$100,001 - \$500,000
5						\$500,001 - \$1,000,000
						\$1,000,001 - \$5,000,000
						\$5,000,001 - \$25,000,000
						\$25,000,001 - \$50,000,000
						\$50,000,001 - \$100,000,000
						\$100,000,001 - \$250,000,000
						\$250,000,001 - \$500,000,000
						\$500,000,001 - \$1,000,000,000

\*The reporting period for each of the liabilities is only that of the filer's spouse or dependent children. If the liability is that of the filer or a joint liability of the filer with the spouse or dependent children, mark the other applicable categories, as appropriate.

**Part II: Agreements or Arrangements**  
 Report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment. See instructions regarding the reporting of negotiations for any of these arrangements or benefits. None

Example	Status and Terms of any Agreement or Arrangement	Parties	Date
1	Pursuant to partnership agreement, will receive lump sum payment of capital account & partnership share at time of partner's withdrawal from partnership.	Doe, Jones & Smith, Hometown, State	7/85
2	Pursuant to partnership agreement, filer will receive payment for capital account and his shares of undistributed firm net income attributable to period he served as partner, made in 5 equal installments by approximately September, 2005 on date firm makes payments to partners.	PBWT, NY, NY	9/06
3	Filer will withdraw vested benefit funds from PBWT Defined Benefit Plan within 60 days of withdrawal from partnership.	PBWT, NY, NY	1/07
4	Filer will leave PBWT 401k funds and Money Purchase Plan funds in mutual funds (reported on Schedules A) with no further contributions made by filer on firm after filer's withdrawal from partnership.	PBWT, NY, NY	9/06

OMB/Audit Account version 1.04 (1/18/2004)  
 Peter R. Lehman Contact: 202-455-4144

52 CFR (Rev. 03/2000)  
 5 CFR Part 2634  
 U.S. Office of Government Ethics

Reporting Individual's Name  
**Mulkerey, Michael B.**

Page Number **3** of **11**

**SCHEDULE D**

**Part I: Positions Held Outside U.S. Government**

Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Examples	Net's Name or Last Name, NY	Organization (Name and Address)	Type of Organization	Position Held	From (Mo., Yr.)	To (Mo., Yr.)
1	Do Jones & Smith, Newtown, State	Do Jones & Smith, Newtown, State	Nonprofit education Law firm	President Partner	7/83	Present
2	Richardson Bookshop, Webb & Tyler		Joint Firm	Partner	09/2005	Present
3						
4						
5						
6						

**Part II: Compensation in Excess of \$5,000 Paid by One Source**

Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other source.

Examples	Source (Name and Address)	Legal Services	Other Description of Duties
1	Do Jones & Smith, Newtown, State Metro University (Client of Do Jones & Smith), Newtown, State	Legal services in connection with university construction	
2	Miss. Theodora L. Onalide, NY, NY	Legal Services	
3	Dennis J. Buckley, Liquidating Trust of DVI, Inc., NY, NY	Legal Services	
4	US Bank National Association Title XI Capital Association Inc, Chicago IL	Legal Services	
5	Nomura Credit + Capital Inc, and Harris Nesbitt Corp, Wilmington DE	Legal Services	
6	Herve Gournaige Newark NJ Estate of Douglas Hancock, Honeyswell Int, Inc, Exquisite Svcs, NNY, Phil PA	Legal Services	

Do not complete this part if you are an incumbent, termination filer, or Vice Presidential or Presidential Candidate. You need not report the U.S. Government as a source.

Prior Editions Cannot Be Used.

03/07/06/06, Amended version 1.0.3 (1/18/2004)



SE 278 (Rev. 03/07/00)  
 SFER, Part 2684  
 U.S. Office of Government Ethics

Page Number: 10 of 11

### SCHEDULE D

Reporting Individual's Name

**Part I: Positions Held Outside U.S. Government**  
 Report any positions held during the applicable reporting period, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

Examples	Part I: Name of Individual (Name and Address)	Type of Organization	Position Held	From (Mo./Yr.)	To (Mo./Yr.)
1	Doj Jones & Smith, Haverwood, NY	Nonprofit education	President	6/92	Present
2	Doj Jones & Smith, Haverwood, NY	Law firm	Partner	7/85	1/00
3					
4					
5					
6					

**Part II: Compensation in Excess of \$5,000 Paid by One Source**  
 Report sources of more than \$5,000 compensation received by you or your business affiliation for services provided directly by you during any one year of the reporting period. This includes the names of clients and customers of any corporation, firm, partnership, or other business enterprise, or any other source. (Name and Address)

Examples	Source (Name and Address)	Best Description of Duties
1	Doj Jones & Smith, Haverwood, NY	Legislatures
2	Peter University (Client of Doj Jones & Smith), Minneapolis, MN	Legal services in connection with university construction
3	Shaw Realty & Dev Co. LLC, NY, NY	Legal Services
4	Sahaly's Inc., NY, NY	Legal Services
5	Taiwan Telecom Inc./Sprint Products Group, NY, NY	Legal Services
6	Village Voice Media/Wash USA Inc., NY, NY, Los Angeles, CA	Legal Services
7	Winston & Strawn LLP, Chicago, IL	Legal Services
8	FBWA/AT	Legal Services

Do not complete this part if you are an incumbent, former, or Vice Presidential or Presidential Candidate. You need not report the U.S. Government as a source.

None

Prior Editions Cannot Be Used.

CGE/Adm. Amdt. ver. 11.2 (10/2004)



**FINANCIAL STATEMENT**  
**NET WORTH**

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		78	702	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		693	000
Real estate owned-add schedule	2	500	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		150	000				
Cash value-life insurance							
Other assets itemize:							
PBWT capital account		103	514				
Mutual Funds - Franklin /Templeton IRA		447	290				
IRA Accounts - American Funds		871	374	Total liabilities		693	000
Money purchase and 401(k) mutual funds - Patterson Belknap		124	015	Net Worth	3	581	895
Total Assets	4	274	895	Total liabilities and net worth	4	274	895
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

**FINANCIAL STATEMENT**

**NET WORTH SCHEDULES**

Real Estate Owned

Personal residence

\$ 2,500,500

Real Estate Mortgages Payable

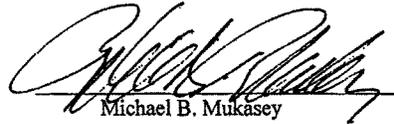
Personal residence

\$ 693,000

AFFIDAVIT

I, Michael B. Mukasey, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

October 2, 2007  
(DATE)

  
Michael B. Mukasey

Carmen Maria Acosta  
(NOTARY)

CARMEN MARIA ACOSTA  
Notary Public, State of New York  
No. 03-433847  
Qualified in Bronx County  
Certificate Filed in New York County  
Commission Expires Aug. 31, 2010

APPENDIX A

**14b. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature of the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number (if not reported).**

*I. United States v. Rahman:* I presided over the nine-month jury trial of ten defendants (including Omar Abdel Rahman—the “Blind Sheik”) accused of seditious conspiracy and other offenses related to a terrorist plot to bomb New York City landmarks, including the World Trade Center. The defendants were convicted in 1996, and I issued sentences ranging from 25 years to life imprisonment. These cases resulted in several published decisions, including: 861 F. Supp. 247 (holding that government surveillance complied with FISA); 870 F. Supp. 47 (ordering the government to disclose a limited amount of confidential information); 854 F. Supp. 254 (denying the defendants’ motion to be tried separately); 837 F. Supp. 64 (disqualifying the Kunstler & Kuby firm from representing multiple defendants in the case); 861 F. Supp. 266 (disqualifying that firm from representing its lone remaining defendant-client); 876 F. Supp. 495 (affirming a search of one of the defendants on inevitable-discovery grounds); and 844 F. Supp. 955 (denying a recusal motion based upon my alleged political opinions and religious beliefs).

Government’s counsel:

Patrick J. Fitzgerald (for the United States)  
 United States Attorney for the  
 Northern District of Illinois  
 219 South Dearborn Street  
 Chicago, Illinois 60604  
 (312) 353-5300

Defendants’ counsel:

Emmanuel A. Moore (for Abdel Rahman)  
 125-10 Queens Blvd, Ste 320  
 Kew Gardens, New York 11415  
 (718) 793-5535

Ronald L. Kuby (for Siddig Ali)  
 740 Broadway, 5th Fl  
 New York, New York 10003-9518  
 (212) 529-0223

Kenneth D. Wasserman (for Hampton-El)  
 401 Broadway, Suite 1101  
 New York, New York 10013-3005  
 (212) 966-9742

Wesley M. Serra (for Alvarez)  
 Irom, Wittels, Freund, Berne & Serra, P.C.  
 349 East 149th Street  
 Bronx, New York 10451-5603  
 (718) 665-0220

**2. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003):** In this habeas case involving now-convicted terror suspect Jose Padilla, who sought to be freed from detention by the Department of Defense as an enemy combatant, I ruled that the President had authority to detain, as “enemy combatants,” citizens captured in the United States during a time of war. In addition, I ruled that Padilla had the right to controvert alleged facts and should have monitored access to counsel.

Petitioner’s counsel:

Donna R. Newman (for Padilla)  
 445 Park Ave, 14th Fl.  
 New York, New York 10022  
 (212) 229-1516

Andrew G. Patel (for Padilla)  
 111 Broadway, Suite 1305  
 New York, New York 10006  
 (212) 396-0230

Respondent’s counsel:

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 Lockheed Martin  
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Eric B. Bruce (for the United States)  
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 (212) 637-2200

**3. *SR Int’l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, No. 01 Civ. 9291(MBM) (S.D.N.Y.):** Following the 2001 World Trade Center attack, Larry Silverstein, the buildings’ leaseholder, sought to recover billions of dollars in insurance payments from insurers and Lloyd’s-of-London syndicates. At issue was whether the two-plane attack on the World Trade Center constituted one or two “occurrences” for insurance purposes. I presided over a two-phase jury trial addressing that question. The jury found that the contracts between Silverstein and nine of the insurers and all 20 of the Lloyd’s syndicates treated the attacks as one occurrence, while the agreements with nine other

insurance companies treated the attack as two occurrences. I declined to find Silverstein in contempt for making public statements in violation of a court order because a contempt order would ultimately be more prejudicial to the fairness of the proceedings than Silverstein's public statements.

Plaintiffs' counsel:

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Defendants' counsel:

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Milton H. Pachter (for Port Authority of New York and New Jersey)  
Office of Senior Litigation Counsel  
225 Park Ave S  
New York, New York 10003  
(212) 435-3507

**4. *In re Assicurazioni Generali s.p.a. Holocaust Insur. Litig.*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004):** I dismissed this suit against an Italian insurer brought by policy beneficiaries and surviving family members of Holocaust victims on the ground that the plaintiffs' legal claims conflicted with the diplomatic policy favored by the President, which was to resolve Holocaust insurance claims through an international tribunal established exclusively for that purpose.

Plaintiffs' counsel:

Robert Swift (for Cornell and Smetana plaintiffs)  
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Defendant's counsel:

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Marco E. Schnabl (for Assicurazioni Generali S.p.A.)  
 Skadden, Arps, Slate, Meagher & Flom, LLP & Affiliates  
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 New York, New York 10036  
 (212) 735-2312

**5. *United States v. Cuff*, 38 F. Supp. 2d 282 (S.D.N.Y. 1999); *Heatley v. United States*, 00 CIV 4313(MBM), 2002 WL 1836753 (S.D.N.Y. 2002):** The "Preacher Crew" was a notoriously violent drug gang that operated in New York City. In 1996, a federal grand jury returned federal racketeering charges against members of the crew, and I presided over the proceedings against them. Before trial, the United States signaled its intention to seek the death penalty against Clarence Heatley (the "Preacher") and John Cuff for murders connected to the racketeering enterprise. Both men then entered guilty pleas, and I sentenced them to life in prison. They subsequently filed habeas petitions challenging their convictions and sentences, which I denied.

Petitioner's counsel:

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 (973) 324-1011

Irving Cohen (for Cuff)  
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Respondent's counsel:

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Sharon McCarthy (for the United States)  
 Kostelanetz & Fink, LLP  
 530 Fifth Avenue, 22d Floor  
 New York, New York 10036  
 (212) 808-8100

**6. *United States v. Lindauer*, 448 F. Supp. 2d 558 (S.D.N.Y. 2006):** I denied a government motion requesting that the court compel a defendant to take psychotropic drugs for the purpose of rendering her competent to stand trial. The defendant, a woman accused of acting as an agent of the Iraqi government, had been found incompetent to stand trial due to delusions of grandiosity and paranoia.

Government's counsel:

Michael J. Garcia (for the United States)  
 United States Attorney for the  
 Southern District of New York

Edward O'Callaghan (for the United States)  
 Assistant U.S. Attorney  
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Defendant's counsel:

Sanford Talkin (for Lindauer)  
 Talkin, Muccigrosso & Roberts L.L.P.  
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 New York, New York 10007  
 (212) 482-000

**7. *Antidote Int'l Films v. Motion Picture Assoc. of Am.*, No. 03 Civ. 9373 (Dec. 5, 2003):** In this case, I preliminarily enjoined the Motion Picture Association of America (MPAA) from enforcing a ban on the distribution of new movies to critics and awards groups. The MPAA instituted the ban to combat movie piracy resulting from the distribution of films prior to release. I found that the plaintiffs had provided enough evidence—for purposes of the injunction—showing that the MPAA's ban violated federal antitrust law and that plaintiffs had demonstrated sufficiently probable economic harm resulting from the ban.

Plaintiff's counsel:

Gregory L. Curtner (for Antidote)  
 1450 Broadway, 41st Floor  
 New York, New York 10018  
 (212) 704-4400

Defendant's counsel:

Richard M. Cooper (for MPAA)  
 Williams & Connolly  
 725 12th Street, N.W.  
 Washington, DC 20005  
 (202) 434-5466

**8. *United States v. Cheng Chui Ping*, 1:94-mj-02577-UA (S.D.N.Y.):** Cheng Chui Ping had a long career smuggling Chinese immigrants into the United States. She financed the trip of the Golden Venture, a ship carrying approximately 300 Chinese nationals that ran aground off the shore of New York, leading to the death of ten individuals who attempted to swim ashore. She was charged with immigrant smuggling, money laundering, and trafficking in kidnapping proceeds. The jury found her guilty after a trial over which I presided, and I sentenced her to 35 years in prison.

Government's counsel:

Tai Hyun Park (for the United States)  
 Shearman & Sterling LLP  
 599 Lexington Avenue  
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 (212) 848-5364

Defendants' counsel:

Stephen Goldenberg (for defendants)  
 225 Broadway, No. 1610  
 New York, New York 10007  
 (212) 346-0600

Joel Michael Cohen (for defendants)  
 Clifford Chance US, LLP  
 31 West 52nd Street  
 New York, New York 10019  
 (212) 878-3215

**9. *United States of America v. Riggi*, No. 00 Cr. 1118 (S.D.N.Y.) :** In 2000, a federal grand jury indicted members of the Decavalcante Organized Crime Family of La Cosa Nostra. The indictment charged the family members with racketeering arising out of murders and conspiracies to murder, extort, engage in loan-sharking and commit securities fraud. I presided over the proceedings against the men, which included several jury trials. The alleged boss of the family, John Riggi, pleaded guilty to a murder charge, and I sentenced him to ten years in prison. One jury trial resulted in guilty verdicts against three family members and a police officer for their roles in a 1998 racketeering-related murder. I sentenced one of the men to life in prison and the police officer to 12 years for being an accessory after-the-fact. Another seven-week jury trial of three high-ranking family members led to racketeering convictions, and I imposed a life sentence on one of the men.

Government's counsel:

John M. Hillebrecht (for the United States)  
Assistant U.S. Attorney

Lisa P. Korologos  
Assistant U.S. Attorney  
Southern District of New York  
One Saint Andrew's Plaza  
New York, New York 10007  
(212) 637-2262

Defendant's counsel:

Paul Brennan (for Riggi)  
401 Broadway, Suite 306  
New York, New York 10013  
(212) 925-8640

**10. *United States v. Henderson, et al.*, CR No. 1:02-CR-00451-MBM-ALL (S.D.N.Y.):**

I presided over the initial proceedings involving two defendants who faced the death penalty for their alleged involvement in a triple-murder that involved torture of the victims. Notably, I revoked Becton's bail and ordered him detained awaiting trial. After I departed the bench, the case was assigned to Judge Owen. Becton pleaded guilty, but has not yet been sentenced; Darryl Henderson was convicted by a jury on some, but not all, counts and was sentenced to life imprisonment.

Government's counsel:

(As of May 31, 2007)  
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Defendants' counsel:

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Talkin, Muccigrosso & Roberts  
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100 Lafayette Street, Suite 501  
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**APPENDIX B**

14c. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.

1. *United States v. Lindauer*, 448 F. Supp. 2d 558 (S.D.N.Y. 2006)

Government's counsel:

Michael J. Garcia (for the United States)  
United States Attorney for the  
Southern District of New York

Edward C. O'Callaghan  
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Defendant's counsel:

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2. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litigation*, 340 F. Supp. 2d 494 (S.D.N.Y. 2004)

Plaintiffs' counsel:

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Rene L. Siemens  
Stephen N. Goldberg  
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**3. *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003)**

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Eric B. Bruce (for the United States)  
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**4. *In re the Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287 (S.D.N.Y. 2002)**

Witness's counsel:

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**5. *Tommy Hilfiger Licensing, Inc. v. Nature Labs, L.L.C.*, 221 F. Supp. 2d 410 (S.D.N.Y. 2002)**

Plaintiff's counsel:

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Adam D. Cole (for Nature Labs)  
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200 Park Avenue  
New York, New York 10166  
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**6. *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997)**

Plaintiff's counsel:

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Carol N. Lambos

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Defendants' counsel:

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**7. *In re Chateaugay Corp.*, 193 B.R. 669 (S.D.N.Y. 1996)**

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David Reis (for Flowline Corporation)  
 Thorp, Reed & Armstrong  
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**8. *United States v. El-Gabrowny*, 876 F. Supp. 495 (S.D.N.Y. 1994)**

Government's counsel:

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 (212) 529-0223

William M. Kunstler (deceased) (for El-Gabrowny)  
 New York, New York

**9. *First Nationwide Bank v. Gelt Funding Corp.*, 820 F. Supp. 89 (S.D.N.Y. 1993)**

Plaintiffs' counsel:

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Defendants' counsel:

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Robin Feingold Singer (New Heights LP, Temple Apt. Mgmt. Corp, & Crown  
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Sheldon Rudoff (for Malek, Rebenwurz, Adar Two Realty, 730 Realty Assoc.,  
740 Realty Associates, and 2344 Davidson Assoc.)  
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Meir Rosenfeld (for Wolf)  
Rosenfeld & Maidenbaum  
132 Spruce Street  
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(516) 295-5405

**10. *United States v. Mendez*, 691 F. Supp. 656 (S.D.N.Y. 1988)**

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Defense counsel:

Ruth Chamberlin (for Mendez)  
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(no known current address)

APPENDIX C

**14d. Provide a brief summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings**

**1. *Tomassi v. Insignia Finan. Group, Inc.*, 478 F.3d 111 (2d Cir. 2007), *rev'g* 398 F. Supp. 2d 263 (S.D.N.Y. 2005):** In this age-discrimination case, I granted summary judgment to the defendants, concluding that there was insufficient evidence to support a reasonable finding that the plaintiff was fired on account of her age. Specifically, I determined that a handful of remarks made by the plaintiff's supervisor were "stray remarks" that, under prior Second Circuit precedent, were not sufficient to support age-discrimination claims. The Second Circuit disagreed with this conclusion. Noting that its "precedents may have been somewhat confusing," on the nature of such "stray" remarks and their impact on age-discrimination claims, the Second Circuit clarified that it "did not mean to suggest that remarks should first be characterized either as stray or not stray and then disregarded if they fall into the stray category."

**2. *Banker v. Esperanza Health Sys., Ltd.*, No. 06-0603, 2006 WL 2853045 (2d Cir. Sept. 29, 2006), *rev'g in part* No. 05-4115, 2005 WL 3077513 (S.D.N.Y. Nov. 17, 2005):** In this case involving an attorney seeking fees from his former clients, I held that the court lacked personal jurisdiction over both the individual and the corporate defendants. The Second Circuit affirmed my ruling as to the individual defendants but held that sufficient facts had been pleaded to create a prima facie case of jurisdiction over the corporate defendants and therefore reversed my dismissal of the claims against them.

**3. *Blakely v. Wells*, No. 05-4846, 2006 WL 3770840 (2d Cir. Dec. 13, 2006) *rev'g sub nom Martin Luther King Jr. High Sch. Parents v. New York City Dep't of Education*, 2004 WL 1656598 (S.D.N.Y. July 23, 2004):** In this case involving claims of violations of various federal and state laws against numerous state agencies and officials involved in the oversight of a junior high school, I dismissed the plaintiffs' second amended complaint with prejudice for failure to comply with Federal Rule of Civil Procedure 8(a), which requires a complaint to contain a "short and plain" statement of the claim showing entitlement to relief. The Second Circuit agreed with my decision to dismiss the second amendment complaint, as it spanned 57 pages, contained 597 numbered paragraphs and, in the words of the Second Circuit, "was far from short or plain." Nevertheless, the Second Circuit held that the complaint should have been dismissed without prejudice because the plaintiffs filed the second amended complaint without notice of the defects in their first amended complaint and were not on notice that the second amended complaint would be dismissed with prejudice if those defects were not corrected.

**4. *Shechet v. Abby Favali Corp. Counsel NYC*, No. 05-5022, 2006 WL 1308656 (2d Cir. May 9, 2006), *rev'g* No. 05-05742 (S.D.N.Y. June 22, 2005):** I dismissed the plaintiff's civil rights claim, holding that it was barred by res judicata because it arose out of the same "transaction or occurrence" as a prior case filed in the Eastern District of New York, which had been dismissed for lack of jurisdiction. The Second Circuit

reversed, holding that res judicata was inapplicable when a prior case was dismissed for lack of jurisdiction, and it remanded the case for my reconsideration in light of a recent Supreme Court decision.

**5. *Christie v. Hollins*, 409 F.3d 120 (2d Cir. 2005), rev'g No. 01-11605, 2003 WL 22299216 (S.D.N.Y. Oct. 7, 2003):** In this habeas case, the petitioner sought relief based on the exclusion of a defense witness's prior testimony. I denied the petition, agreeing with the Magistrate Judge that the question was a close one but ultimately holding that it was not unreasonable for the state courts to conclude that the witness was not "unavailable" and that her testimony would not have affected the verdict. I granted a certificate of appealability to petitioner to seek further resolution of her claim in the Second Circuit. The Second Circuit held that in spite of the "conscientiousness of the state courts that have sustained Christie's conviction" and the "due regard to the careful consideration given by the District Court," it was "fully persuaded that this case presents that unusual instance" where the state courts had denied the plaintiff the right to present a defense and had therefore unreasonably applied federal law.

**6. *Konits v. Valley Stream Ctr. High Sch. Dist.*, 394 F.3d 121 (2d Cir. 2005), overruling *Nonnenmann v. City of New York*, 174 F. Supp. 2d 121 (S.D.N.Y. 2001):** In *Nonnenmann*, I had held that alleged retaliation based on an individual's identification as a witness in a fellow employee's discrimination suit could not give rise to a First Amendment cause of action. An intra-court split arose in 2002, when another judge in the Southern District held that such alleged retaliation could give rise to a First Amendment cause of action. The Second Circuit resolved this split in *Konits*, holding that such alleged retaliation could, in fact, give rise to a First Amendment cause of action and explicitly overruled *Nonnenmann* to the extent it held otherwise.

**7. *Jacobs v. Ramirez*, 400 F.3d 105 (2d Cir. 2005), rev'g in part No. 02-CV-2282 (S.D.N.Y. Mar. 22, 2002):** The plaintiff filed a 42 U.S.C. § 1983 action against parole officers claiming, among other things, that his civil rights were violated when he was paroled to his mother's house, which was unsafe and unsanitary. I dismissed his action for failure to state a claim. The Second Circuit reversed as to this claim, noting that, although the plaintiff chose to be paroled at his mother's home, he also alleged that the parole authorities "compelled" him to live in the unsafe conditions. Accordingly, the Second Circuit determined that it could not conclude "beyond doubt" that the plaintiff could prove no set of facts that would entitle him to relief.

**8. *Robinson v. New York City Hous. Auth.*, No. 02-9188, 2004 WL 2889916 (2d Cir. Dec. 15, 2004), rev'g No. 02-6508 (S.D.N.Y. Aug. 15, 2002):** I dismissed the plaintiff's complaint for failure to state a claim. The Second Circuit affirmed my dismissal of the plaintiff's injunctive or declaratory relief claims under *Younger*, but it remanded for my consideration whether *Rooker/Feldman* or other doctrines barred the remainder of the plaintiff's claims.

**9. *Murray v. New York City*, Nos. 02-0194, 02-0197, 2004 WL 2030233 (2d Cir. Sept. 13, 2004), rev'g Nos. 02-3350, 02-3351 (S.D.N.Y. May 1, 2002):** I dismissed the

plaintiff's 42 U.S.C. § 1983 claims for failure to state a claim. On appeal, the plaintiff asserted that I did not address his excessive force claim. The Second Circuit noted that the facts in the plaintiff's complaint did not "appear to rise to a claim of excessive force against [the officer]; however, it is possible, if unlikely, that [the plaintiff] could amend his claim to assert a colorable claim of excessive force." Accordingly, the Second Circuit vacated and remanded to allow the plaintiff to amend his complaint.

**10. *B. Lewis Prods., Inc. v. Angelou*, Nos. 03-7864, 03-7922, 2004 WL 1147071 (2d Cir. May 21, 2004) vacating in part No. 01-0530, 2003 WL 21709465 (S.D.N.Y. July 23, 2003):** In this case involving a dispute over the right to market certain goods related to the poet Maya Angelou's work, I granted summary judgment to the defendants, holding that the letter agreement between the parties lacked certain terms necessary to create a joint venture or an exclusive agency agreement under either New York or North Carolina law. The Second Circuit agreed with my interpretation of the law but remanded for a determination as to whether the letter agreement formed a contract other than a formal joint venture or exclusive agency agreement, an argument not raised by the parties initially.

**11. *Jones v. Kelly*, 378 F.3d 198 (2d Cir. 2004), rev'g No. 99-1203 (S.D.N.Y. Jan. 6, 2004):** After *Krimstock*, *infra*, was remanded to my court, I worked with the parties to craft an order establishing a "hearing for vehicles seized as arrest evidence or as an instrumentality of a crime." Both parties provided comments to my draft order. The City expressed concern about including "arrest evidence" in the order, since *Krimstock* concerned only vehicles seized as an instrumentality of a crime. The City appealed the final order. The Second Circuit vacated the part of my order that related to cars held as arrest evidence, noting that they did not vacate the order for "flawed legal reasoning, as to which we take no position, but because it is premised on assumptions and conclusions that have not been tested in a hearing."

**12. *U.S. v. Jacques*, 321 F.3d 255 (2d Cir. 2003), rev'g No. 01-167 (S.D.N.Y. June 25, 2001):** The defendant pleaded guilty to Social Security fraud but appealed the restitution order that I imposed. Finding the record unclear, the Second Circuit vacated the sentence and remanded the case for a determination as to the defendant's ability to pay restitution.

**13. *Padilla v. Rumsfeld*, 352 F.2d 695 (2d Cir. 2003), rev'g 243 F.Supp.2d 42 (S.D.N.Y. 2003), 243 F. Supp.2d 564 (S.D.N.Y. 2002), later rev'd by 542 U.S. 426 (2004):** In this habeas case involving now-convicted terror suspect Jose Padilla, who sought to be freed from detention by the Department of Defense as an enemy combatant, I held that, among other things, Secretary of Defense Donald Rumsfeld was a proper respondent, that jurisdiction was proper in the Southern District of New York, that the Constitution and statutes provided the President with the authority to detain Padilla as an enemy combatant, and that Padilla was entitled to consult with counsel and present facts and argument to rebut the government's determination that he was an enemy combatant. The Second Circuit agreed with my determinations with respect to Secretary Rumsfeld and jurisdiction, but held that the Authorization for the Use of Military Force enacted by Congress following the attacks of September 11th, 2001, did not confer authority upon

the President to detain Padilla as an enemy combatant. The Supreme Court, in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), reversed the holdings that Secretary Rumsfeld was the proper respondent and that jurisdiction was proper in the Southern District of New York and did not reach the question as to the President's authority to detain Padilla. The Court held that the proper respondent was Commander Melanie Marr, the commander of the naval brig in Charleston, South Carolina, where Padilla was being held and that jurisdiction was proper only in the District of South Carolina.

**14. *Seabury Const. Corp. v. Jeffrey Chain Corp.*, 289 F.3d 63 (2d Cir. 2002), rev'g No. 98-5941 (S.D.N.Y. May 7, 2001):** The plaintiff in this case sued for breach of contract arising from failures in an industrial collector chain. Dismissing plaintiff's suit, I concluded that defendant's compliance with a required testing protocol trumped otherwise applicable contract specifications. The Second Circuit reversed, holding that the terms of the purchase order did not override either the hardness requirements or performance assurances specified in the contract. The Second Circuit remanded with instructions to enter judgment in favor of the plaintiff and to determine damages.

**15. *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21 (2d Cir. 2002), rev'g 49 F. Supp. 2d 629 (S.D.N.Y. 1999):** In this securities fraud case brought principally by American investors in a Canadian company, the Judicial Panel on Multidistrict Litigation transferred all of the actions, over the objections of several plaintiffs, to the Southern District of New York. I dismissed the actions under the doctrine of *forum non conveniens*, holding that the case was best litigated in Canada. The Second Circuit ultimately reversed this dismissal in two related appeals after reconsidering the controlling Supreme Court precedent in an *en banc* rehearing of another case.

**16. *Rodriguez v. Bennett*, 303 F.3d 435 (2d Cir. 2002) remanding No. 00-401, 2001 WL 682446 (S.D.N.Y. June 18, 2001):** In this habeas case, I initially determined that the petitioner's second habeas petition was timely based on then-controlling circuit precedent because the period for filing the petition was tolled during the pendency of the initial federal habeas petition, as well as the pendency of the petitioner's state petition for a writ of *coram nobis*. Nevertheless, the same day that I issued my initial decision, the Supreme Court released *Duncan v. Walker*, 533 U.S. 167 (2001), which did not permit tolling during the pendency of a federal petition. As a result, I revised my ruling, determined that tolling was not appropriate during the pendency of the initial federal petition, and held, as a result, that the second federal petition was untimely. The Second Circuit agreed with my interpretation of the law, but remanded for a determination as to whether equitable tolling might be available to the petitioner.

**17. *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), rev'g *Krimstock v. Safir*, No. 99-12041, 2000 WL 1702035 (S.D.N.Y. 2000):** The plaintiffs challenged the constitutionality of the New York City statute that authorized the city to seize cars, prior to a forfeiture proceeding, if the car could be considered an instrumentality of certain crimes. I applied the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to ascertain the level of procedural safeguards required by the Fourteenth Amendment. I held that the "plaintiffs' due process right to a meaningful hearing at a

meaningful time does not require the additional safeguard of a probable cause hearing.” Specifically, I held that plaintiffs’ interests were adequately protected by a probable cause arrest and the eventual forfeiture proceeding and I dismissed the constitutional claim. The Second Circuit reversed and, after balancing the *Eldridge* factors, found that the Fourteenth Amendment required that the “plaintiffs be afforded a prompt post-seizure, pre-judgment hearing before a neutral judicial or administrative officer to determine whether the City [was] likely to succeed on the merits of the forfeiture action” and if a shorter retention of the car could “satisfy the City’s need to preserve it from destruction or sale during the pendency of the proceedings.”

**18. *Building Trades Employers’ Educ. Ass’n v. McGowan*, 311 F.3d 501 (2d Cir. 2002), rev’g No. 98-4998, 2001 WL 682740 (S.D.N.Y. June 18, 2001).** This case presented the issue of the impact of federal labor law preemption on the regulatory activities of a state agency. Plaintiffs sought to compel the NY State Labor Department to interpret and comply with one of its own regulations. The Department, in turn, concluded that federal labor law preempted any action on the regulation and refused the plaintiffs’ request. I granted summary judgment for the Department. The Second Circuit reversed, however, holding that federal labor law required the Department to act.

**19. *Schonfeld v. Hilliard*, 218 F.3d 164 (2d Cir. 2000), rev’g in part 62 F. Supp. 2d 1062 (S.D.N.Y. 1999):** In this case involving allegations of fraud, breach of contract, and breach of fiduciary duties, I granted summary judgment in favor of the defendants on all but the fraud claim, holding that the plaintiff could not prove the existence or amount of damages for lost profits or lost asset damages, excluding testimony as irrelevant, and holding that that plaintiff was not entitled to punitive damages. The Second Circuit agreed with my ruling as to the plaintiff’s claim for lost profits and punitive damages. Nevertheless, the Second Circuit held that claims for lost asset damages could be distinguished from lost profit damages, that the value of such assets could be shown with reasonable certainty, and that expert testimony could be provided with respect to such claims.

**20. *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), overruling *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884 (S.D.N.Y. 1998), rev’d by 534 U.S. 516 (2002):** In *Beeson*, I held that the exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA) applied to claims brought by inmates alleging assault or excessive force because such claims fell within the meaning of “prison conditions” in the statute. My view accorded with the position adopted by some judges in the Southern District of New York, as well as the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Sixth Circuit. Nevertheless, other district judges in the Southern District of New York and the District of Connecticut took a different view, holding that the PLRA’s exhaustion requirement did not apply to such claims. The Second Circuit agreed with the latter position and overruled my decision in *Beeson*. The Supreme Court subsequently overruled the Second Circuit’s interpretation in *Porter v. Nussle*, 534 U.S. 516 (2002), holding that the PLRA’s exhaustion requirement applied to all inmate claims about prison life.

**21. *Jordan v. Lefevre*, 206 F.3d 196 (2d Cir. 2000), *rev'g in part* 22 F. Supp. 2d 259 (S.D.N.Y. 1998):** In this habeas case, the petitioner argued that the state trial court that convicted him of stabbing an acquaintance to death did not properly handle the analysis of his claim that the state prosecutor had improperly used race as a basis for striking jurors in violation of *Batson v. Kentucky*, 276 U.S. 79 (1986). I held that the state trial court had met the requirements of *Batson* in relying on the race neutral reasons for the peremptory challenges provided by the state prosecutor. The Second Circuit held that, under *Batson*, the state trial court should have independently assessed the credibility of the prosecutor's race neutral reasons to determine the prosecutor's actual intent in striking jurors. As a result, the Second Circuit reversed and remanded for a finding as to the state prosecutor's state of mind during the pre-trial proceedings.

**22. *Consolidated Edison Co. of New York v. United States*, 221 F.3d 364 (2d Cir. 2000) *rev'g* 34 F. Supp. 2d 160 (S.D.N.Y. 1998):** In this case involving ConEd's use of untaxed fuel for taxable purposes, I granted summary judgment for the United States because ConEd had reason to know that the fuel was untaxed and there were no disputed issues of material fact as to ConEd's reason to know. The Second Circuit reversed, holding that there was a disputed issue of material fact as to what a reasonable taxpayer would have known from the examination of the ticket accompanying the fuel shipment to ConEd.

**23. *Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000), *rev'g* 11 F. Supp. 2d 299 (S.D.N.Y. 1998):** In this habeas case, petitioner argued that he was denied the right to effective assistance of counsel at trial because he failed to seek a new trial when the prosecution failed to hand over the prior statement of a witness to be called at trial. I held that, although the prosecution had failed to turn over a memo book containing a witness statement, the statement fell within an exception to the general New York state rule that such statements must be turned over because it was the "duplicative equivalent" of statements already turned over to the defense. As a result, I denied the petition on the ineffective assistance claim. The Second Circuit reversed, holding that under New York law the presence of "minor" inconsistencies between the memo book and other statements already provided to the defense precluded a finding that the documents were "duplicative equivalents." The Second Circuit further held that the omissions in the memo book could form the basis for cross-examination and therefore held that trial counsel's waiver of the opportunity to seek a new trial rendered his performance objectively unreasonable.

**24. *United States v. Rahman*, 189 F.3d 88 (2d 1999), *aff'g and rev'g in part* 854 F. Supp. 254 (S.D.N.Y. 1994), 861 F. Supp. 247 (S.D.N.Y. 1994), 876 F. Supp. 495 (S.D.N.Y. 1994):** This case involved the trial and sentencing of ten defendants convicted of seditious conspiracy and other offenses for their roles in numerous terrorist plots, including the first World Trade Center bombing. The Second Circuit affirmed all procedural decisions and convictions and remanded for the sole purpose of re-sentencing one defendant, Ibrahim El-Gabrowni. During sentencing, I had stated that I would have sentenced El-Gabrowni to 24 years less than the Sentencing Guidelines required if I had had the authority. While the court recognized that this point of law was not settled in the

Circuit, it stated that district courts do in fact have downward departure authority in such circumstances. The court also noted that I was required to make specific, individualized findings linking El-Gabrowny to the World Trade Center bombing in order to deny him an inchoate offense sentence reduction.

**25. *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), rev'g 1996 WL 350685 (S.D.N.Y. June 26, 1996), 1998 WL 148332 (S.D.N.Y. Mar. 30, 1998):** In this 42 U.S.C. § 1983 prisoner suit, I concluded that Supreme Court decisions in *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Heck v. Humphrey*, 512 U.S. 477 (1994), barred a § 1983 claim where a prisoner challenges a disciplinary sanction that has no effect on the duration of the prisoner's overall confinement. The Second Circuit acknowledged that this was an open question in the Circuit, but held that a prisoner may challenge the conditions of confinement through § 1983 where the prisoner is unable to do so through a federal habeas corpus petition.

**26. *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999), rev'g 1997 WL 357980 (S.D.N.Y. June 26, 1997):** In this 42 U.S.C. § 1983 suit, a prisoner claimed that prison officials violated his First Amendment rights by preventing him from meeting with a prison chaplain. I dismissed the action for failure to exhaust administrative remedies as required by the Prison Litigation Reform Act (PLRA), which was enacted after the prisoner filed suit. The Second Circuit held that requirements adopted by the PLRA cannot be applied to an action pending as of the time that the PLRA was enacted.

**27. *LNC Investments, Inc. v. First Fidelity Bank, N.A. New Jersey*, 173 F.3d 454 (2d Cir. 1999), vacating No. 92-7584 (S.D.N.Y. Mar. 31, 1998):** In this matter, the plaintiff bondholders sued the defendant trustees for breach of fiduciary duty, breach of contract, and violation of the Trust Indenture Act in connection with the trustees' conduct during the bankruptcy of a company in possession of property secured by the bonds held by the plaintiffs. After a jury verdict in the trustees' favor, I dismissed all claims. The Second Circuit vacated and remanded, finding that the bondholders were entitled to a jury instruction on the applicability of a relevant New York statute and that the instruction on reliance was clearly erroneous. The court further held that another instruction was erroneous because it invited the jury to decide a legal issue.

**28. *Rocket Jewelry Box, Inc. v. Noble Gift Packaging*, 157 F.3d 174 (2d Cir. 1998), vacating in part 986 F. Supp. 231 (S.D.N.Y. 1997):** In this patent infringement dispute, the patentee filed a petition to confirm an arbitration award in its favor and the licensee cross-petitioned to vacate the award. The licensee argued that the issue of the patent's validity was not submitted to arbitration and still needed to be litigated and only a "final" award can be confirmed by the court. I found that the Second Circuit had two different and potentially conflicting standards of "finality" for purposes of confirming an arbitration award. Under one of these standards, the licensee's claim of an outstanding litigable issue could have precluded finality. I concluded, however, that the licensee's argument would fail if litigated and accordingly confirmed the award. The Second Circuit affirmed the confirmation on different grounds. It held that the existence of a

legal claim not submitted to arbitration did not detract from the arbitration's finality and thus vacated as unnecessary my assessment of the merits of the licensee's claim.

**29. *Morelli v. Cedel*, 141 F.3d 39 (2d Cir. 1998), rev'g No. 96-2874, 1997 WL 61499 (S.D.N.Y. Feb 13, 1997):** In this employment discrimination suit, a former employee sued her former employer, a Luxembourg bank, under the Age Discrimination in Employment Act (ADEA). I dismissed the complaint for lack of subject matter jurisdiction, because the ADEA applies only to employers with a minimum of twenty employees. The defendant employer had only ten employees in the United States, and I ruled that employees employed outside the United States are not counted as employees for purposes of the statutory minimum both because they are not "employees" protected by the statute and because the prohibitions of the ADEA do not apply to foreign companies' foreign operations. On appeal, the Second Circuit held that foreign employees may be counted for purposes of determining whether the corporation is subject to the ADEA.

**30. *NBN Broadcasting, Inc. v. Sheridan Broadcasting Networks, Inc.*, 105 F.3d 72 (2d Cir. 1997), rev'g in part No. 95-10395, 1996 WL 194314 (S.D.N.Y. Apr. 24, 1996):** In this action for a breach of a partnership agreement related to the operation of a radio network, I dismissed the claims as barred by res judicata in light of a prior state proceeding involving the same parties and partnership. The Second Circuit affirmed this holding except with respect to one claim, which the court deemed not decided in the prior litigation.

**31. *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997), rev'g No. 95-1191 (S.D.N.Y. Mar. 25, 1996):** In this case, the plaintiff was a prisoner, incarcerated on unrelated charges, who brought a civil rights action against city officials and an unidentified police officer alleging use of excessive force. I dismissed the complaint for failure to follow my order to provide a more detailed description of the defendant officer for purposes of identifying a defendant. The Second Circuit vacated my order, reasoning that as a *pro se* litigant who was incarcerated, the plaintiff had made sufficient efforts to assist in determining the identity of the officer. The case was remanded so for further inquiry into the identity of the officer in question.

**32. *Maxwell v. City of New York*, 102 F.3d 664 (2d Cir. 1996), rev'g No. 93-5834 (S.D.N.Y. Apr. 27, 1995):** The plaintiff in this matter brought suit against various police officials and officers for alleged violations of his constitutional and civil rights after he was stopped by police at a vehicle checkpoint. I denied qualified immunity to four officials responsible for planning and ordering the establishment of the checkpoint, but the Second Circuit held that establishing the checkpoint was not a violation of the plaintiff's Fourth Amendment rights and that the defendants were entitled to qualified immunity.

**33. *U.S. v. Burd*, 86 F.3d 285 (2d Cir. 1996), rev'g No. 92-109 (S.D.N.Y. May 30, 1995):** The defendant, who was convicted on twelve counts of wire fraud, appealed my order correcting a technical illegality in his original sentence. The Second Circuit

reversed my amended judgment, finding that the district court lacked the jurisdiction to make the correction. The court remanded the case for re-sentencing but with authorization to impose the original sentence.

**34. *New York State Health Maintenance Org. Conference v. Curiale*, 64 F.3d 794 (2d Cir. 1995), rev'g No. 93-1298, 1994 WL 482951 (S.D.N.Y. Feb. 25, 1994):** In this case, I permanently enjoined New York State from enforcing a health insurance regulation on the ground that it was preempted by the Employee Retirement Income Security Act of 1974 (ERISA). The Second Circuit held that the regulation did not implicate ERISA so as to be preempted and vacated my order.

**35. *Bel Geddes v. Zeiderman*, 22 F.3d 1091 (2d Cir. 1994), rev'g No. 92-6849, 1993 WL 318908 (S.D.N.Y. Aug. 13, 1993):** The defendants sought Rule 11 sanctions against plaintiff in this case after she dismissed her action against them in federal court. I denied the motion and fined defense counsel \$100 each for filing the motion, which I deemed manifestly unreasonable under existing precedent. The Second Circuit vacated my order without written opinion.

**36. *United States v. Medina*, 32 F.3d 40 (2d Cir. 1994), rev'g No. 93-20 (S.D.N.Y. July 27, 1993):** In this criminal case, the defendant was convicted, after a jury trial, of attempted robbery, conspiracy to commit robbery, and aiding and abetting robbery (Count One) and using and carrying a firearm during and in relation to a crime of violence, and aiding and abetting that offense (Count Two). The Second Circuit affirmed the defendant's conviction on Count One, but reversed his conviction on Count Two for insufficiency of evidence. As the basis for its reversal, the Second Circuit noted that the defendant had not participated in the actual robbery and had neither provided a firearm to be used in the robbery nor encouraged the use of a weapon.

**37. *Deere & Co. v. MTD Products, Inc.*, 41 F.3d 39 (2d Cir. 1994), questioning *Lobo Entm'ts, Inc. v. Tunnel, Inc.*, 693 F. Supp. 71 (S.D.N.Y. 1988).** The Second Circuit, in a footnote, stated that *Lobo Entertainments* erroneously stated that an earlier Circuit opinion identified "predatory intent" as an element of an anti-dilution claim, rather than a relevant factor in assessing an anti-dilution claim.

**38. *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559 (2d Cir. 1994), questioning *Love v. Kwitny*, 772 F. Supp. 1367 (S.D.N.Y. 1991):** *Love* was a copyright infringement case in which I held that neither willful nor non-willful infringers should be allowed to deduct income taxes in calculating profits derived from the infringement. My decision in *Love* was affirmed on appeal, but the Second Circuit later noted in *In Design* that, under controlling precedent, a non-willful infringer should be allowed to deduct taxes paid on profits and thereby pay an after-tax damage award to the plaintiff.

**39. *Orsini v. Kugel*, 9 F.3d 1042 (2d Cir. 1993), rev'g in part *Orsini v. Pierre*, 1992 WL 358769 (S.D.N.Y. Nov. 30, 1992):** The underlying case was a diversity automobile accident case in which the jury returned a verdict in plaintiffs' favor. I entered judgment against one set of defendants on a cross-claim for contribution asserted by the other set of

defendants. While the Second Circuit affirmed my award of \$222,000 on the cross-claim for contribution, my reward of pre-judgment interest was reversed. The court held that pre-judgment interest is not permitted on a claim for contribution in a personal injury case under New York law.

**40. *United States v. Martinez*, 987 F.2d 920 (2d Cir. 1993), vacating No. 88-902 (S.D.N.Y. July 28, 1992):** In this criminal case, one defendant, Martinez, pleaded guilty and the other defendant, Ortiz, was convicted by a jury of conspiracy to distribute more than five kilograms of cocaine. I initially sentenced Ortiz to two concurrent terms of 151 months imprisonment under the United States Sentencing Guidelines. My initial calculation under the Guidelines accounted for the fact that the conspiracy distributed more than five kilograms of cocaine. The Second Circuit vacated the sentence and remanded for a finding of whether Ortiz knew or should have known prior to joining the conspiracy that Martinez sold four or more kilograms of cocaine. On remand, the government relied upon a statute requiring a ten year minimum sentence for conspiracy convictions involving more than five kilograms of cocaine. I sentenced Ortiz to the statutory minimum and the Second Circuit again vacated and remanded, holding that, even under the statutory minimum, the government must provide that Ortiz knew or should have known about the quantity of drugs sold prior to his joining the conspiracy.

**41. *Ortiz v. Regan*, 980 F.2d 138 (2d Cir. 1992) rev'g 77 F. Supp. 1185 (S.D.N.Y. 1991):** In this dispute over the award of attorney fees, I determined that a counsel for a retiree who prevailed on a procedural due process challenge to a suspension of pension benefits without a hearing was entitled only to fees incurred before the defendant offered a post-deprivation hearing to the retiree under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The Second Circuit held that the attorney was entitled to additional fees because more was at stake than the post-deprivation hearing and that the attorney was entitled to fees for work done after the retiree learned of the right of the post-deprivation hearing.

**42. *Associated Indem. Corp. v. Fairchild Indus., Inc.*, 961 F.2d 32 (2d Cir. 1992), rev'g 138 F.R.D. 384 (S.D.N.Y. 1991):** In this action for declaratory relief, a company sued to determine whether it was covered under several insurance policies for certain environmental liabilities. I granted a motion for Rule 11 sanctions for one defendant's refusal to dismiss another defendant from the lawsuit. The Second Circuit concluded that my factual finding was erroneous and reversed the awarding of sanctions, finding that the defendant could have reasonably believed that it faced \$25 million in environmental liability.

**43. *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425 (2d Cir. 1992), rev'g 768 F. Supp. 89 (S.D.N.Y. 1991):** The plaintiff in this case was a recruiter attempting to recover fees from placing a CEO with a client company. I granted summary judgment in favor of the defendants based on the clear language of their contract. The Second Circuit disagreed with my finding that the contract's language was unambiguous and reversed and remanded to give the parties an opportunity to present extrinsic evidence to establish the intent of the original contracting parties.

**44. *Alier v. Tuscan Dairy Farms, Inc.*, 979 F.2d 946 (2d Cir. 1992), *rev'g* 752 F. Supp. 116 (S.D.N.Y. 1990):** A number of union members sued their former employer and union claiming the employer breached their collective bargaining agreement and the union breached its duty of fair representation. Following a bench trial on liability, I ruled in favor of the union members on both claims and ordered a judgment against the defendants. A few months after this decision, the Supreme Court decided *Air Line Pilots Association, International v. O'Neil*, 499 U.S. 65 (1991), which clarified the standard to be applied to fair-representation claims against a union. The Second Circuit vacated my judgment and remanded to permit reconsideration of the claims in light of *O'Neil*.

**45. *Rivera v. U.S.*, 928 F.2d 592 (2d Cir. 1991), *rev'g in part* 728 F. Supp. 250 (S.D.N.Y. 1990):** This case dealt with the execution of search warrants in an apartment complex which plaintiffs alleged violated their constitutional, statutory, and common law rights. I dismissed plaintiffs' claims for failure to state a claim upon which relief can be granted and granted summary judgment. The Second Circuit determined that the Fourth Amendment claims with respect to some defendants and the common law tort claims should have been allowed to move forward.

**46. *Bank of China v. Chan*, 937 F.2d 780 (2d Cir. 1991), *rev'g in part* No. 88-0232, 1990 WL 53007 (S.D.N.Y. Apr. 23, 1990):** The Bank of China sued an individual guarantor of a corporate debt, seeking to recover his personal guarantee. I granted summary judgment to the Bank. Chan appealed, and the Second Circuit reversed my grant of summary judgment, holding that genuine issues of material fact existed on two issues.

**47. *United States v. Miranda-Ortiz*, 926 F.2d 172 (2d Cir. 1991):** The defendant in this case was convicted of distribution of cocaine and conspiracy to distribute cocaine. On appeal, the Second Circuit affirmed the conviction but reversed his sentence and remanded for resentencing. The court held that the defendant's base offense level for sentencing should not have been calculated on the basis of quantities of cocaine distributed by co-conspirators before the defendant joined the conspiracy, absent evidence that the defendant knew of the quantities previously distributed.

**48. *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir. 1991), *rev'g* No. 87-3408, 1990 WL 16956 (S.D.N.Y. Feb. 20, 1990):** In this case, a plaintiff alleged that his employer discriminated against him on the basis of age when it declined to hire him for a new position after his old position was eliminated. I granted summary judgment for the employer, finding that the employer proffered a legitimate, non-discriminatory reason for refusing to rehire the plaintiff. The Second Circuit reversed, finding that a reasonable juror could infer discriminatory animus from the employer's stated reason that the plaintiff was overqualified for the position.

**49. *Rosen v. Thornburgh*, 928 F.2d 528 (2d Cir. 1991), *rev'g* No. 87-4495, 1990 WL 7514 (S.D.N.Y. Jan. 29, 1990):** In this Title VII action, the plaintiff brought a suit against his former employer for religious discrimination. The employer claimed that he

was terminated for failing to pass the driving exam. I granted summary judgment for the employer, holding that the plaintiff failed to demonstrate a prima facie case for religious discrimination by failing to show a connection between his termination and his Jewish religion. The Second Circuit reversed, holding that material fact issue existed as to whether anti-Jewish animus affected the employer's driving requirement as applied to the trainee.

**50. *1st Interstate Credit Alliance, Inc. v. Clark*, 930 F.2d 910 (2d Cir. 1991), rev'g No. 89-3263, 1989 WL 149078 (S.D.N.Y. Dec. 4, 1989):** The plaintiff in this case sought to recover funds owed by the defendant, a guarantor of another company's debts. I granted summary judgment to the plaintiff as to liability but denied the motion as to damages. The Second Circuit reversed without opinion.

**51. *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991):** In this criminal case, I granted a downward departure to two co-defendants based on the disparity resulting from differences in applicable Guideline ranges among co-defendants. On appeal, the Second Circuit concluded that the Sentencing Commission contemplated and approved of the differences and held that disparity among co-defendants is not a permissible basis for a downward departure.

**52. *Gollust v. Mendell*, 501 U.S. 115 (1991), aff'g *Mendell In Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724 (2d Cir. 1990) rev'g No. 87-0085, 1988 WL 123703 (S.D.N.Y. Nov 8, 1988):** This case involved the issue of whether one must be a current holder of stock in order to bring an insider trading action under § 16(b) of the Securities Exchange Act. I held that that a § 16(b) action may be prosecuted only by the issuer itself or the holders of its securities. A divided panel of the Second Circuit reversed, holding that nothing in the text of the Act prohibited a former owner from asserting a § 16(b) action, and the Supreme Court affirmed.

**53. *U.S. v. Wong Chi Keung*, 916 F.2d 67 (2d Cir. 1990), vacating No. 88-571, 1990 WL 48078 (S.D.N.Y. Apr. 9, 1990):** The Second Circuit vacated a defendant's convictions for conspiracy and substantive drug charges after trial and remanded the case for further fact-finding regarding the actions of defendant's former and current counsel. The defendant claimed that his former counsel, who had represented the defendant in connection with a prior immigration charge, participated with the prosecution and a government informant (and current client) in arranging for the informant to "set up" the defendant for the benefit of counsel's current client. The defendant further alleged that the former counsel thereafter recommended his current counsel for the case in question. My opinion made no findings on these issues and the Second Circuit remanded for further consideration and disposition as warranted by the findings.

**54. *Gutierrez v. Bowen*, 898 F.2d 307 (2d Cir. 1990), rev'g 702 F. Supp. 1050 (S.D.N.Y. 1989):** In this case, supplemental security income (SSI) claimants challenged the decision of the Social Security Administration (SSA) to reopen their case and to deny them eligibility for SSI due to their additional financial resources. I held that the SSA had the authority to *sua sponte* reopen a case under the applicable regulations and that

good cause existed to reopen the claimants' case. While assuming without deciding that the SSA had the authority to *sua sponte* reopen a case, the Second Circuit held that no good cause existed to reopen the case.

**55. *Abdul-Hakeem v. Koehler*, 910 F.2d 66 (2d Cir. 1990), *rev'g* 718 F. Supp. 1211 (S.D.N.Y. 1989):** A prisoner filed a petition for a writ of habeas corpus seeking to compel state corrections officials to transfer him to a different facility because of past brutality by prison guards. I determined that a petition for habeas corpus was the only method by which he could obtain relief, but I dismissed the action for failure to exhaust state remedies. A divided panel of the Second Circuit permitted the suit to proceed, holding that the prisoner could also bring his claim under 42 U.S.C. § 1983 because it challenged the conditions of his confinement

**56. *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989):** In this case, the Second Circuit determined that the sentence and probation imposed on defendants for mail fraud exceeded the terms permitted by law. The court remanded for re-sentencing.

**57. *Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), *rev'g in part Consolidated Gold Fields, PLC v. Anglo American Corp. of South Africa Ltd.*, 698 F. Supp. 487 (S.D.N.Y. 1988):** A corporation, the target of a hostile tender offer, and its subsidiary moved to enjoin the hostile tender offer under § 16 of the Clayton Act. I issued a preliminary injunction, but denied antitrust standing to the plaintiffs. A divided panel of the Second Circuit held that target companies had standing to seek injunctive relief through demonstration of a threat of "antitrust injury."

**58. *Sorlucco v. New York City Police Dept.*, 888 F.2d 4 (2d Cir. 1989), *rev'g* 780 F. Supp. 202 (S.D.N.Y. 1992):** After a jury found that the NYPD terminated a probationary officer on the basis of sex in violation of 42 U.S.C. § 1983, I granted the Department a judgment n.o.v. based on insufficient evidence to conclude that the officer's dismissal was part of a pattern or practice of discrimination. I also dismissed her Title VII claims in a bench trial. Much of the evidence supporting the officer's claims was premised on a study documenting the NYPD's disciplining of forty-seven probationary officers, including only four women. I found the study to be statistically insignificant for purposes of finding a constitutional violation. The Second Circuit disagreed, holding that the study, buttressed by other evidence at trial, was sufficient for a jury to rationally conclude that the Department operated in a discriminatory manner. With respect to the Title VII claims, the court also concluded that I was collaterally estopped from finding no liability.

**59. *In re Marine Pollution Service, Inc.*, 857 F.2d 91 (2d Cir. 1988), *rev'g* 88 B.R. 588 (S.D.N.Y.):** In this bankruptcy case, a trustee challenged an arbitrator's determination of the combination of employee seniority lists of two companies in Chapter 11 bankruptcy. The bankruptcy court vacated the arbitrator's decision, holding that the order failed to draw its essence from the contract. I reversed the bankruptcy court, because the award was a proper exercise of the arbitrator's powers under the contract. Upon its review of the award, the Second Circuit agreed with the bankruptcy court and held that the arbitrator's award did not draw its essence from the contract.

APPENDIX D

**14e. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

1. *Anemone v. Metropolitan Transportation Authority*, 410 F. Supp. 2d 255 (S.D.N.Y. 2006).
2. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *rev'd*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).
3. *Panas v. Reno*, 114 F. Supp. 2d 283 (S.D.N.Y. 2000).
4. *United States v. De La Paz*, 43 F. Supp. 2d 370 (S.D.N.Y. 1999).
5. *United States v. Heatley*, 41 F. Supp. 2d 284 (S.D.N.Y. 1999).
6. *Beeson v. Fishkill Corr. Facility*, 28 F. Supp. 2d 884 (S.D.N.Y. 1998).
7. *Jordan v. Lefevre*, 22 F. Supp. 2d 259 (S.D.N.Y. 1998), *aff'd in part, rev'd in part, and remanded* 206 F.3d 196 (2d Cir. 2000), *on remand*, 2000 WL 1877039 (S.D.N.Y. Dec. 27, 2000), *aff'd*, 293 F.3d 587 (2d Cir. 2002).
8. *Flores v. Demskie*, 11 F. Supp. 2d 299 (S.D.N.Y. 1998), *rev'd and remanded*, 215 F.3d 293 (2d Cir. 2000), *cert. denied sub nom. Keane v. Flores*, 531 U.S. 1029 (2000).
9. *Farrell Lines v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff'd sub nom. Farrell Lines v. Ceres Terminals*, 161 F.3d 115 (2d Cir. 1998).
10. *United States v. Ortiz-Gonzalbo*, 946 F. Supp. 287 (S.D.N.Y. 1996), *aff'd without opinion*, 133 F.3d 908 (2d Cir. 1997).
11. *Atkinson v. B.C.C. Assocs.*, 829 F. Supp. 637 (S.D.N.Y. 1993).
12. *Block v. Marino*, 819 F. Supp. 349 (S.D.N.Y. 1993).
13. *United States v. Walker*, 805 F. Supp. 1112 (S.D.N.Y. 1992), *aff'd*, 7 F.3d 26 (2d Cir. 1993), *cert. denied*, 540 U.S. 1169 (1994).
14. *Glasford v. New York State Dep't of Soc. Serv.*, 787 F. Supp. 384 (S.D.N.Y. 1992).
15. *United States v. Sheth*, 782 F. Supp. 916 (S.D.N.Y. 1992).
16. *Ortiz v. Regan*, 749 F. Supp. 1254 (S.D.N.Y. 1991), *later proceeding*, 769 F. Supp. 570 (S.D.N.Y. 1991), *costs and fees proceeding*, 777 F. Supp. 1185 (S.D.N.Y. 1991), *costs and fees ruling aff'd in part and rev'd in part*, 980 F.2d 138 (2d Cir. 1992).

17. *Paulino v. Connery*, 766 F. Supp. 209 (S.D.N.Y. 1991).
18. *Schurman v. Leonardo*, 768 F. Supp. 993 (S.D.N.Y. 1991).
19. *United States v. Keung*, 761 F. Supp. 250 (S.D.N.Y. 1991), *aff'd*, 948 F.2d 1277 (2d Cir. 1991).
20. *Watson v. Sexton*, 755 F. Supp. 583 (S.D.N.Y. 1991).
21. *United States v. 16 Clinton St.*, 730 F. Supp. 1265 (S.D.N.Y. 1990), *later proceeding*, 785 F. Supp. 1157 (S.D.N.Y. 1992), *aff'd*, 978 F.2d 705 (2d Cir. 1992).
22. *Rivera v. United States*, 728 F. Supp. 250 (S.D.N.Y. 1990), *aff'd in part and vacated in part*, 928 F.2d 592 (2d Cir. 1991).
23. *Weaver v. New York City Employees' Ret. Sys.*, 717 F. Supp. 1039 (S.D.N.Y. 1989).
24. *Fowler v. New York City Dep't of Sanitation*, 704 F. Supp. 1264 (S.D.N.Y. 1989).
25. *United States v. Mendez*, 691 F. Supp. 656 (S.D.N.Y. 1988).

APPENDIX E

**14f. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.**

1. *Bao Zhu Zhu v. Gonzales*, 460 F.3d 426 (2d Cir. 2006).
2. *King v. Fox*, 458 F.3d 39 (2d Cir. 2006).
3. *Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006)
4. *Adams v. Suozzi*, 433 F.3d 220 (2d Cir. 2005): In this contract dispute between Nassau County and its sheriffs' union, the County sought to enforce an arbitration agreement and stay litigation pursuant to the Federal Arbitration Act, 9 U.S.C. § 3 (2000). The district court denied the County's motion. I authored the opinion for the court. First, we held that the district court properly exercised subject matter jurisdiction over the case based on one of the union's federal constitutional claims. Second, we affirmed the district court's denial of the motion because we agreed that the arbitration clause in question was premised on a void contract.
5. *United States v. Miller*, 430 F.3d 93 (2d Cir. 2005)
6. *United States v. Miller*, No. 04-2637, 2005 U.S. App. LEXIS 29315 (2d Cir. Nov. 16, 2005).
7. *United States v. Space Hunters, Inc.*, 429 F.3d 416 (2d Cir. 2005).
8. *Zmijewska v. Gonzales*, 426 F.3d 99 (2d Cir. 2005).
9. *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186 (2d Cir. 2005).
10. *Brown v. Senkowski*, 152 Fed. Appx. 15, 2005 U.S. App. LEXIS 20680 (2d Cir. Sept. 22, 2005).
11. *Palkovic v. Johnson*, 150 Fed. Appx. 35, 2005 U.S. App. LEXIS 20681 (2d Cir. Sept. 22, 2005).
12. *Mignano v. United States*, No. 04-6153, 143 Fed. Appx. 398, 2005 U.S. App. LEXIS 20682 (2d Cir. Sept. 22, 2005).
13. *Ahmad v. Gonzales*, No. 03-40324, 143 Fed. Appx. 393, 2005 U.S. App. LEXIS 20640 (2d Cir. Sept. 21, 2005).
14. *Societe Generale v. U.S. Bank Nat'l Ass'n*, No. 04-4503, 144 Fed. Appx. 191, 2005 U.S. App. LEXIS 20644 (2d Cir. Sept. 21, 2005).

15. *United States v. Tomscha*, No. 04-5873, 150 Fed. Appx. 18, 2005 U.S. App. LEXIS 20648 (2d Cir. Sept. 21, 2005).
16. *Neal v. Peerless Elec.*, No. 04-5592, 149 Fed. Appx. 37, 2005 U.S. App. LEXIS 20656 (2d Cir. Sept. 21, 2005).
17. *Javois-White v. Barnhart*, No. 05-0459, 143 Fed. Appx. 390, 2005 U.S. App. LEXIS 20660 (2d Cir. Sept. 21, 2005).
18. *Sims v. Goord*, No. 05-0597, 151 Fed. Appx. 12, 2005 U.S. App. LEXIS 20661 (2d Cir. Sept. 21, 2005).
19. *King v. Fox*, 418 F.3d 121 (2d Cir. 2005): This case involved a New York attorney-client fee dispute where the client argued that the attorney was collaterally estopped to defend the suit and that their fee agreement was unconscionable. The district court granted summary judgment for the attorney, rejecting the estoppel and unconscionability claims and holding that the client ratified the disputed fee agreement. I wrote the opinion for the court, affirming the district court's ruling on collateral estoppel and certifying the unconscionability issue to the New York Court of Appeals on the ground that New York law was unclear as to whether a client may ratify an attorney fee agreement generally and in cases of fraud or unconscionability in particular.
20. *United States v. Gonzalez*, 138 Fed. Appx. 349, 2005 U.S. App. LEXIS 13369 (2d Cir. June 29, 2005).
21. *Chen v. Bd. of Immigration Appeals*, 138 Fed. Appx. 356, 2005 U.S. App. LEXIS 13413 (2d Cir. June 29, 2005).
22. *Gilford v. City of New York*, 136 Fed. Appx. 390, 2005 U.S. App. LEXIS 11485 (2d Cir. June 15, 2005).
23. *Mohammed-Blaize v. INS*, 133 Fed. Appx. 774, 2005 U.S. App. LEXIS 10258 (2d Cir. June 1, 2005).
24. *Holt v. Home Depot USA, Inc.*, 135 Fed. Appx. 449, 2005 U.S. App. LEXIS 5706 (2d Cir. Apr. 6, 2005).
25. *United States v. Doe*, 128 Fed. Appx. 179, 2005 U.S. App. LEXIS 5707 (2d Cir. Apr. 6, 2005).
26. *United States v. Rivera*, 127 Fed. Appx. 543, 2005 U.S. App. LEXIS 5709 (2d Cir. Apr. 6, 2005).

27. *Rodriguez v. McElroy*, 124 Fed. Appx. 702, 2005 U.S. App. LEXIS 5288 (2d Cir. Apr. 1, 2005).
28. *Hudson v. Imagine Entm't Corp.*, 128 Fed. Appx. 178, 2005 U.S. App. LEXIS 5289 (2d Cir. Apr. 1, 2005).
29. *Yan Ping Xiao v. United States DOJ*, 127 Fed. Appx. 10, 2005 U.S. App. LEXIS 5256 (2d Cir. Mar. 29, 2005).
30. *United States v. Newton*, 369 F.3d 659 (2d Cir. 2004).
31. *Barcia v. Sitkin*, 367 F.3d 87 (2d Cir. 2004).
32. *Zaremba v. GMC*, 360 F.3d 355 (2d Cir. 2004).
33. *PSINet Liquidating L.L.C. v. Bear Stearns & Co.* 357 F.3d 263 (2d Cir. 2004).
34. *United States v. Chue*, 85 Fed. Appx. 799, 2004 U.S. App. LEXIS 902 (2d Cir. Jan. 21, 2004).
35. *United States v. Whab*, 355 F.3d 155 (2d Cir. 2004).
36. *United States v. Toohey*, 85 Fed. Appx. 263, 2004 U.S. App. LEXIS 566 (2d Cir. Jan. 15, 2004).
37. *Fowlkes v. Adamec*, 85 Fed. Appx. 266, 2004 U.S. App. LEXIS 567 (2d Cir. Jan. 15, 2004).
38. *Miller v. Hekimian Labs., Inc.*, 85 Fed. Appx. 266, 2004 U.S. App. LEXIS 568 (2d Cir. Jan. 15, 2004).
39. *United States v. Riaz*, 85 Fed. Appx. 261, 2004 U.S. App. LEXIS 501 (2d Cir. Jan. 14, 2004).
40. *Thabault v. Ashcroft*, 85 Fed. Appx. 257, 2004 U.S. App. LEXIS 503 (2d Cir. Jan. 14, 2004).
41. *Scalise v. Metro. Group Prop. & Cas. Ins. Co.*, 85 Fed. Appx. 255, 2004 U.S. App. LEXIS 504 (2d Cir. Jan. 14, 2004).
42. *Pecor v. ELRAC, Inc.*, 85 Fed. Appx. 259, 2004 U.S. App. LEXIS 505 (2d Cir. Jan. 14, 2004).
43. *United States v. Maloney*, 85 Fed. Appx. 252, 2004 U.S. App. LEXIS 373 (2d Cir. Jan. 13, 2004).

44. *United States v. Datillo*, 85 Fed. Appx. 250, 2004 U.S. App. LEXIS 374 (2d Cir. Jan. 13, 2004).
45. *Brown v. Barnhart*, 85 Fed. Appx. 249, 2004 U.S. App. LEXIS 375 (2d Cir. Jan. 13, 2004).
46. *Yak v. Bank Brussels Lambert*, 252 F.3d 127 (2d Cir. 2001).
47. *Quesada-Mosquera v. United States*, 243 F.3d 68585 (2d Cir. 2001).
48. *Timmons v. Alexion*, 7 Fed. Appx. 4, 2001 U.S. App. LEXIS 4947 (2d Cir. Mar. 23, 2001).
49. *United States v. Nachamie*, 5 Fed. Appx. 95, 2001 U.S. App. LEXIS 4150 (2d Cir. Mar. 19, 2001).
50. *Prima U.S., Inc. v. Panalpina, Inc.*, 223 F.3d 126 (2d Cir. 2000).
51. *Integrated Waste Servs. v. Akzo Nobel Salt, Inc.*, 2000 U.S. App. LEXIS 14619 (2d Cir. Jun. 22, 2000).
52. *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291 (2d Cir. 2000).
53. *Rodgers v. Seaward (In re Seaward)*, 2000 U.S. App. LEXIS 12466 (2d Cir. Jun. 6, 2000).
54. *Bobreski v. Ebasco-Rayethon Constructors*, 2000 U.S. App. LEXIS 12469 (2d Cir. Jun. 6, 2000).
55. *Bear U.S.A., Inc. v. Kim*, 2000 U.S. App. LEXIS 12554 (2d Cir. Jun. 6, 2000).
56. *Duran v. Reno*, 197 F.3d 63 (2d Cir. 1999).
57. *Duran v. Reno*, 193 F.3d 82 (2d Cir. 1998).
58. *Argentina v. Emery World Wide Delivery Corp.*, 188 F.3d 86 (2d Cir. 1998).
59. *Andy Warhol Found. for Visual Arts, Inc. v. Hayes (In re Hayes)*, 183 F.3d 162 (2d Cir. 1999).
60. *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).
61. *Argentina v. Emery World Wide Delivery Corp.*, 161 F.3d 108 (2d Cir. 1998).
62. *United States v. King*, 1998 U.S. App. LEXIS 28265 (2d Cir. Nov. 9, 1998).

63. *United States v. Scaria*, 165 F.3d 15 (2d Cir. 1998).
64. *Int'l Jet Mkts. v. Simat, Helliesen & Eichner, Inc.*, 1998 U.S. App. LEXIS 28280 (2d Cir. Nov. 9, 1998).
65. *Kanowitz Fruit & Produce Co. v. United States*, 1998 U.S. App. LEXIS 28025 (2d Cir. Oct. 29, 1998).
66. *United States v. Gonzalez*, 1998 U.S. App. LEXIS 27977 (2d Cir. Oct. 27, 1998).
67. *Zigmund v. Solnit*, 1998 U.S. App. LEXIS 27981 (2d Cir. Oct. 27, 1998).
68. *United States v. Shaiw Tin Jang*, 1998 U.S. App. LEXIS 27147 (2d Cir. Oct. 21, 1998).
69. *United States v. King*, 165 F.3d 15 (2d Cir. 1998).
70. *Hansen v. United States DOJ*, 1998 U.S. App. LEXIS 27569 (2d Cir. Oct. 21, 1998).
71. *Sawyer v. Musumeci*, 1998 U.S. App. LEXIS 27570 (2d Cir. Oct. 21, 1998).
72. *Przygoda v. Hove*, No. 98-6007, 1998 U.S. App. LEXIS 27573 (2d Cir. Oct. 21, 1998).
73. *Tough Traveler v. Outbound Prods.*, No. 98-7002, 1998 U.S. App. LEXIS 27574 (2d Cir. Oct. 21, 1998).
74. *Jafri v. Rubin*, No. 97-6125, 1998 U.S. App. LEXIS 38625 (2d Cir. Oct. 21, 1998).
75. *United States v. 27.09 Acres of Land*, 43 F.3d 769 (2d Cir. 1994).
76. *Moller v. North Shore Univ. Hosp.*, 12 F.3d 13 (2d Cir. 1993).
77. *Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993).
78. *Atlantic Healthcare Benefits Trust v. Googins*, 2 F.3d 1 (2d Cir. 1993).
79. *Waisome v. Port Auth. of N.Y.*, 999 F.2d 711 (2d Cir. 1993).
80. *United States v. 27.09 Acres of Land*, 1 F.3d 107 (2d Cir. 1993).
81. *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306 (2d Cir. 1993): The parties to this case appealed and cross-appealed a district court judgment awarding defendants \$313,807 in damages, but no attorneys' fees, for their counterclaim arising from misrepresentations made during a merger of two insurance companies. The defendants argued that the judgment was inconsistent with the

jury's special verdict form with respect to damages and attorneys' fees. I wrote the opinion for the court, holding that the jury's responses on the special verdict form may have been inconsistent but that the district court's judgment accounted for those inconsistencies and appeared to be fair and reasonable. Nevertheless, we reversed and remanded the district court's denial of attorneys' fees because the jury's special verdict form indicated that the defendants were entitled to the fees.

82. *In re Bolar Pharm. Co., Sec. Litig.*, 966 F.2d 731 (2d Cir. 1992).

83. *Gron Dahl v. Merritt & Harris, Inc.*, 964 F.2d 1290 (2d Cir. 1992).

84. *ITT Corp. v. United States*, 963 F.2d 561 (2d Cir. 1992): The appellant in this case, a corporate taxpayer, appealed a district court order in favor of the government disallowing claimed losses arising from the corporation's conversion and surrender of debentures issued by its subsidiaries from 1966 to 1969. I wrote the opinion for the court, holding that the government was collaterally estopped to relitigate the deductibility of the losses because the issue was fully and fairly litigated between the parties in a previous action.

85. *American Lung Ass'n v. Reilly*, 962 F.2d 258 (2d Cir. 1992).

86. *United States v. Alexander*, 962 F.2d 199 (2d Cir. 1992).

87. *United States v. Helmsley*, No. 92-1179, 1992 U.S. App. LEXIS 6846 (2d Cir. Apr. 14, 1992).

88. *Calero v. INS*, 957 F.2d 50 (2d Cir. 1992).

89. *United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991).

90. *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112 (2d Cir. 1991).

91. *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991).

92. *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991).

93. *National Foods, Inc. v. Rubin*, 936 F.2d 656 (2d Cir. 1991): This case raised the issue of whether the Eleventh Amendment prohibited a law firm representing a N.Y. State employee in federal court on behalf of the State from moving in that federal court for additional attorneys' fees to be paid by the State. The Eleventh Amendment immunizes states against money judgments in federal court unless the states consent to federal court jurisdiction or Congress has overridden their immunity by statute. I wrote the opinion for the court, holding that the Eleventh Amendment did not bar the law firm's motion in this case because the N.Y. State statute that

authorized representation by private attorneys in federal court expressly permitted that federal court to settle any related disputes on attorneys' fees.

94. *Lopez v. Metro. Life Ins. Co.*, 930 F.2d 157 (2d Cir. 1991): In this employment-discrimination case, an employee, who was black and of Jamaican descent, was discharged from his job at the end of his probationary period because he failed to meet the employer's production quota. The employee filed an action for discrimination, claiming that he could not meet the quota because the employer discriminated against him on the basis of his race and national origin by failing to train him and by otherwise depriving him of opportunities afforded white employees. I authored the opinion for the court, affirming the district court's finding that the employee had failed to establish a prima facie case of discrimination and affirming the dismissal of the case.

95. *Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556 (2d Cir. 1991).

96. *Arc Elec. Constr. Co. v. Comm'r*, 923 F.2d 1005 (2d Cir. 1991).

97. *Carey v. Crescenzi*, 923 F.2d 18 (2d Cir. 1991).

98. *Maritime Asbestosis Legal Clinic v. LTV Steel Co. (In re Chateaugay Corp.)*, 920 F.2d 183 (2d Cir. 1990): This matter involved the interpretation of § 362(h) of the Bankruptcy Code, which permits "an individual" injured by a willful violation of an automatic stay to recover actual and punitive damages. I wrote the opinion for the court, holding that the word "individual" in the statute applies by its plain meaning only to natural persons and not to corporate debtors.

99. *United States v. Jones*, 918 F.2d 9 (2d Cir. 1990).

100. *United States v. Long*, 917 F.2d 691 (2d Cir. 1990).

101. *Finnegan v. Fountain*, 915 F.2d 817 (2d Cir. 1990).

102. *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church v. New York*, 914 F.2d 348 (2d Cir. 1990).

103. *United States v. Oshatz*, 912 F.2d 534 (2d Cir. 1990): In this criminal tax fraud case, the majority opinion concluded that it is improper to ask character witnesses hypothetical questions that assume the guilt of the defendant, regardless of whether the witnesses are testifying about the defendant's reputation or are expressing their own opinion about the defendant. The error in the case, however, was deemed harmless. I wrote a separate concurrence to express my view that guilt-assuming questions to character witnesses expressing their *opinions* of the defendant should not be excluded from jury consideration, because, *inter alia*, this type of questioning is

highly relevant to the jury's assessment of the character witness and is not unfairly prejudicial—particularly in light of potential prophylactic measures available to the trial judge.

104. *Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n*, 909 F.2d 48 (2d Cir. 1990).

105. *Wells v. Sullivan*, 907 F.2d 367 (2d Cir. 1990).

106. *In re Sonmax Indus.*, 907 F.2d 1280 (2d Cir. 1990).

107. *Mann v. United States*, 904 F.2d 1 (2d Cir. 1990).

108. *Sommer v. Sullivan*, 898 F.2d 895 (2d Cir. 1990).

109. *Maduakolam v. Columbia Univ.*, 866 F.2d 53 (2d Cir. 1989).

110. *United States v. Rooney*, 866 F.2d 28 (2d Cir. 1989).

111. *Fleming v. New York Univ.*, 865 F.2d 478 (2d Cir. 1989): The appellant in this case, a former student who was handicapped, sued New York University for overcharging him for his dormitory room during his undergraduate and graduate years in violation of § 504 of the Rehabilitation Act of 1973. The district court granted the University summary judgment based on the expiration of the three-year statute of limitations. The district court held that the statute began to run at the appellant's undergraduate graduation and the suit commenced more than three years later. The appellant countered that the statute of limitations began to accrue only when he received the bill listing his unpaid charges for the dormitory. I wrote the opinion for the court, holding that mere notice of past overcharges does not amount to an ongoing violation and that the statute of limitations had run. The ruling also affirmed the district court's finding that the appellant had failed to present a prima facie case of discrimination with respect to his graduate housing in light of the appellant's failure to have applied for such housing.

112. *Eames v. Bowen*, 864 F.2d 251 (2d Cir. 1988).

October 15, 2007

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

I am writing to update my Senate Questionnaire with the following additional information which was inadvertently omitted from my earlier submission.

Question 10: I am a member of the Federal Judges Association

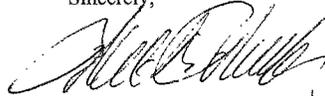
Question 13(d):

While serving as Chief Judge of the Southern District of New York, I spoke at the dedication of the Thurgood Marshall Courthouse on the importance of Thurgood Marshall's career and the importance of the civil rights movement. The event was held on April 14, 2003.

In addition to the Federalist Society panel of October 5, 2006, I moderated two additional panels for the New York chapter. I do not recall the dates and topics of these two panels.

I participated in a panel in Washington, D.C. on media and the courts. I do not recall the date or location.

Sincerely,



Michael B. Mukasey

cc:  
The Honorable Arlen Specter  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Chairman LEAHY. Thank you, Judge, and you had mentioned that your wife, Susan, is here and your son Marc and daughter Jessica, and I would ask the staff to put in the record the names of all the other people who are accompanying you. Someday in the Mukasey archives, they will be enjoying looking at the fact that they were all here.

Judge, in the course of this Committee's investigation into the termination of U.S. Attorneys, we found evidence that showed the White House and Justice Department officials deciding who to fire were focused on the political impact of Federal prosecutions and whether Federal prosecutors were bringing charges against those people they saw as political opponents. For example, New Mexico U.S. Attorney David Iglesias was fired a few weeks after Karl Rove complained to the Attorney General about the lack of what he saw as voter fraud enforcement cases. Then the fired U.S. Attorney Todd Graves from Missouri was replaced by Interim U.S. Attorney Brad Schlozman, who then brought four indictments right on the eve of a closely contested election. And we had others, in Wisconsin and elsewhere.

These prosecutions, like the Schlozman ones, clearly violated the Justice Department's Red Book, which is its guide for Federal prosecutions of election offenses, which basically says you do not bring these last-minute prosecutions when it may affect an election.

Now, that guidebook was recently revised under the outgoing, now discredited leadership to do away with that. The Red Book is now a Green Book.

Judge, will you go back to the old standards, the standards that have been there with Republican and Democratic administrations as long as I can remember?

Judge MUKASEY. Well, your question concerns the Red Book and the Green Book, but it obviously goes well beyond the Red Book and the Green Book. It goes to very basic principles that I have articulated before and, if I am confirmed, I am going to articulate again in as clear English as I can, and that is that politics, partisan politics, plays no part in either the bringing of charges or the timing of charges, and that people in the Department should not be authorized, people below a very small group at the top should not be authorized to take calls or make calls with political figures to talk about cases. And those people ought to have available to them and will have available to them, if I am confirmed, the telephone numbers of the very few people who can take calls and make calls on the subject of cases or any other subject in the interest of some elected official.

Chairman LEAHY. I would also ask you to look back at the old Red Book, too, and the fact that it said don't bring charges on the eve of elections if they are apt to affect the outcome one way or the other.

Judge MUKASEY. Obviously, the closer you get to an election, when there is a charge that either deals with a candidate or deals with an issue that can affect the outcome, the higher and higher has to be the standard and the greater and greater has to be the necessity for bringing the charge at the particular time in order to justify it.

Chairman LEAHY. And, of course, you have had a close association with Rudy Giuliani, who is one of the leading candidates for the Republican nomination for President. It goes back to your work with him in the U.S. Attorney's Office, something you have spoken of with pride, and he has, too. And you have served recently on the Justice Advisory Committee.

Can I assume that as Attorney General, and with the fact that the Justice Department has to watch that elections are held fairly, would it be safe to say you will totally recuse yourself from any involvement either with Mr. Giuliani or any candidate for President?

Judge MUKASEY. It is safe to say. It is not only safe to say, I am saying it, too, just so that there is no ambiguity.

Chairman LEAHY. It is kind of Hornbook law, isn't it?

Judge MUKASEY. Right. There is no ambiguity in the record.

Chairman LEAHY. Thank you.

Now, let's go to the so-called Bybee memo. I think one of the greatest stains on the history of this country is the memo dated August 1, 2002, signed by then Assistant Attorney General Jay Bybee, that concluded that the President has the authority as commander-in-chief to override domestic and international laws prohibiting torture, to immunize anybody who commits torture, immunize them from prosecution.

And many of us voted against Alberto Gonzales's nomination for Attorney General because he refused to disavow legal conclusions in a memo that did not rule out the use of cruel, inhuman, degrading treatment of detainees during interrogations.

It turns out that our concerns are well founded. The New York Times recently reported that soon after Attorney General Gonzales took over, the Department of Justice secretly endorsed combinations of the harshest interrogation tactics as legal even though they had been publicly withdrawn under the so-called Bybee memo.

Now, do you believe, so we know where you might stand on this, do you believe that the President has the authority under any circumstances to exercise a so-called commander-in-chief override and immunize acts of torture, as the Bybee memo argued?

Judge MUKASEY. We are parties to a treaty that outlaws torture. Torture is unlawful under the laws of this country. The President has said that in an Executive order. But beyond all of those legal restrictions, we don't torture not simply because it is against this or that law or against this or that treaty. It is not what this country is about. It is not what this country stands for. It is antithetical to everything this country stands for.

Soldiers of this country liberated concentration camps toward the end of World War II and at the end of World War II and photographed what they saw there as a record of what the barbarism that we oppose. We didn't do that so that we could then duplicate it ourselves.

The Bybee memo, to paraphrase a French diplomat, was worse than a sin, it was a mistake. It was unnecessary. As I have read—I mean, I have read the memo and I have read what has been—some of what has been written about it. It purported to justify measures based on broad grants of authority that were unnecessary. The analysis in that memo was found to be defective, and the memo was withdrawn in favor of a later memo that narrowed sub-

stantially the basis for authorizing measures beyond, perhaps different from those that may be contained in the Army Field Manual.

Chairman LEAHY. Would it be a safe characterization of what you have just said that you repudiate this memo as not only being contrary to law but also contrary to the values America stands for?

Judge MUKASEY. I do.

Chairman LEAHY. Thank you. And is there such a thing as a commander-in-chief override that would allow the immunization of acts of torture that violate the law?

Judge MUKASEY. Not that I am aware of.

Chairman LEAHY. Thank you. Now, the memos issued under Attorney General Gonzales apparently gave legal approval to harsh physical and psychological tactics, head slapping, simulated drowning, frigid temperatures and so on. The first of these memos was issued over the objections of Deputy Attorney General James Comey, who predicted that the Department of Justice would be ashamed when the public learned of them. And, of course, the public did learn of them. It would appear, though, that they still remain in effect as governmental policy.

Will you ensure that the Department of Justice will rewrite its guidance on interrogation and degrading treatment and bring it back into line with the law that Congress passed?

Judge MUKASEY. I am certainly going to examine the underlying memos and the underlying facts. I have not been "read in on," I think is the Washington expression, any classified program or information, including the classified information that relates to interrogation methods or the memoranda that relate to interrogation methods. And so I cannot say that there is something that is out of line with the law in those programs until I see the programs and see the memos and see whether they are in alignment or not.

Chairman LEAHY. Will you not only read the memos, but make sure that they are in line with the testimony you have already given and your own views of what is allowed under our law?

Judge MUKASEY. I certainly will.

Chairman LEAHY. Attorney General Gonzales apparently believed the President has a commander-in-chief override for many of the laws of this country which contribute to the violations of the Foreign Intelligence Surveillance Act, the so-called FISA, with the signing statement reservation and others, that for 5 years the administration conducted a program of warrantless surveillance that violated the provisions of FISA. They did not come to us and ask us for changes even though this Congress has almost unanimously updated and changed FISA more than 30 times since it was first enacted to take into consideration changes in technology and needs.

Only after somebody in the administration leaked to the press that this was going on and the resultant public criticism and telecommunication companies that had cooperated were sued did they come back and say maybe we ought to look at a new law.

Do you believe that the President has the authority to override something that is in law, legal requirements, and immunize illegal surveillance on Americans?

Judge MUKASEY. The President cannot immunize illegality. That is a contradiction in terms. But that said, I think there is a long, complex history to the FISA statute, beginning with its passage in

1978, when the then Attorney General, Jimmy Carter's Attorney General, Griffin Bell, took the view and expressed the view that the limits of FISA did not reach to the limits of Presidential authority, which is to say that there was some gap between where FISA left off and where the Constitution permitted the President to act.

I said I was not read in on classified programs, and the Terrorist Surveillance Program that you speak of, although it is no longer in effect, remains a classified program, and so I do not know what the details are of—

Chairman LEAHY. But you will get read into it.

Judge MUKASEY. Of course I will.

Chairman LEAHY. There will probably be further questions. My last question is this, and I will go back into this more on the next round. If the House or Senate certified a contempt citation against current or former White House officials arising from the U.S. Attorney investigation, would you permit the U.S. Attorney to carry out the law and refer the matter to a grand jury, as required by 2 U.S.C. 194?

Judge MUKASEY. In order for a U.S. Attorney to take a charge of contempt to a grand jury, a U.S. Attorney has to be able to tell that grand jury that any reliance by the contemnor on a privilege cited by the President or on an order of the President was unreasonable. Unless the U.S. Attorney can say that it was unreasonable for the person who is proposed to be held in contempt to have relied on a privilege or an order of the President, that would be—that person cited for contempt cannot be found to have had the state of mind necessary to warrant charging her or him with criminal contempt. And, therefore, that evaluation is going to have to be made by the executive when, as, and if it happens.

I hope and pray for a lot of things. One of them is that I do not ever have to make that decision. But when I make it, I am going to make it in line with the principles I have just discussed.

Chairman LEAHY. Your predecessor made the decision without even looking at those principles and said that the U.S. Attorney would not be allowed to go forward, and the White House did. You would at least require some principles before making such a determination. Is that what you are saying?

Judge MUKASEY. That is what I am saying. I am going to be guided by the principles I just mentioned.

Chairman LEAHY. Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Judge Mukasey, many references have already been made to the imperative need for honesty and integrity and independence in the Attorney General of the United States.

Going right to the heart of the matter, are you prepared to resign if the President were to violate your advice and in your view violate the Constitution of the United States on an important matter as Attorney General Elliot Richardson did in the Saturday Night Massacre?

Judge MUKASEY. As you and I discussed, if the President proposed to undertake a course of conduct that was in violation of the Constitution, that would present me with a difficult but not a com-

plex problem. I would have two choices: I could either try to talk him out of it, or leave. Those are the choices.

Senator SPECTER. Well, if the alternative is to leave if you cannot talk him out of it, then I think the answer to my question is yes.

Judge MUKASEY. It is.

Senator SPECTER. OK. Judge Mukasey, there is a variance between the way you are quoted in this morning's Washington Post contrasted with your citation of Justice Jackson's statement. Your quote in the Washington Post is saying, "When it comes to the international arena, our national priority is not to do justice to individual litigants; it is to protect the security of the body politic of the United States."

When you quote Justice Jackson on the considerations of authority versus liberty, he said that, "Protecting civil liberties, and people's confidence that those liberties are protected, is a part of protecting national security..."

Now, I am candidly concerned with the statement which appears in the Post because when you talk about not to do justice to individual litigants, it moves away from the traditional balancing test. National security is of vital importance, and I think it is fair to say, and a consensus would be present, that the President has to have greater authority in time of war or in time of an attack from international terrorism and a continuing threat, but there is still a necessity to be concerned about individual litigants, which your first statement rejects.

Is your dominant view the view you expressed by—or quoted Jackson that protecting civil liberties is a part of protecting national security?

Judge MUKASEY. It is, and I think I—I am not certain that I recall precisely the context of the statement that was quoted in the Post, but I think I was talking there about individual litigants, not in United States courts but, rather, individuals who may be in our custody abroad and whose rights are less than the litigants—or different from those of the litigants in U.S. courts.

Senator SPECTER. Well, the Supreme Court said in *Rasul* that if the territory is under the control of the U.S. Government, as Guantánamo was, wouldn't that apply to an individual in custody and control of the U.S. Government anywhere?

Judge MUKASEY. The holding in *Rasul* relating to Guantánamo related to a location that we control by virtue of a long-term lease, and it was, as I understood it, a statutorily based holding. In fact, Congress then passed a statute that changed the result in *Rasul*, which it could not have done had the result been constitutionally based. Whether the result would be the same if we were talking about the Bagram Air Base or some other location, I don't know. And that matter, of course, is now before the Supreme Court, which took cert. in the *Boumediene* case, and I think the briefs, in fact, have already been filed.

Senator SPECTER. Well, I am interested in your view. You are going to be called upon to make judgments long before the Supreme Court will. That is the great importance of the Attorney General to follow constitutional course, because it takes the Court a long time.

But on the issue of where the individual is, when we enacted the detainee treatment legislation in 2005, the critical provision is this: "No individual in the custody or under physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." I am going to come to the latter part in a minute, but the relevant part here for what we are discussing now is that it does not matter where the "physical location" is.

Judge MUKASEY. As to that provision, it certainly does not matter, and that provision relates to cruel, inhuman, and degrading treatment, which no one is permitted to engage in regardless of where he or she is.

Senator SPECTER. Senator Leahy quoted the Bybee memo. I want to refer to another Department of Justice memo in 2002, which said that, "Any effort by Congress to regulate the interrogations of battlefield combatants would violate the Constitution's sole vesting of the commander-in-chief authority of the President."

Now, the legislation defining the scope of interrogation to exclude "cruel, inhuman, or degrading treatment or punishment" was enacted after a 90-9 vote in the Senate and a highly publicized disagreement between President Bush and Senator McCain in a meeting between the two of them and a rapprochement, and then the President issued a signing statement, which said that his authority as commander-in-chief, authorities under Article II, did not necessarily mean that he would comply with the legislative provision, which is really more than a legislative provision since it was negotiated with the executive branch.

Now, if somebody comes to you as Attorney General, if confirmed, and they have a line of interrogation which you conclude violates the language of "cruel, inhuman, or degrading," and you have the authority of Office of Legal Counsel saying that the Congress cannot affect the President's authority on battlefield interrogation, realizing that this legislation says that regardless of physical location, are you going to advise the person who brings you the issue that you follow the statute or you defer to the President's Article II power?

Judge MUKASEY. Well, I think the question assumes that the President has directed that that method of intelligence, notwithstanding a finding that it violates the law, should proceed anyway. And in that case, I have no course but to follow the law.

Senator SPECTER. Follow the statute.

Judge MUKASEY. Yes, sir.

Senator SPECTER. The statute controls as opposed to Article II power. Thank you on that point.

Judge Mukasey, is there any justification for concluding that the constitutional right to habeas corpus is more limited than the statutory right to habeas corpus? And you and I discussed this informally, and it arises in the context of the *Rasul* decision by Justice Stevens saying that habeas corpus applied to Guantánamo and habeas corpus is provided for in the statute. But Justice Stevens then went on to say that there was a constitutional right of habeas corpus which emanated from the Magna Carta in 1215, John at Runnymede. And then, to my judgment inexplicable, the Court of Appeals for the District of Columbia said that the change in the stat-

ute on habeas corpus limited the constitutional rights of a detainee, notwithstanding what Justice Stevens said in *Rasul* about the Magna Carta and John at Runnymede.

So is there any justification for construing statutory rights of habeas corpus more broadly? Or, really, is there any justification for interpreting the constitutional right to habeas corpus in a narrower way than the statutory right?

Judge MUKASEY. Senator, as I understand it, that question and related questions are squarely before the Court in *Boumediene*, and I am going to have to do—to carry into—

Senator SPECTER. Judge Mukasey, you are punting now.

Judge MUKASEY. That is right, because I am going to have to do what I was told to do when I was a kid, which is I have to watch my mouth about this.

Senator SPECTER. Well, you can punt a little more easily when that issue is before the Court. I will grant you that. But there are many issues which are going to come to you where a Court decision is a long time away. And this Court decision may be a long time away. They are going to hear argument on it. It has been very contentious. They denied cert. Then on reapplication for cert, they granted it, requiring five votes instead of four.

There are going to be a lot of detainees who are going to be asserting their rights, and somebody comes to you in the interim, the Supreme Court has not decided, and they say, “Attorney General Mukasey, we have got this detainee. We want to know, since he has a constitutional right to habeas corpus, whether we have to accord him that right in light of the fact that the Congress has fiddled around and taken it away.” What do you say to him? Here you have got a detainee, you have got a person, you have a case in controversy right before you, months before the Supreme Court decides it.

Judge MUKASEY. That, as you say, is precisely the case that is before the Court, and the Department has filed—has already filed briefs in that case. I am not—

Senator SPECTER. I filed a brief, too, but that does not mean anything. The court has not ruled.

Judge MUKASEY. The fact that the Court has not heard it does not mean that I am not—

Senator SPECTER. Well, my time is up.

Chairman LEAHY. Go ahead, if you want to finish your question.

Senator SPECTER. I like to set a good example, Judge Mukasey. I like to quit on time. Thank you very much.

Chairman LEAHY. A strong message to some of the rest of us.

Senator KOHL?

Senator KOHL. Thank you, Mr. Chairman.

Judge Mukasey, when Attorney General Gonzales was nominated, many of us expressed serious reservations about his lack of independence from the White House, and the record shows that we were right to be concerned. For example, the White House and politics generally were very involved in ongoing prosecutions and charging decisions at the Justice Department, and politics infringed on personnel decisions, most notably in the case of U.S. Attorneys, but also regularly in the hiring of career employees.

Also, the Vice President's office seemed to control much of the legal advice that the Justice Department produced. We expect you to vow to us this morning that you will be independent of the White House and that politically driven decisionmaking will be eliminated if you are confirmed, but we are hoping that you can say more than that. You have had some time since your nomination to think about these problems and determine a course of action to address them.

So how will you ensure that politics plays no role and that there is no appearance that politics plays a role in cases brought by the Justice Department?

Judge MUKASEY. The question you asked, of course, is enormously important because it goes to whether our citizens and everybody here can have confidence in the administration of justice in this country. And what I have said in meetings with people in the past and what I have said here and what I am going to reiterate, if I am confirmed, is that any attempt to interfere with a case is not to be countenanced; any call to a line assistant or to a United States Attorney from a political person relating to a case is to be cut and curtailed, and that person, that caller, is to be referred to the few, the very few people at the Justice Department who can take calls from elected officials. Regardless of that, hiring is going to be based solely on competence and ability and dedication and not based on whether somebody has got an "R" or a "D" next to their name.

I served in the Department in the U.S. Attorney's Office in the Southern District of New York 35 years ago. I was never asked what my politics were. I did not know the politics of many of the people there, and still do not. And it did not matter. It had nothing to do with our job, nothing to do with the way we did it, and it cannot have anything to do with the jobs of the people in the Justice Department today.

That is the standard I am going to make very clear, very precise, and I am going to enforce.

Senator KOHL. Other than saying you will not hire or fire U.S. Attorneys solely for political reasons, what can you do to ensure that this practice does end immediately?

Judge MUKASEY. I don't know now of any ongoing dispute involving the dismissal of a United States Attorney for any such reason, but if there is any such, I am going to get in the middle of it very fast and stop it and do everything I can to stop it.

Senator KOHL. What can you say to assure us that the legal opinions produced by your Justice Department will be based on the best interpretation of law and not on the White House or the Vice President's interpretation of the law?

Judge MUKASEY. I am going to review the significant decisions of the Office of Legal Counsel, particularly those relating to national security, although not exclusively, so as to make certain that they are sound, soundly reasoned, soundly based. We have already had the experience of one of those opinions having to be withdrawn, and I want to make certain that the others that are in place are sound and change them if they are not.

I think we need to do that not only so that everybody can have confidence in the administration of justice, but also so that the peo-

ple who are out in the field, the people who work for agencies, people who may be engaging in interrogation, have confidence that they are acting on the basis of the law and that they are not going to have the rug pulled out from under them at a later time because it is found that somebody had gone too far in giving them authorization.

It is important that they be able to do their work, and we are going to expect them to do their work. We want them to get the information that we need. But we cannot expect them to put their careers and their freedom on the line if they do not have confidence that the authorizations that are being given to them are sound.

Senator KOHL. Justice Department senior positions, as you know, are filled with acting positions who the President has not nominated and the Senate has not confirmed. Do you think this is a problem for the effective management of the Department and the enforcement of our laws? And if so, what do you intend to do to change it?

Judge MUKASEY. Of course it is a problem. Matters cannot move forward unless necessary authorizations are given; and if the offices of people who would give those authorizations and move those matters forward are vacant, then things stagnate, and not only does justice not get done, but morale deteriorates.

I will try to attract people—and I think I can attract people—who understand the importance of doing the jobs that are unfilled and get people to do them just as quickly as I can. It is not something, obviously, that I could do—or can do before confirmation. I think it would have been regarded as something of an act of presumption for me to start looking at people and talking to people and interviewing people and so forth. But I have thought about it, and it is obviously a top priority.

Senator KOHL. Judge Mukasey, for decades this country has been admired around the world for its unwavering commitment to human rights and the rule of law. There is a growing consensus that the detention center at Guantánamo Bay is causing great harm to our reputation around the world. Former Secretary of State Colin Powell said, and I quote, “If it was up to me, I’d close Guantánamo not tomorrow, but today.”

Last year, even the President himself recognized that Guantánamo has been a focus of international criticism, and he said, “I would like to close Guantánamo.”

Do you think that we need to close Guantánamo Bay prison? And if so, will you recommend that to the President?

Judge MUKASEY. I think there are substantial problems with Guantánamo, both problems of reality and problems of perception. As to reality, it is my understanding that although people are humanely treated at Guantánamo, it is more than a matter of humane treatment. It is a matter of the fact that we are detaining people apparently without end, and that it has given us a black eye. And I understand the practicalities that the President has to deal with beyond the question of whether people are or are not being humanely treated.

I think a substantial reason for the problem we have had with Guantánamo is that, to use a bureaucratic expression, “nobody owns it.” The Defense Department runs it. There is obviously an

overlay of Justice Department involvement insofar as we are talking about hearings or not for detainees. The National Intelligence Director obviously has an interest in what happens to the people there because they may very well have or have had information that we need in order to combat terrorism. So it is out there in a kind of no man's land of jurisdiction, and control has to be taken.

Senator KOHL. Are you prepared to recommend to the President that we close Guantánamo?

Judge MUKASEY. I am prepared to recommend to the President that we take the responsible course in dealing with the people at Guantánamo. I cannot simply say we have to close Guantánamo because obviously the question then arises of what we do with the people who were there. And there is now no easy solution to that.

Senator KOHL. Well, you have had time to think about this. It has been on the table since the day you were nominated, and for a long time before that. What are you prepared to do with Guantánamo? Are you prepared to close it? Are you prepared to take the steps that are necessary to close it?—which you have indicated needs to be done. But are you prepared to say to the President we need to close Guantánamo as soon as we can, we have several things that need to be done so that we can close Guantánamo, but the prison needs to be closed?

Judge MUKASEY. I think I am prepared to say that we need to get the best advice and the best ideas that we can and act responsibly, with the goal of closing it down because it is hurting us. That I am prepared to say, and I think as regards this President, I think I would be preaching to the converted. I think he understands that, and I think he has said that he understands that Guantánamo has hurt us.

Senator KOHL. Is that high on your list of priorities?

Judge MUKASEY. Yes, it is, along with—yes, along with filling vacancies, it is.

Senator KOHL. So we can expect that in the event that you are confirmed, soon thereafter we will be hearing about Guantánamo and the things that you believe need to be done to close it as soon as possible?

Judge MUKASEY. I think we can expect that I will try to get the best people I can to give the best advice that they can and that I will be making that known to the President. That is what I am going to do.

Senator KOHL. Do you believe that Congress has the constitutional authority to prohibit torture?

Judge MUKASEY. Yes, I do, and it has.

Senator KOHL. Thank you.

Judge Mukasey, in today's Washington Post there is an article describing how, since September 11, 2001, the Justice Department has redirected its efforts away from fighting violent crime. Referring to the alarming recent increases in violent street crime, the article quotes a speech this week from FBI Director Mueller in which he states, "We are realizing that national security is as much about reducing the number of homicides in our streets as it is about reducing the threat of terrorism."

Do you agree with Director Mueller and the statements he made? And if so, what steps will your Justice Department take to reduce the now growing threat of violence across our country?

Judge MUKASEY. I do, and I think we need to look at both resource allocation and at the resources we have. It is my understanding that the terrorism effort, insofar as it took place within the Justice Department, apart from the FBI, just the Justice Department excluding the FBI for a moment, that that effort was undertaken by people who were taken from the Criminal Division and put into antiterrorism efforts, and that there may have been programs, including anti-gang programs, that may have suffered as a result. And that is something that cannot be tolerated because we cannot turn our society into something that is not worth preserving in order to preserve it. That is not a formula for success.

I think we need to figure out staffing. I think we need to get the budget where it ought to be. And, obviously, if I am confirmed, I am going to be here not like a mendicant, but I will be here with, I hope, an intelligent program for putting it on track and for implementing in particular anti-gang efforts.

I come from a jurisdiction where violent gangs reduced virtually an entire borough to a war zone and related parts of another borough. I know what gangs can do to a city. I saw it. There is a Violent Gangs Unit in the U.S. Attorney's Office in my district focusing specifically on that. So I understand the importance of that, and it is also corrosive because people attracted to violent gangs obviously are young people, and that is supposed to be our future.

Senator KOHL. As you know, Judge Mukasey, violent crime, to which we referring just a minute ago, rose again last year. Many of us are concerned that the way in which your predecessor addressed this important issue was not good enough. In each year of his tenure, he proposed drastic reductions to important State and local law enforcement funding programs. One program this administration has continually tried to eliminate is the very successful and cost-effective COPS universal hiring program. As funding for more police officers on our streets decreased or ended, not coincidentally violent crime rose significantly across our country.

Would you agree that we need a renewed commitment to this COPS program to counter the surge in violent crime across our country?

Judge MUKASEY. I think the COPS program has been very successful, and I think we ought to keep it in place.

That said, as I understand the COPS program, the mechanism that was supposed to be put in place was that there would be an initial funding for hiring and then States and localities which saw a good effect from the additional hiring, hopefully had an effect of reducing crime, would themselves begin to fund their police departments and State police officers locally and statewide. But the COPS program was not supposed to be an ongoing funding program for police departments, and I support that. I think programs that teach by example and then permit localities to follow that example are the best use of Federal resources, and I would encourage it.

Senator KOHL. So you are not about to say that you do support continuing funding for the COPS program?

Judge MUKASEY. I think we ought to fund it in such a way that it encourages States and localities to continue the initiative and to keep the momentum going. I think the point was to start momentum and keep it going with State and local funds. And that is the principle I support.

Chairman LEAHY. Thank you, Senator Kohl.

Senator Hatch will be next, and before we start, just so you know, we will continue to go back and forth. Judge, I am going to break about noon, as I mentioned to you earlier. If you need a break before then, let us know.

Judge MUKASEY. Thank you.

Chairman LEAHY. The idea, because of the fact that the President is coming up here for the presentation of the Congressional Gold Medal to His Holiness the Dalai Lama, a lot of things slow down in the Capitol. We are moving around, a number of us who are sponsors of that Gold Medal will—or a number of us who are friends of the Dalai Lama want to be there.

We will go now to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Judge Mukasey, I appreciated the time we had together in my office. I certainly appreciated the comments by both Senators Schumer and Lieberman about you and their relationship with you. I thought they were very good comments.

You have an excellent reputation as a judge, as a prosecutor, as an attorney. And I for one am very grateful the President has called you to this position.

Now, I appreciate your willingness to accept this position at this time, with only a year and a half, a little over a year to serve, at a time when we really need you, and I think everybody should appreciate that fact. And I hope that you will be quickly confirmed at the conclusion of these hearings because we need you down there at the Justice Department as early as we can, and to strengthen and pull together that Department like it needs to be.

Now, if I heard it correctly, when Senator Specter was asking you about detainee treatment, I thought he characterized you as saying that a statute necessarily trumps the President's authority under the Constitution. Now, I may have gotten that wrong, but I want to clear it up just in case. Does or can a statute trump the Constitution?

Judge MUKASEY. If that is what I said, that is not what I meant.

Senator HATCH. Well, I know you did not mean that.

Judge MUKASEY. As I said earlier, even when the Foreign Intelligence Surveillance Act was enacted, it, according to the then Attorney General, did not reach the limit of the President's authority, which means that the President had authority between where the statute left off and where his authority left off. The statute cannot limit that authority because he has the responsibility to protect the country, and so he has the authority that is commensurate with that.

But that said, I think it has been obvious from events of the last several years that everybody is better off—the President is better off, the Congress is better off, the country is better off—when everybody is rowing in the same direction. When the President acts pursuant to his authority with help from the Congress, with the

tools that the Congress provides, then we do not have to get into butting heads over who can and who cannot.

Justice Holmes said that when the Constitution defined three branches of Government, it did not define fields of black and white. There is gray, and there is always friction at the borders. We are all much better off when those issues do not have to be resolved in an either/or fashion.

Senator HATCH. Thank you.

The first area that I would like to discuss beyond that is the enforcement of our laws against obscenity and pornography. Obscenity and pornography seem to be more widespread than ever. It just seems to be pervasive in our media today, especially the Internet. The consumption of this material harms individuals, families, communities. The production of this material victimizes children as well as adults and disproportionately victimizes women, as far as I can see. I am pleased to see that the Justice Department is finally finishing regulations to implement the child pornography statute Congress passed last year as part of the Adam Walsh Act.

Now, eight members of this Committee were cosponsors of that legislation, and I hope the Department will get those regulations finished and rigorously enforce the law with regard to that.

Turning to the issue of obscenity enforcement, the Justice Department's record of enforcing the laws against adult obscenity has been criticized almost continuously for more than a decade. These cases essentially stopped altogether during the Clinton administration, and, unfortunately, there is not much more to show during the Bush administration.

Just last week, the Los Angeles Times published an article reviewing some of these issues and criticisms. The cases that are brought focused narrowly on the most extreme material rather than on the more mainstream obscenity. And perhaps that narrow approach makes a few convictions more likely, but those convictions have little or no effect on the obscenity industry, and most consumers do not access this extreme fringe material.

Now, the larger mainstream obscenity companies will gladly condemn the extreme marginal producers as if by doing so they can take some sort of a moral high ground. In my view, the Justice Department's obscenity enforcement strategy has been misguided. It focuses on prosecuting too narrow a range of obscene material. Now, in my view, there are too few FBI agents and too few prosecutors around the country initiating investigations and cases in this area.

So I am asking you personally to review this policy decision about prosecuting extreme rather than mainstream obscenity and to consider changing it. Would you give some consideration to that?

Judge MUKASEY. I certainly will.

Senator HATCH. I would be grateful to you if you would.

Judge MUKASEY. I certainly will, and I do so because I recognize that even what is referred to conversationally as "mainstream material" can have an effect of cheapening society, of objectifying women, and of endangering children in a way that we cannot tolerate.

Obviously, we are all aware the Supreme Court has put limits on the degree to which we can prosecute for content. But even

within those limits, we have to make sure that this stuff does not affect children and does not wind up undermining families.

Senator HATCH. Will you review the allocation of resources and discretion in the FBI field offices to ensure that this area of law enforcement is given the priority it deserves?

Judge MUKASEY. I will.

Senator HATCH. Thank you so much.

Let me ask you about a case you listed in your questionnaire as one of the ten most important cases that you have personally worked on, and, of course, that is the *Karlin Communications* case, a very important case. As you can imagine, this case caught my eye since it occurred in my home State of Utah. Briefly describe your role in this case and why you think it merits being in your top ten list.

Judge MUKASEY. My role in that case was simply that I was asked to serve, along with actually the principal—the lawyer whose client that was, my former, my late partner, Harold Tyler, who was a former Deputy Attorney General, and a company that was known colloquially as the “dial-a-porn” business was being investigated through the U.S. Attorney’s Office in Salt Lake City, and they asked us to represent them.

It turned out that the statute under which the charges were proposed to be brought and later were brought was a statute that did not apply to an operation of that sort. And that was the nature of the defense that we interposed. I tried first, unsuccessfully, to persuade the U.S. Attorney’s Office and to persuade a district judge not to permit the filing of an indictment under a statute that did not apply. After the indictment was filed, I moved before that same judge, as it turned out, to dismiss the indictment because the statute did not apply. He granted that motion, and the case was affirmed by the Tenth Circuit.

So far as being among the top ten, it is fairly rare that one gets an indictment dismissed for failure to charge a Federal crime, which is what happened there, but it had to do entirely with whether the statute was the appropriate one or not, and nothing else.

Senator HATCH. That is an appropriate effort by any attorney under the law and enforce the law, and that shows, again, I think, how you have acted throughout your lifetime. Some people might try and construe your representation in that case wrongly, but I commend you for being the great attorney you are.

Judge MUKASEY. Thank you.

Senator HATCH. Well, let me just—let me see. I still have a little bit of time. Judge Mukasey, the protection of intellectual property has always been one of my top interests here. Currently, Chairman Leahy and I are working on—and others on this Committee, I have to say, and Senator Specter has done some yeoman work in this area. But a number of us on this Committee are trying to come up with the Patent Reform Act of 2007, which the Senate we hope will consider in the coming weeks. Now more than ever, Americans’ ingenuity continues to fuel our economy, and it is imperative that we protect new ideas and investments in innovation and creativity. Piracy and counterfeiting are now the new face of economic crime around the world, far exceeding traditional property crimes. Strong

intellectual property protection builds the economies of developed and developing nations alike. Counterfeiting and piracy, on the other hand, cripple growth and stifle innovation.

Nationally, my colleagues and I in the Senate are committed to curtailing piracy and counterfeiting, but this is a global problem, and the solution will require a commitment to beef up domestic enforcement and a governmentwide effort to prevent the creation of pirated and counterfeited materials.

Furthermore, I believe any solution must take an integrated approach on both the domestic and international fronts, incorporating educational, judicial, and enforcement components. And I believe that the draft proposal released by the Justice Department earlier this year addressing some of the enforcement issues is a good start.

Now, what role do you think the Department should have in this important endeavor?

Judge MUKASEY. I think the Department should be aggressive in protecting the intellectual property, which is as important as any natural resource that we have. That is what fuels our economy, and that is what promotes our growth. And I had occasion as a district judge to enforce intellectual property laws. There is a way of authorizing private entities when they believe that their intellectual property is being knocked off and otherwise duplicated improperly to get a U.S. marshal to go out and seize both the offending material and the means used to produce it. And I did that on more than one occasion, and I think successfully shut down some counterfeiting operations.

Obviously, as you say, this is not just a problem in this country. This stuff is pouring in from abroad, and we need to stop it.

Senator HATCH. It is a worldwide problem.

In the case of terrorist Jose Padilla, you ruled that the Government could designate him as an enemy combatant, but you also ruled against the arguments of able lawyers, such as James Comey and Paul Clement, that Padilla was entitled to consult with counsel. One article, I believe, was in Newsweek about a month ago describing you as telling Mr. Clement that his arguments were absurd.

Now, some critics of the previous Attorney General have said that he was not independent enough of the White House. Now, will you take that same backbone that you exhibited there, assuming that Newsweek was accurate, and sense of independence shown during your judicial service into this new position as an Attorney General?

Judge MUKASEY. Well, I will reject any argument that I feel is without foundation, and I just want to make one minor correction, particularly since I have met Paul Clement since then. He is a superb lawyer.

Senator HATCH. I have no doubt that you will work very harmoniously with him.

Judge MUKASEY. I do not think I actually said his argument was "absurd." My manner and my ruling may have said that, but I don't—I think I tried to avoid that word. I think I did succeed in avoiding it.

Senator HATCH. Well, I only raise it because it was a lot of fun for me to raise.

[Laughter.]

Senator HATCH. I want you to know how much I appreciate your willingness to accept this great position—it is an important position in this country—and how much I personally care for you and like you and respect you, most importantly respect you. You are one of the best, and I commend the President for choosing you, and I really, really thank you for taking this position in this very short time left in this administration. I am grateful to you.

Judge MUKASEY. Thank you very much.

Chairman LEAHY. Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and welcome, Judge. It is good to have you here, and I also thank you for taking this position.

You mentioned earlier—and I wanted to clear something up—that the Terrorist Surveillance Program is not now in effect. I think you mentioned this in response to Senator Specter's question. It is, in fact, in effect. It has been brought under the jurisdiction of the Foreign Intelligence Surveillance Court, but I do not want anyone to believe it is not in effect.

Judge MUKASEY. As I said, I am not read in on classified programs, and so I am going to make mistakes like that, and I appreciate being corrected.

Senator FEINSTEIN. Thank you, just for the record.

Now, let me ask you a question about delegation of authority. Attorney General Gonzales issued an Executive order on March 1, 2006. It was Order 2808, and I have it here. That delegated substantial authority to hire and fire to his chief of staff and the White House Liaison. Those were Kyle Sampson and Monica Goodling.

Now, technically, the order does not involve U.S. Attorneys, but it became very clear to me that they played a role unofficially in the firing of the U.S. Attorneys.

My question to you is: Will you reverse this order?

Judge MUKASEY. I didn't understand—I am surprised to hear that order is still in effect, and I certainly believe that, just as a way of—as a tool of administration, delegation is important. Obviously, an Attorney General cannot do everything himself or herself. But that said, the authority is that of the Attorney General, and you do not assign to people who are—particularly people who are regarded as political people, the authority to make decisions on hiring in contact with other political people. That is not the way I am going to run the Department.

Senator FEINSTEIN. Well, I thank you. I would respectfully suggest you take a look at it, because it does vest authority, and I quote, “to take final action in matters pertaining to the appointment, employment, pay, separation, and general administration of;” and then it cites three specific categories of service employees. So I would hope that you would take a look at it, and I think it is the nub of the problem that we had before.

I would like to ask a question about Executive power, and in *Padilla v. Bush*, you upheld the President's power to detain Jose Padilla indefinitely, even though he was a United States citizen seized on United States soil, without being charged with any crime. Under an existing statute, no American citizen could be detained “except pursuant to an Act of Congress.”

You ruled that the Authorization for the Use of Military Force was an Act of Congress and was written broadly enough to authorize Padilla's detention. The Second Circuit disagreed, saying that the AUMF did not authorize the President to detain American citizens like Padilla who were seized in the United States. The Supreme Court did not reach the issue, and it remains unresolved.

As Attorney General, will you advise the President that the AUMF authorizes him to seize United States citizens on U.S. soil and detain them indefinitely without charge?

Judge MUKASEY. I think that the authority of the President to seize U.S. citizens and detain them without charge, leaving aside for a moment where that happens, was, in fact, sustained in *Hamdi*. The Court in *Hamdi* did rule that the President had authority to, among other things, seize and detain American citizens captured on the field of battle. Of course, that person was captured, I believe, in Afghanistan.

Senator FEINSTEIN. I am talking about the United States.

Judge MUKASEY. *Hamdi* left open the question of where the battlefield is and who defines the battlefield. And I certainly cannot say that as of now there is clear authority authorizing what I thought there was authority to authorize in *Padilla*.

Senator FEINSTEIN. Thank you very much. I appreciate that.

Also, in your *Padilla* opinion, you claim that under Civil War era prize cases, the President has inherent authority to respond to aggressive acts by third parties and that "courts may not review the level of force selected."

The first question is: How long does this unlimited power last?

Judge MUKASEY. I think the short answer to that is that it lasts as long as it has to last until the other political bodies involved in the matter can take the matter up and deal with it. And obviously Congress did take up the disaster that was—that fell upon us on September 11 and responded with the Authorization for the Use of Military Force shortly thereafter.

Senator FEINSTEIN. So you would then agree that the Congress under its Article I authority would have the right to set boundaries on military actions?

Judge MUKASEY. I think that Congress under its Article I authority has to provide tools to the President. Where the provision of tools leaves off and interference with the use of those tools and the way those tools are used begins is not something I ever want to see resolved in some definitive way because of a conflict between the two branches.

Senator FEINSTEIN. I think this is a real point of issue and could be of issue in the future, and because of this case, I would be very interested in your advice to the President. We well could be faced with an exercise of Executive power that we would want to bind in the future, and so where I am going is: Do you believe the Congress would have the authority under Article I to do so?

Judge MUKASEY. I think that would very much depend on how it was done and what it concerned. And I am—the learning curve that I have had up until now has been very steep, and I think it is—it is not in my interest and I think it is not in the general interest for me to be in a position of having to come up with highly detailed expressions of view on very difficult subjects, because I

want—I am sure we all want that learning curve to continue after—

Senator FEINSTEIN. I understand that.

Judge MUKASEY.—I leave this hearing room, if I am confirmed.

Senator FEINSTEIN. Right. I understand that. But the *Padilla* case caused me—the statement, “courts may not review the level of force selected,” you know, causes some concern.

Let me ask one other question. Would not the President have to advise the Congress of his intentions and actions?

Judge MUKASEY. I think the President does advise the Congress of intentions and actions. I think that obviously very much depends on the level of detail we are talking about. The President would be at the very least unwise to undertake major initiatives without making sure that everybody is on the same page and that everybody understands and is comfortable with his authorization to move forward, because otherwise the country is riven with dissent, and that is not helpful.

Senator FEINSTEIN. I would agree.

Let me go to the FBI. In the last oversight hearing with Director Mueller, he spelled out both in his written testimony and I asked him questions about the priorities of the FBI, and, in fact, violent crime was No. 8 of eight priorities. Well, in the last 2 years, violent crime in the United States has increased, and I am very concerned about it.

Director Mueller also said that the funding staffing level for FBI criminal case agents has decreased by almost a thousand agents—that is 18 percent—since 9/11.

My question to you is: Will you look into this? Will you look into this prioritization? You spoke about gangs and their activities, and I am one that believes that we have a real problem with gangs in the United States. Certainly in my State, California, and I believe in every medium- and large-size city in this country, there are, in fact, operative gangs that practice violent crime.

So the question I have of you is: Would you make overseeing these priorities a priority of yours?

Judge MUKASEY. I certainly will, and I will look at the priorities, and I am obviously particularly interested to find out what the other seven priorities are. But there is no excuse for making violent gangs other than a very substantial priority.

Senator FEINSTEIN. I appreciate that.

Now, in reviewing your record—and this is only important in that it may be a harbinger of how you would view civil rights—we found a case—and it is *U.S. v. New York Police Department*. It is about a female police officer who was raped by her male colleague. The issue was whether the female victim was treated differently by the employer than the male assailant. And the facts of the case reflected that the victim did not tell the truth about the events, had not secured her weapon, which was eventually used against her. However, it was not disputed that she was raped or that a bullet was fired into her bed. The victim was repeatedly questioned about the attack, placed on restricted duty, charge with making false statements, and eventually fired.

The assailant was not interviewed until 8 months after the attack and 2 months after Karen Sorluco was fired, nor was he reprimanded or punished in any way.

You were the trial judge on this case, and you decided that it should not be heard by a jury, and you granted summary judgment. The Second Circuit disagreed and ordered a jury trial. After hearing all the evidence, a jury agreed that the female victim had been treated differently than the male officer and awarded her over \$260,000 in damages.

You vacated that verdict. She appealed and again the Second Circuit overruled your decision, stating that you were wrong to substitute your judgment for the jury's, and that the New York Police Department tragically failed to show any sensitivity to the physical trauma and resulting psychological manifestations commonly experienced by rape victims.

Now, as you look at this case in hindsight, and as I look at the case and am concerned about the Civil Rights Division of the Department of Justice at this point in time, is this a showing of your views? Or do you see it as an unusual case?

Judge MUKASEY. It is, to say the very least, it is a stark euphemism to say that it is an unusual case. The only issue presented to the fact finder in that case—and as I understood it, presented to me—was not whether the police department acted sensibly or humanely or certainly not as I would have acted. The only issue as I saw it was whether they had acted unlawfully in their treatment.

And I wrote a decision setting out what I thought the evidence was that indicated that they could not be reasonably found to have acted unlawfully. And I set it out in detail so that the Court of Appeals could understand how I had reached the decision I had reached, and so that, if necessary, they could—as, in fact, they did—reverse the case.

It was, as you say, a very unusual case—I am sorry.

Chairman LEAHY. No, I am sorry. Go ahead. Finish your—

Judge MUKASEY. I guess that is the kind of narrow answer to the narrow question, but there is a much broader question, which is the question about harbinger and basically where do I stand on civil rights—on women's issues specifically and on civil rights generally. And there I have a record of 40 years of service as a lawyer, as an Assistant U.S. Attorney, as a judge, in my interactions with my colleagues, with my employees, including my law clerks, half of whom were women, and each of them hired on the merits—on the merits.

In my own personal life, I at one time belonged to a club that restricted membership to men, and I tried to undermine that, sponsored for membership a woman whose name did not indicate that she was a woman. And we went through a process, including letters of recommendation without using the pronoun, and saw how far I could go, and it was discovered and she was rejected. And then there were two votes by that club, both of which came out against admitting women. And at that point, I pushed back and said, "I have had enough," and I withdrew.

That is just an anecdote, but it, I think, indicates what my personal standard is, and my standard that I would bring to the Department.

So far as the Civil Rights Division is concerned, that Division occupies a very special place because the civil rights movement in general has been one of the finest expressions of the genius of American politics that it is possible to imagine. The—

Chairman LEAHY. We can go back onto the same question, obviously, in Senator Feinstein's followup time. I agree with what you say about the Civil Rights Division. There are going to be a number of questions on that because of some of the things that have been done there.

What I intend to do is have Senator Grassley ask questions. We are going to try to stick within our time, then go to Senator Feingold. We will then close or recess with Senator Feingold and go back to—and if I am not here, Senator Feingold, if you would please recess the hearing until after the matter of the Dalai Lama.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. That will give you plenty of time, too, to relax, visit with your family, and have some lunch.

Judge MUKASEY. Thank you.

Chairman LEAHY. Senator Grassley, go ahead, sir.

Senator GRASSLEY. Judge, congratulations on your appointment. I had a nice talk with you in my office. I visited with you then about some issues, and I said I would probably ask questions on those issues for the record. And so basically I am going to stick within that guideline. If I throw you a curve ball, I will welcome answers in writing if you do not feel comfortable.

Judge MUKASEY. I will try to hit a curve ball.

Senator GRASSLEY. OK. One topic that is near and dear to my heart, as I told you, is the Federal False Claims Act. This is a law signed by President Lincoln, but it was intended to recover Government money lost as a result of war profiteers who sold the Government faulty goods during the Civil War. It needed to be updated, and so in 1986, I passed the False Claims Act to do that. The goals of that amendment of 1986 remain just as important today or just as important as they were 150 years ago. We have recovered \$20 billion of money, taxpayers' money that would have otherwise been lost and gone forever. In fact, I think maybe, you know, the deterrent effect probably has saved a lot more money than that, but you cannot measure that. The bottom line is that there is tremendous benefits to the Act and to its aggressive enforcement.

Unfortunately, the False Claims Act has been under constant attack since President Reagan signed it in 1986. Opponents have tried to gut it through work of Congress. They have tried to get the Justice Department to slow down enforcement, and they have brought lawsuit upon lawsuit to water the Act down in the courts.

Well, in large measure, the False Claims Act has stood the test of the time, including even challenges to its constitutionality. But the next Attorney General and every Attorney General needs to continue to support this law and appreciate the benefits that a vigorously enforced False Claims Act can bring about.

Judge, if you are confirmed, what actions will you take to support and strengthen the Justice Department's program to prosecute false claims cases?

Judge MUKASEY. Well, as you know, the mechanism for implementing False Claims Act charges begins initially with people who could later be witnesses, people who have knowledge of dishonest behavior, behavior that hurts the Government, and they come in and file lawsuits on their own, which are then sealed and sent to the Justice Department so that it can decide whether the resources of the Justice Department, after investigation, whether those resources should be put behind that lawsuit and whether that lawsuit should then be used to recover Federal money and put an end to Federal waste. Those are enormously important.

I had, I believe, only one such lawsuit in my tenure, but I tried to treat it with the seriousness it deserved. And the Department is going to have to also treat those cases with the seriousness they deserve, and each U.S. Attorney's Office is going to have to be alert to filing of such a case and to following up on such a case and to interacting with Main Justice if they have to, to get resources to push such cases, because they result, as you say, not only in enormous recovery, but they have a great deterrent value.

Senator GRASSLEY. I think you have answered my second question, at least the first part of it, and that is, you obviously seem to vigorously support the Act and its prosecutions. I told you about some attempts to weaken it. I would hope that you would commit to not bowing to outside pressure to weaken the Act.

Judge MUKASEY. I am not going to bow to pressure from any direction to weaken the Act.

Senator GRASSLEY. Would you pledge to work cooperatively with qui tam whistleblowers—and I think you have answered partly that by saying you were going to consider these cases, and they had to be there for you to consider. But would you cooperate with qui tam whistleblowers that file false claims cases and ensure that those cases are reviewed promptly by the Justice Department and do not languish under seal? Because that is a problem we have come up against.

Judge MUKASEY. I am going to try to make sure that they get reviewed, both promptly and fairly.

Senator GRASSLEY. Then let me ask you about a process, about this under seal process. Would you provide Congress with regular updates on the status of False Claims Act cases, including statistics as to how many are under seal and the average length of time a case has been under seal?

Judge MUKASEY. I am going to examine into whether those statistics can be gathered. I don't know how easy or hard it is to find that out, but I think it is an important thing to find out.

Senator GRASSLEY. Well, at least you know that is one of the problems we need to know, as long as we oversight this legislation.

A problem that the False Claims Act has encountered has been the courts placing jurisdictional hurdles on the law that clearly were not intended by Congress. For example, in the *Totten* case, the D.C. Circuit limited the application of the False Claims Act to Government grantees. In that case, it was Amtrak, because the

court determine that Amtrak employees were not Government employees within the terms of the Act.

Earlier this year, the Supreme Court limited the definition of "original source" under the Act in the *Rockwell International* case. Not only are these two cases contrary to the original intent of the law, they place procedural and jurisdictional hurdles in the way of the U.S. Government and the qui tam relators who seek to recover Government money lost to fraud, thus weakening the effectiveness of the law.

In order to fix these inaccurate judicial interpretations, I have introduced S. 2041, the False Claims Act Correction Act of 2007, with several of my Judiciary Committee colleagues. I have asked the Department to comment on this legislation. However, Judge Mukasey, I want to hear from you that you will support my efforts to ensure the False Claims Act is clarified to meet the original goals of the 1986 amendments.

So would you agree to work with me to fix these negative interpretations of the False Claims Act and to bring court cases back in line with the intent of the 1986 amendments?

Judge MUKASEY. I will certainly work with you to do whatever we can do to make sure that the qui tam legislation is enforced the way it was meant to be enforced.

Senator GRASSLEY. This next question on the same point is easier to answer. Could we get a timely comment from the Justice Department on S. 2041 after you are sworn in?

Judge MUKASEY. Obviously, I am going to have to find out where in the Justice Department that particular measure is. But I will find it out and let's see whether we can get a timely comment, because that is necessary.

Senator GRASSLEY. When we met in September, we discussed my congressional oversight efforts and how I take that constitutional responsibility seriously. Oversight is a critically important part in helping to make Government more transparent, more accountable, more effective. Everyone benefits from congressional oversight. More importantly, oversight lets the American taxpayers understand what their hard-earned money is buying—or maybe being wasted on, as I just gave a speech on the Senate floor in regard to the GSA on this very issue. So I hope that you appreciate the role Congress has in conducting oversight over the activities of the executive branch, including your own Department. I trust that you will be responsive to my oversight activities, and I expect that my questions and document requests will be answered in a timely and complete fashion.

Judge, do I have your assurances that you will assist in my oversight activities, be responsive to requests not just from me but from Congress as a whole, help me to make the Justice Department more accountable to the American people? And I am not asking of your Department anything I would not ask of any department head.

Judge MUKASEY. You have that assurance.

Senator GRASSLEY. As part of my ongoing oversight efforts with the Department, meaning your Department, and its subordinate agencies such as the FBI, I have made extensive document requests and requests for interviews with agents and attorneys. Of-

tentimes, these requests for interviews are rebuffed, and my requests for documents are delayed due to the lengthy process of “internal clearance” at both the agency and the Department. And, obviously, those two words, “internal clearance,” remind me of nothing but a stonewall.

One noteworthy example among many others is a document request to the FBI for unclassified—I want to emphasize unclassified—e-mails related to the issuance of exigent letters in connection with the use of National Security Letters. Although I sent this request to the FBI Director on March 19, 2007, I have gotten nothing so far, despite assurances from the FBI officials to my staff that they were “given to the Department”—again, that word—“for clearance.” Another stonewall. I guess it is like saying, “Mr. Mukasey, can you tear down that wall?”

But, anyway, waiting over 7 months for unclassified e-mails to such an important oversight matter is unacceptable. I am concerned that both the FBI and the Justice Department clearance hinders the oversight process and may be just another tactic to slow down congressional oversight.

So, Judge, will you commit to ensuring that my document requests of both the Department and subordinate DOJ agencies, including the FBI, are fulfilled in a timely manner and do not languish in the clearance process or are not going to be stonewalled?

Judge MUKASEY. I am going to assure that there is not going to be any stonewalling. I ought to point out, though, that in particular as the NSL issue, there are ongoing investigations there. There has been an investigation by OIG, but there is more investigating going on, as I understand it, and that may be part of the reason why it is not quite as easy as it may seem to clear matters, because that investigation has to be pursued.

I will certainly look into what the requests are and whether the information can be provided in some convenient form that does not in some way step on the ongoing investigation.

Senator GRASSLEY. It would seem to me like in the words of the Department, it was—or in the words of the FBI, it was given to the Department “for clearance.” It would seem to me like at least we should have been told if that is what is holding them up. We were told nothing.

Judge, will you review the clearance process at the Department—this may even be more important—if there is something screwy about this clearance process, to ensure that it is not just a way to put up road blocks and further delay production of documents to Congress?

Judge MUKASEY. I am certainly going to review the clearance process to make sure that it is, in fact, a clearance process and not simply a black hole.

Senator GRASSLEY. Will you ensure that my outstanding—well, you have answered that.

Judge Mukasey, I have been an outspoken advocate for whistleblowers because I value the candid, unfiltered information that they provide to Congress about executive branch activities. At the Justice Department, I watched carefully the treatment of whistleblowers by the FBI and have been provided assurances that past practices of retaliation against whistleblowers are over. This in-

cludes assurances that the FBI has been working to ensure integrity within the Office of Professional Responsibility, which itself has had internal problems such as retaliation against FBI whistleblowers.

One, could you please address what safeguards you would put in place to ensure that all FBI whistleblowers are not subject to retaliation, be it whether it is the OPR or elsewhere within the FBI or the Justice Department?

Judge MUKASEY. I think I will talk to Director Mueller about the way in which the FBI deals with complaints and make sure that those complaints get a fair hearing, and that the treatment of people who bring complaints can in no way be characterized as retaliation, that those people ought to be—people ought to be encouraged to come forward. There is to be a designated person to whom they come forward, and that they should be protected.

Senator GRASSLEY. If you keep making that statement within the Justice Department, you will find out a lot of things that are wrong, but you will find out also that there is a lot of retaliation. But you might discourage a lot of that retaliation, and so I appreciate very much your comment.

I have learned that the FBI and the Justice Department Office of Inspector General have been using an overly broad non-disclosure form, and I think that this was supposed to—this is what I am talking about here, and my staff will bring that to you. Let me start over again.

I have learned that the FBI and the Justice Department Office of Inspector General have been using an overly broad—my time is up?

Senator FEINGOLD. [Presiding.] It is, Senator Grassley.

Senator GRASSLEY. Yes, I am sorry. I am going to ask you to respond to these questions in writing because I should not abuse my time, and thank you very much.

Judge MUKASEY. Thank you very much.

Senator FEINGOLD. Thank you, Senator Grassley. And I thank the Chair for allowing me to get my round in this segment.

Thank you, Judge, for being here, for your willingness to serve our country in this capacity. I greatly enjoyed the cordiality and the quality of our conversation that we had in my office, and I will certainly say, although I do not agree with everything you are saying, you are a much more responsive witness and nominee than we had in the last instance. And I am grateful for that and for the thoughtfulness of your answers so far today.

When we met a few weeks ago, I asked about your view of the legality of the NSA's warrantless wiretapping program as described by the President. You said that you were "agnostic" about whether the President can authorize violations of a statutory criminal prohibition. Both Senator Leahy and Senator Hatch have brought this up, but this was a key issue in my consideration of the nomination of the last Attorney General, so I want to return to it.

I agree with you, we are, of course, better off if we do not have conflicts between the branches. But conflicts do arise. Conflicts have arisen. And the U.S. Supreme Court has serious and detailed jurisprudence in this area. I do not think it is simply a matter of there being gray areas. I think there is a record and there are

cases that help inform us, and I am sure you, with your experience and excellent record, would agree with that.

Now, you have had several weeks to consider the question I asked you, so I will ask you again: Do you believe that the President has the constitutional power to authorize violations of the criminal law when acting as commander-in-chief?

Judge MUKASEY. The reason for my expression of agnosticism—and I thought it concerned the Terrorist Surveillance Program—was that I am not familiar with that program. I cannot possibly be familiar with that program. And for me to make a categorical statement with regard to that program one way or the other I think would be enormously irresponsible.

Senator FEINGOLD. Well, I think with regard to the law, though, we can talk about the warrantless wiretapping program without you knowing all the details. Let's take this. Do you agree that under Justice Jackson's three-part test the President's authority to authorize warrantless domestic foreign intelligence wiretaps without complying with FISA would be at its lowest ebb in light of the criminal prohibition in FISA? That seems to me to be something you can answer.

Judge MUKASEY. I think under that analysis, the President's authority, to the extent that it is not a war-based authority directly involving a war, is at its lowest ebb.

Senator FEINGOLD. In any event, wouldn't it be at its lowest ebb in this circumstance?

Judge MUKASEY. It is certainly at its lowest ebb because it does not have congressional authorization.

Senator FEINGOLD. And do you think there are situations where the President nonetheless could direct Government employees to violate FISA even where his power, as you have suggested it is, is at its lowest ebb under Justice Jackson's test?

Judge MUKASEY. Attorney General Bell said that FISA, certainly as originally enacted, did not go to the limit of the President's authority, and in the area between where that statutory authority left off and where his authority left off under the Constitution, on Judge Bell's view—and it is one I share—I think he would have the authority to act. I think it is important to recognize that the Fourth Amendment bars unreasonable searches. It then goes on to speak of when a warrant is required and when it is not. But there is very scant, if any, case law on the question of whether intelligence gathering, as distinct from gathering of evidence for criminal cases, is something that may very well be much more flexible than matters relating to the gathering of evidence for presentation in a criminal case.

Senator FEINGOLD. I guess I would say, Judge, in light of the Jackson test, which you have certainly said is relevant, and the clear language of the FISA statute, I find your equivocation here somewhat troubling. A prestigious group of law professors wrote the following to the Committee in 2006: "Every time the Supreme Court has confronted a statute limiting the commander-in-chief's authority, it has upheld the statute." And FISA specifically states that it is the exclusive means for conducting foreign intelligence surveillance of people in the United States, indicating Congress did

not intend to leave any room for what Senator Leahy referred to as a “commander-in-chief override.”

So this is, in fact, right in the core of being about these intelligence issues, and Congress has spoken. I think this is a very important principle, and I think the Attorney General of the United States should be comfortable with that. Would you like to respond?

Judge MUKASEY. I think in large measure, because I do not know what the program involves and where the statute leaves off and the program begins, I have to limit my response to what it has been up until now.

Senator FEINGOLD. Well, for the moment I will take “agnostic” as better than simply adhering to some extreme notion of commander-in-chief power. But I certainly hope as you become familiar with the program, you realize what I believe is to be the case, that the statute is exclusive in this area and that it does control.

You have been very critical, Judge, and even dismissive on occasions, of people who raise concerns about the PATRIOT Act. In 2004, you gave a speech on it, and you wrote a lengthy piece in the Wall Street Journal. How did you come to write this piece? And why did you decide to write about this particular topic?

Judge MUKASEY. The piece was not written for the Wall Street Journal. I received an award in that year, and it was expected that the recipient of the award would respond with remarks, and I responded with remarks relating to the PATRIOT Act. And it—

Senator FEINGOLD. What award was that?

Judge MUKASEY. It was the Learned Hand Medal of the Federal Bar Council, an award of which I will tell you I am very proud.

Senator FEINGOLD. Absolutely.

Judge MUKASEY. And I responded with remarks relating to the PATRIOT Act, and of what I then thought and, frankly, still think were some excessive criticisms of it, some of them without any view of what was in it and what I was recommending to my audience, which was an audience of lawyers, is that they get involved in the debate, that they look at the statute, that they propose amendments to it if they thought they were necessary, but that they participate in the debate in an intelligent, informed way, and not in a way that was just unmoored from reality.

Senator FEINGOLD. Which, frankly, is precisely what many of us tried to do from day one as they tried to pass the bill. But how did you conduct your research in writing this piece?

Judge MUKASEY. I conducted my research in writing the piece on looking at some provisions of the statute and at reading some of the criticisms that had been leveled at it that I thought were not justified.

Senator FEINGOLD. And did you rely solely on administration documents and the PATRIOT Act, or did you go into some independent materials?

Judge MUKASEY. I did not have administration documents relating to the PATRIOT Act. I had the PATRIOT Act.

Senator FEINGOLD. So you pretty much had just the words of the statute and some articles about it that were critical that you did not agree with?

Judge MUKASEY. Correct.

Senator FEINGOLD. Well, my sense is that your speech did not seem to take seriously the arguments on the other side. I understand that the PATRIOT Act became a symbol of Government excesses after September 11th and that people often blame the PATRIOT Act for executive branch actions that, you are correct in pointing out, sometimes did not have to do with the PATRIOT Act. That is a fair statement. But many serious people did have legitimate concerns about some provisions of that legislation, many of which have been borne out in a very dramatic way by later events and court decisions.

Your speech really kind of suggested that there were no such legitimate concerns. I would like to know if there were any other sources that you relied on to evaluate the arguments of the other side other than the statute. You have answered that it was simply the language of the statute, but I am wondering if there was anything else to it.

Judge MUKASEY. It was the language of the statute and the criticisms. I sat and composed that in my home. I did not have access to any other material.

Senator FEINGOLD. I guess, you know, that concerns me because I think there is very serious debate on both sides on this issue, and these provisions have been proven on a number of occasions, in particular with regard to National Security Letters. A really frightful report from the Inspector General, indicating that the failure of Congress to nail down the statutory language properly led to enormous abuses, suggests that the concerns that were raised by critics were real and had merit.

On more than one occasion, you have described concerns about civil liberties implications of the PATRIOT Act as "recreational hysteria." Despite your very appropriate and respectful approach in general, I think that one goes a little beyond respectful disagreement. It reminds me a little bit of Attorney General Ashcroft's infamous characterization before this Committee of critics as "chasing phantoms of lost liberty." I voted for Attorney General Ashcroft, and I agree with Senator Schumer's remarks that he has proven on a number of occasions to have stood up for the rule of law in tough situations. But that comment suggests to me a little bit of a troubling disregard for the seriousness of this issue.

Since you first made the comment, three Federal judges have struck down provisions of the PATRIOT Act as unconstitutional. Are these judges engaging in recreational hysteria? Or do you think perhaps a re-evaluation of your criticism might be needed?

Judge MUKASEY. I certainly do not think that any Federal judge of whom I was aware who dealt with any issue under the PATRIOT Act was engaging in recreational hysteria. What I had in mind were people who used it as a shorthand for everything that terrified them, regardless of whether it was in the statute or not. People who, for example, suggested that they would not under any circumstance cooperate with any investigation because they objected to the PATRIOT Act, I thought that kind of view was inexcusable.

Senator FEINGOLD. Fine, and I think there is some validity to that. But I would hope you acknowledge the validity of my concern. Prior to this moment, have you ever publicly acknowledged that

not all critics of the PATRIOT Act are engaging in reflexive or recreational hysteria?

Judge MUKASEY. I believe that I acknowledged it in the very remarks that included that phrase when I said that it may very well be that amendments to the statute would be necessary and that people ought to participate in an informed debate about it and that there may very well be parts of it that are unwise, bad as a matter of policy. And I left that possibility wide open, as I do.

Senator FEINGOLD. Thank you, Judge.

I would like to finish by asking you questions about the Protect America Act, the law that passed at the beginning of August to grant the Government vast new wiretapping authority. Are you familiar with the controversy surrounding the Protect America Act?

Judge MUKASEY. I am familiar with the fact that there is a controversy. I cannot say that I am up on the details of it. But I know there is a controversy.

Senator FEINGOLD. Are you aware of some of the concerns?

Judge MUKASEY. I am aware of some of the concerns.

Senator FEINGOLD. If you take over the reins at the Justice Department, are there any particular questions you are going to ask about its implementation or any particular concerns you have heard that you will want to try to address?

Judge MUKASEY. Obviously, I am going to need to know what the details are of the program, and I am going to need to know what actions are protected and how we go about enlisting the aid of private entities in doing this, because Government obviously cannot do it alone. Those are the details I am going to need to find out, the what and the how.

Senator FEINGOLD. I have been very concerned about the administration's attacks on the efforts by the House of Representatives to amend that law. I have my own concerns about the House bill, but it is, without question, a good-faith effort both to give the administration the authority it needs and also protect the rights of Americans.

As you evaluate the Justice Department's position in the reauthorization process, will you commit that you will meet directly both with critics and supporters of the Protect America Act to understand fully both sides of the debate?

Judge MUKASEY. I will.

Senator FEINGOLD. Thank you, Judge. You have been very patient this morning.

At this point the Committee will stand in recess until 2:30.

Judge MUKASEY. Thank you very much.

[Whereupon, at 12:14 p.m., the Committee recessed, to reconvene at 2:30 p.m., this same day.]

AFTER RECESS [2:46 p.m.]

Chairman LEAHY. I'd welcome everyone back. I apologize. This went longer than I had anticipated, although His Holiness the Dalai Lama gave a very, very moving speech, I thought the President deserves a great deal of credit for being here with the questions of Tibetan repression versus Tibetan autonomy in his speech. Edie Whitsell, the other Nobel Peace laureate on the stand, gave a moving speech. But I think that probably Senator Harry Reid

summed it up best when he said, "You refer to yourself as an author. I refer to you as a poet." And it really was poetical.

Senator BROWNBACK, you've been waiting very patiently, and I yield to you, sir.

Senator BROWNBACK. Thank you. I was at the ceremony as well, and it was quite moving to have two Nobel Peace laureates in the room and on the Capitol. It was quite a day.

Judge Mukasey, I want to go at a couple of topics. The first one I want to go to is, I think, the lead issue you're going to be wrestling with as Attorney General, presuming you're confirmed, and I will believe you will be confirmed. I want to congratulate you in the hopes that would take place.

But I want to look at this particular area of the interaction between intelligence gathering and civil liberties in the United States. That's the issue that this committee has been wrestling for some time about, and you've gotten different snippets and bites of it.

You've been a trial court judge on two of the lead cases, really looking at this area, and I think that's why you've been selected for this job, is to help us sort through this juncture of our need to gather intelligence as a country to protect our society and to protect ourselves, to provide for the common defense, which is the first role of the Federal Government, and our need, desire, and requirement that we protect the civil liberties of the people of the United States.

This is a tough issue and it's a tough moment, particularly with the ways and means of communication, the ease of travel today, the nature of the world becoming flatter and flatter each day and people being able to communicate. So I want to go right into this.

You've continually emphasized the importance of the rule of law and you've discussed controversial PATRIOT Act provisions. You didn't rely on an expansive theory of the executive branch, as I read it, but instead look at the practical impact of each portion of the statute.

In these discussions, you have balanced the national security gains from such provisions against any harms to privacy and civil liberties. You have also emphasized the rights of individuals to seek remedies under it. I want to ask you, for the record here, does that remain your viewpoint and does that remain your general view of what we need to do as a society and what you need to do as the Attorney General today?

Judge MUKASEY. Yes, it does.

Senator BROWNBACK. And then going particularly at this, do we have your assurances that, if confirmed, you'll vigorously defend the government's need to gather vital intelligence using laws like the PATRIOT Act and the Protect America Act and its successors, along with protecting civil liberties of the people of the United States?

Judge MUKASEY. Yes. Absolutely.

Senator BROWNBACK. On September 26th, a district judge in Oregon struck down two provisions of the PATRIOT Act dealing with searches and intelligence gathering. I'm sure you followed the various legal rulings on provisions of intelligence gathering in the PA-

TRIBUT Act. What's your response to this ruling, and how would you deal with it as Attorney General?

Judge MUKASEY. I've not looked at the ruling in detail, but the one thing I know about my own rulings as a district judge is that they are only as durable as the time it takes to get them to the circuit.

I assume, without knowing, that that decision will be appealed to the Ninth Circuit, and if necessary, to the Supreme Court. The word of a district judge, although persuasive and obviously dispositive in the case before that judge, is hardly ever the last word on any subject.

Senator BROWNBAC. Are there any particular criticisms of intelligence gathering laws like the PATRIOT Act or others that you feel this committee should know about from your viewpoint and from your vantage as being a judge on several of these key cases?

Judge MUKASEY. There are none that come readily to mind. I would seize on just two words in the question you asked before when you talked about—you mentioned my experience as a district judge, and then you mentioned practicality. The experience as a district judge teaches me that the abstract is a very bad place to decide questions like this.

Concrete situations present themselves that confound a lot of theories, and the best policy is to be guided by general principles, but to wait for a situation that presents itself before deciding on a hard-and-fast position as between one and the other, because reality has a way of undoing a lot of theories.

Senator BROWNBAC. But to give us a view here, and to give the American people a view of your advice and counsel that you'll give to the President of the United States, I can't give you hypothetical cases. There would be a hundred that could easily come to mind, actually, but that wouldn't be fair, nor would you answer it, nor should you answer it.

But is there anything in what I read here, or otherwise, that would illuminate for us your thinking when you balance these issues of security needs of the American people and civil liberty requirements under our Constitution?

Judge MUKASEY. I think we need to have a very clear-eyed idea of what it is we're protecting when we talk about protecting civil liberties, as well as to recognize the need to gather intelligence. The rights of free speech are, thank heaven, very much intact in this country. Some people are concerned that intelligence gathering interferes with their rights of privacy.

I think it's important for people to understand, as a general matter, what it is the Government does in gathering intelligence, not in detail, obviously, but that it is very much like what law enforcement does in gathering—in conducting investigations in the line run of cases. Very often, we're not talking about anything that is different in kind from what is done in conducting investigations generally.

Senator BROWNBAC. Just basically extending in the intelligence gathering operation the same both requirements and protections as we do presently under criminal law investigations.

Judge MUKASEY. Correct.

Senator BROWNBACk. And I've seen you write on that in some of your pieces. It's basically extending that same set of logic and requirements there into the intelligence gathering.

Judge MUKASEY. Correct.

Senator BROWNBACk. And that would be a basic mind-set you would bring to this field and area?

Judge MUKASEY. It is a basic mind-set that I do bring to it.

Senator BROWNBACk. I want to take you to the blind sheik trial of 1999, the World Trade Center bombing and related terrorism plots. The lead co-defendant, Abdul Rahman, sought to introduce expert testimony to show that his actions were governed by Islamic law. You properly, I believe, excluded the testimony on Islamic law as irrelevant to the criminal charges and potentially confusing to the jury.

As the Second Circuit explained in affirming your ruling, it would not constitute a defense that Abdul Rahman was justified within the framework of Islamic law. Do you remember this piece of that case?

Judge MUKASEY. I do. And the point of the ruling was that the issue before the jury was not what Islamic law provided or didn't, but rather what was in his mind when he made statements that were proved at trial to his followers about what they should do, and what was appropriate for them to do, and that his obligations under Islamic law were totally irrelevant to that. The issue wasn't Islamic law, the issue was what was in his mind and what wasn't.

Senator BROWNBACk. And that's the issue that I want to get at, if we can. It may be a difficult thing to discuss or get at. But certain countries' courts have held that Sharia, Islamic religious law, trumps civil constitution. There's been a case in Malaysia. There was a case earlier this year in Germany where a Frankfurt presiding judge over a divorce court involving two Muslim Moroccan residents in Germany put aside German divorce law and ruled instead on the basis of her understanding of the Koran. The case aroused considerable controversy, and in June the Justice Ministry in the German state that she resided in—the judge did—decided against disciplining the judge.

What would be your thoughts on this were this to arise in the United States, in a court of law in the United States?

Judge MUKASEY. I think we should not create anywhere in this country enclaves that are governed by any law other than the law that applies to everybody. We live in this country under one system of laws. Whatever may be the religious requirements of any group, we don't create enclaves where a different law applies, different law governs, and people don't have the rights that everybody else has outside that enclave. I would resist that very firmly, the creation of any such enclave.

Senator BROWNBACk. Good. I think that's the right way to look at it. It's troubling to a number of people, and it's troubling to me that you see these sorts of thoughts starting to come forward, and in western countries, that they move forward. The Constitution is the law of the land and it governs all of us, and the laws that proceed out of it that are built here.

Senator Hatch brought up some of the cases on pornography that I spoke with you in private about, and I'm pleased to see your in-

terest and willingness to deal with some of that because it is an important issue that's affecting our overall society. In the time I have left, there's one other issue that will come up—and you'll have a number of issues—on prison recidivism and reform that I just want to put out in front of you.

A number of us are working on a bill that we worked with your predecessor on called the Second Chance Act to address prison recidivism in the United States. We've got a system in the U.S. where, once you go to jail, two-thirds of the time you're going back. It's just been a high-cost, revolving door, very costly system.

What we've put forward on a bipartisan basis is a series of funding. It is to fund efforts that will cut recidivism rates in half over 5 years of groups that work within the proposal. Some of them are faith-based, some are not. A lot of it is mentoring programs. A lot of it is relationship building for when the prisoner gets out.

I want to ask your attention to that, and hopefully your support of this effort, because I think it's one of the key things that we need to deal with on trying to cut down the number of people in prisons, given the crowded situation that we have today.

Judge MUKASEY. I certainly agree. I think we need to stop the system where our prisons are essentially an institution of higher learning for criminality and where recruitment to criminality goes on. That's not something we can afford because these people, after they go in, are going to come out some day. When they come out, we want them to come out as productive citizens.

I know that it's hard to generate popular support for prison programs. It's often seen as kind of the last priority. But we need to face the fact that those people need to come out in a productive way, and in order for them to do that they're going to need some kind of support in the institution to make sure that that happens.

Senator BROWNBACK. Thank you, Judge.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Schumer, you're recognized for 12 minutes.

Senator SCHUMER. Thank you, Mr. Chairman.

Thank you, Judge Mukasey. I thought I'd just share with the panel and the audience, during the break Judge Mukasey told me that he was enjoying the debate. He said it was a good back-and-forth on questions and answers and the kind of discussions—he didn't say this—but I imagine you might even have at law school. I know he was a professor there. I told him that's great, and I think it speaks well of him.

That's what many of us felt was so sorely lacking at the Justice Department for so many years, and hopefully there will be lots of honest debate and discussion with the Congress as we move forward.

My first question is about judicial independence. As you know, Jack Goldsmith, former head of the Office of Legal Counsel, wrote a book, this book, called "The Terror Presidency". I know you're familiar with it because we talked about it during our discussions. It details some of the pressures brought to bear on Jack Goldsmith by figures in the administration who wanted him to justify what he thought wasn't right.

What did you think of this book, Judge Mukasey?

Judge MUKASEY. I thought it was superb. Talk about, couldn't put it down. I was, in a way, sorry when I finished it.

Senator SCHUMER. Well, let's hope he doesn't have to write another one, or you don't have to write one like this.

Judge MUKASEY. I don't have a book in me.

[Laughter.]

Senator SCHUMER. OK. Thanks.

Chairman LEAHY. You may after these hearings.

[Laughter.]

Senator SCHUMER. He's having a good time, Mr. Chairman. Or not a bad time, anyway.

Goldsmith repeatedly points out that the administration missed opportunities to put its terrorism policies on sound legal footing simply by going to Congress. In *Hamdan*, for example, the Supreme Court chastised the administration for not going to Congress, saying the administration could not proceed with military commissions without Congress's explicit approval.

He describes one meeting where now-Solicitor General Paul Clement warned that the Supreme Court might not accept the administration's arguments in support of its detention programs.

On page 124, Goldsmith reportedly says, "Why don't we just go to Congress and get it to sign off on the whole detention program?" Others supported this approach, but David Addington, Vice President Cheney's Chief of Staff, asked, "Why are you trying to give away the President's power?" So they didn't go to Congress.

Now, do you agree that working with the Congress in the long run actually enhances the President's power, increases public confidence, and protects policies from being rejected by the court?

Judge MUKASEY. As a general matter, certainly I do.

Senator SCHUMER. OK.

And do you commit to working with Congress before moving forward with any proposal like national security courts?

Judge MUKASEY. We can't move forward with national security courts unless and until we work with Congress. The Constitution says that it's Congress's power, not anybody else's, to constitute—as it says "such inferior courts as Congress may from time to time create."

Senator SCHUMER. Right. OK.

How about with respect to any new surveillance tools that you believe are needed that are outside of FISA rather than stretch or ignore FISA?

Judge MUKASEY. I'm not in favor, generally, of stretching or ignoring. On the other hand, I don't know what tools are going to come to hand or to mind in the future.

Senator SCHUMER. I'm not asking the specifics. I'm just asking, if it's your opinion that the law ignores FISA or stretches it in a somewhat contorted way, would you suggest going to Congress?

Judge MUKASEY. I would certainly suggest that we go to Congress whenever we can. It always strengthens the hand of the President to do that.

Senator SCHUMER. Thank you.

Jack Goldsmith also writes, "It was said hundreds of times in the White House that the President and Vice President wanted to leave the Presidency stronger than they found it. In fact, at least in my

opinion, they seemed to have achieved the opposite. They borrowed against the power of future Presidencies, Presidencies that, at least until the next attack and probably even the following one, will be viewed by Congress and the courts, whose assistance they need, with a harmful suspicion and mistrust because of the unnecessary unilateralism of the Bush years.”

The last Attorney General, by all accounts, was not much more than a potted plant or a rubber stamp behind closed doors when the subject turned to working with Congress. I want to know what attitude and approach you will bring to those discussions. Do you agree that unilateralism is a bad idea?

Judge MUKASEY. Unilateralism, across the board, is a bad idea. There are powers inherent in each branch, here and there.

Senator SCHUMER. When you're in the room, the room that Goldsmith was in, will you go along with a unilateral approach?

Judge MUKASEY. I will do what I think the Constitution and the laws mandate. If the subject under discussion involves an authority that I think actually inheres on the President, and for all my endorsement of bilateralism and for all my belief that it strengthens the hand of the President, there are some authorities that inhere in him, just as there are some authorities that inhere in this body.

But if we're talking about something that is a subject on which he should get the concurrence of this body, or even a marginal subject, I will try to have a bias in favor of getting the concurrence of this body because it makes everybody stronger, whether—

Senator SCHUMER. Thank you. I think Goldsmith would agree with that. I think many of us on both sides of the aisle on this committee would agree with it, and I think it's a refreshing change.

Now, Goldsmith also writes that some of the OLC opinions he read when he came into office were “deeply flawed and sloppily reasoned”. That's Goldsmith's view, obviously. You assured me yesterday, and I just want to get this on the record, that you would undertake a review of existing OLC opinions, if you're confirmed, on various issues. So just confirm to me that you will do such a review on the terrorist surveillance program.

Judge MUKASEY. I will.

Senator SCHUMER. Detention policies.

Judge MUKASEY. Yes.

Senator SCHUMER. And torture policies.

Judge MUKASEY. Yes.

Senator SCHUMER. Thank you.

Judge MUKASEY. Well, torture—I wouldn't characterize them as “torture policies”. But from what you're telling me, is a policy on doing something unlawful. I don't know of any such policy, and candidly, I hope not to find one.

Senator SCHUMER. OK. That's fair enough.

And if you find in this review a problematic opinion or legal justification, will you modify it, correct it, or withdraw it?

Judge MUKASEY. I will raise it with the people who originated it at first. As I said, my learning curve has been pretty steep, and it's ongoing.

Senator SCHUMER. I understand. But let's say your view is that it doesn't have the legal justification asserted in the opinion.

Judge MUKASEY. If my view, after consideration, with those people and with other people that I think I have to talk to is that it has to change, then it will change.

Senator SCHUMER. Right.

And will you do so publicly and inform the Congress?

Judge MUKASEY. I have to be very, very careful about what I do publicly—what I undertake to do publicly and when I don't. I don't know the subject of all those decisions and I need to consider them and that subject before I make a categorical promise to come out and announce that I'm changing a policy.

Senator SCHUMER. If it's not going to create any adverse interest, if possible, will you do it publicly so we're all stronger?

Judge MUKASEY. I think it's important that government explain itself to its citizens and to the Congress. That's what I think, and that's what I'm going to continue to think.

Senator SCHUMER. Right. OK.

Next, I'd like to move on, talking about independence. I take it you knew Jim Comey when he was the U.S. Attorney in the Southern District. What did you think of his commitment to legal and ethical excellence?

Judge MUKASEY. I thought it was admirable and complete.

Senator SCHUMER. As I mentioned in my introductory remarks, Comey gave an extraordinary speech to the National Security Agency on May 20, 2005. He talked about the difficulty of doing what is right as a government lawyer. He talked about the difficulty of saying "no".

So, Judge Mukasey, here's my question again publicly, the one I asked you privately yesterday: will you have the courage to look squarely in the eyes of the President of the United States and tell him "no" if that is your best moral and legal judgment?

Judge MUKASEY. Yes.

Senator SCHUMER. And even when people are suggesting, as apparently David Addington has before, that "blood will be on your hands"?

Judge MUKASEY. Yes.

Senator SCHUMER. In the future, if your Office of Legal Counsel is unable to find a legal basis for a counterterrorism program, you agree with the conclusion, and the White House insists on proceeding with it nonetheless—we've had this instance, as you know—what will you do?

Judge MUKASEY. That presents what I guess I can describe as a difficult, but not a complex, problem. I will either talk them out of it or I will push away from the table and leave.

Senator SCHUMER. Thank you. OK.

This is executive privilege. I have limited time left, so I'm going to be quick here and not go through it all because we talked a little bit about this yesterday. This is one area where I think we had some disagreement.

As you know, many of us felt that the administration was going much too far in asserting executive privilege, particularly in the U.S. Attorneys' investigation. One area where I thought they particularly stretched it was in a claim of executive privilege when a third party, say the chairman of the New Mexico Republican

Party—that was one specific instance we had—reached out to somebody within the administration.

I've never heard of executive privilege being used in that regard. The rationale of executive privilege is to allow unimpeded conversations within the White House, or even within an executive branch, to go on without the fear that they might be made public. I've never heard that where there's a third party, where there's always a fear it might be made public by the third party who had the discussion and is not under executive privilege.

What's your view of this? Have you had a chance to think it over overnight?

Judge MUKASEY. I looked at the letter quickly, and I've thought about it a bit. I don't know the facts relating to, what was it, the chairman of the New Mexico Republican Party?

Senator SCHUMER. Yes.

Judge MUKASEY. I don't know who called whom, and why. Obviously, within the executive there has to be the ability to gather facts, both from within the executive and from the outside. I suppose I can envision circumstances in which, because of the need to gather facts, there may be some question of privilege. Again, I don't know what the situation was with respect to the chairman of the New Mexico Republican Party. I will admit to you that my first reaction to that section of the letter was: "Huh?" But I'd like to take a closer look at the facts before that's my only reaction.

Senator SCHUMER. Just keep "huh-ing" on that.

Judge MUKASEY. OK.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

To follow on what Senator Schumer was saying about the question of torture and what you will find, if you find something that you think is inappropriate, whether you'd change it, trust me, if you're confirmed, you're going to get an opportunity to discuss this with us further.

We will be having another hearing after the first of the year, and by then you will have had a chance to see all these things. I suspect you will find folks on both sides that will be asking. But in the meantime, as I've suggested to you before on these things, you should never hesitate. If you want to bounce ideas off of Senator Specter or myself, on behalf of the committee, please do so—an offer we made to your predecessor, and he never took us up on it.

Senator CORNYN?

Senator CORNYN. Judge Mukasey, as I told you when we met privately, I was not familiar with your name or your reputation until I first saw that Senator Schumer had suggested you might possibly be a good nominee to the U.S. Supreme Court by President Bush. But I have to tell you, since I've become better acquainted with your record of public service and your professionalism, I've grown in admiration of your fine record. I congratulate you on this nomination.

Judge MUKASEY. Thank you.

Senator SCHUMER. Oh ye of little faith.

[Laughter.]

Senator CORNYN. I have to tell you, I was also profoundly struck when you started your comments this morning and said "it's not

about me". What a refreshing point of view here in Washington, DC. I do believe you when you say that, and you believe it's about serving your country. I respect that.

I want to just tell you, as I was reading through some of the things you have written, as a member of what we call in the Congress "the recovering judge caucus"—we have a small group of former judges who now serve in Congress—I admired your choice of Learned Hand in one of the articles that you wrote about the Spirit of Liberty and his famous comments in that speech, that "the spirit, which is not too sure that it's right," is one that we ought to emulate.

You were talking in this article about the PATRIOT Act, a statute which you said critics ought to read before attacking it. You noted that it had become the focus of a good deal of hysteria, some of it reflexive, and much of it, you said, recreational.

I was reminded once again that your experience in the court of law, my experience, and those of us who practiced in a court of law, the standard for proof in a court of law is substantially more rigorous than it is in the court of public opinion. This is particularly true in hearings before Congress; even though witnesses take the oath, things are said that probably wouldn't be admitted in evidence in a court of law.

But the one thing that I wanted to ask you about is that you point out that the PATRIOT Act broke down the wall between intelligence gathering and law enforcement. You also said that the previous decision establishing that wall preventing the sharing of information had been a stark misreading of the law.

Why do you believe that there's been an apparent inability to communicate to the American people in widely acceptable terms the difference between a criminal law paradigm and fighting a war on terror and dealing with a military paradigm?

Judge MUKASEY. I can't say, as I sit here, that I know why there's been a failure to communicate that. I think that it is very important for government generally to make the case to its citizens for what it does, not just to do things that promote their welfare, but make the case. I'm a lawyer, and so I'm the sort of person who's trained to make the case. I would like, if I'm confirmed, the opportunity to go out and do that.

And I don't mean I'm just going to go off on some speechifying tour, but it's one of the things that I take very seriously, and that is the need to make the case for the importance of what we do, and for the fact that we do it within the law. We don't just do it willy nilly, we do it with due regard for the real interests that are at stake.

Senator CORNYN. And of course, in a criminal law context you're always punishing an act after it occurred. Obviously the goal of our intelligence gathering and fighting a war is to prevent terrorist attacks from occurring.

But there's one other example I wanted to ask you about. In your experience in trying the 1993 World Trade Center bombing case, did it occur that a list of some 200 unindicted co-conspirators was turned over to the defense—

Judge MUKASEY. Yes.

Senator CORNYN.—and ultimately found its way into the hands of—well, it found its way to Sudan, I believe, in the hands of others who subscribe to the same views on jihadism that the defendants in that case did. Is that maybe another example why the criminal law paradigm is not always the best approach?

Judge MUKASEY. The law of unintended consequences operates there, as it does in a lot of other places. That list had to be served under the law, and it showed up, we found out, long afterwards, in Khartoum in the hands of Osama bin Laden, who happened to have been on that list, and it told him who was on that list, that he was included, and who we knew about who was working with him.

Senator CORNYN. Let me pivot quickly here, since time is short, to the reporter's shield law that's been proposed to Congress. There are a lot of things that the members of this committee agree on. The Chairman and I have been working closely together on reform of the Freedom of Information laws for the first time in a generation, and I trust we'll be working with the Department of Justice on that when you're confirmed. But the shield law that's been proposed has a provision that provides a qualified privilege to covered persons.

What I expressed a concern about, and Senator Durbin and Senator Feinstein also voiced some concerns—I'll let them speak for themselves—is that the definition is so broad that it would cover virtually anyone who decides to publish information.

For example, consider the young jihad enthusiast who uses the Internet to spread Osama bin Laden's message. A blogger posts an English translation of a scholarly treatise advocating violent jihad and lists hundreds of links to secret websites where his readers can obtain the latest insurgent videos from Iraq.

As you may know, Judge, this is not a hypothetical situation. This is the case of a 21-year-old American who writes his blog from his parents' home in North Carolina. The New York Times reported this story on Monday in an article entitled "An Internet Jihad Aims at U.S. Viewers".

My concern is that if we pass a reporter's shield law, which I voted for out of the committee, but with the caveat that I'm concerned about the breadth of that definition, Congress will be providing a qualified privilege to anyone who holds themselves out as a journalist. Do you have concerns about the breadth of that definition as well and how it would actually impact your ability to do your job?

Judge MUKASEY. That is one, but only one, of my concerns.

Senator CORNYN. And would you care to share with us your other concerns?

Judge MUKASEY. Sure. Even if you narrow the definition to include people who are reporters for a living, I can recall, when I was a college journalist of sorts, meeting a TASS reporter, a reporter for the then-Soviet news agency, TASS. It was very clear at the time that many, or most, TASS reporters were in fact KGB agents who were working full-time as reporters, but indeed were doing a lot of other things. I can't help but believe that the same is true of many reporters for Shinhwa.

I don't know that for a fact, it's just a belief based on my own experience. It would not be above the capability of someone involved in a terrorist organization to become a journalist or to have a whole superstructure erected around her or him that allowed them to present themselves as a journalist, somebody earning a full-time living as a journalist, and still be someone who would be protected by the law. So, that's one concern.

Another concern has to do with the kind of proof that has to be presented in order to overcome the shield law, proof of danger to the country, which sometimes is an imponderable, hard to prove in advance. The example of that list of unindicted co-conspirators is only one example, but it's a good one. Nobody could have proved in advance that turning that over was going to be dangerous, but you can prove it in retrospect. I don't want to have to look at retrospect, so I'm uneasy about that, too.

Senator CORNYN. You are no doubt familiar with "Project Exile." The program is focused on gun crimes and prosecuting gun crimes under the Federal laws, with mandatory minimums for felons and others carrying guns illegally, going after the gun crime as a discrete offense, and punishing that in addition to whatever other crimes are being committed.

That Federal program gave rise to something in my State, when I was Attorney General, we called "Texas Exile", which was a very successful collaboration between Federal, State, and local law enforcement officials to persuade criminals to leave their guns at home by letting them know that there would be a significant and meaningful punishment—meaning imprisonment—if they used a gun in the commission of a crime.

I wanted to commend to you the Project Safe Neighborhoods follow-on, which is now a substantial program within the Department of Justice, and ask for your support, or at least your willingness to work with Congress to try to make sure that we continue to prosecute gun crimes vigorously, and thereby, I believe, reduce a lot of the violence associated with gang activities, drug transactions, and hopefully in the process save some lives.

Will you give me that commitment to work with us on that?

Judge MUKASEY. I sure will.

Senator CORNYN. Thank you.

Let me give you one quick caveat in the one minute I have left. There is sort of an anomaly. This came to light in the case of the prosecution of two Border Patrol agents who shot a drug dealer along the border in my State in Texas, and because they discharged a firearm in the course of the activities for which they were convicted, they received an automatic minimum 10-year plus-up to their prison sentence. I'm not sure.

I know there was some conversation about this when Congress passed these laws, how they would apply to a law enforcement officer who has no discretion but to carry a firearm in the course of their duties, and how it might disproportionately impact that law enforcement officer.

I'd just ask here today, simply, whether you would agree to work with us, the Judiciary Committee, to look at that statute to see whether we ought to revisit it, and whether it does unfairly impact

law enforcement officials who do have to carry, and sometimes discharge, their firearms in the course of their lawful duties.

Judge MUKASEY. That was a very difficult case, and I will, yes. Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Just so we'll know what the list is, on this side we have Senator Durbin, Senator Whitehouse, Senator Cardin. On the Republican side we have Senators Graham, Sessions, and Kyl. We will alternate back and forth. It would be my intention at the end of that, a number of people have suggested second rounds. We will not begin those today. When the last person has asked their questions, then we will recess over until tomorrow. I will consult with Senator Specter on a time that that will begin, but we will also make sure, of course, that we let you know.

Senator Durbin?

Senator DURBIN. Judge Mukasey, thank you for being here. Thanks for your service on the court and your willingness to have your name submitted for the Attorney General's position. Thanks to your family and friends, some of whom have been friends of mine for a period of time. I'm glad that they're with you today.

Several weeks ago, you were kind enough to come by my office. We had a short time to have a conversation. You referred several times here to your learning curve in this process, and so the questions I'm about to ask may be attributable—your earlier responses may be attributable to learning curves, but I want to clarify and make sure I understand where you stand on several things we discussed in my office.

One of the things which we talked a lot about was this issue of torture. You said at one point, "There's a whole lot between pretty please and torture," and you suggested that coercive techniques short of torture were effective. I would like to ask you so that it's clear in my mind, will you now acknowledge that it is illegal and inconsistent with our values as a Nation to subject detainees to cruel, inhuman, and degrading treatment?

Judge MUKASEY. It is unlawful to subject detainees to cruel, inhuman, and degrading treatment, there is no doubt. I don't think that's inconsistent with what I said.

Senator DURBIN. And we talked about the McCain statute, which I co-sponsored and had a 90–9 vote in the Senate. I asked you about whether the McCain statute on torture would be controlling in certain circumstances, and you said at one point, there could be a point where the President's constitutional authority would override this statute. I would like some clarification on that, if you would, please.

Judge MUKASEY. OK. I don't recall the context in which I said that the President's authority could override a statute. I would be very surprised if that context were the McCain statute. There is some authority that the President has that is inherent in the President and that he has willy nilly.

There have been statutes that Congress has passed that every President, since the time they were passed, has taken the view are unconstitutional in that they encroach on the President's power, the President's authority. The most notable one—at least to me the one that comes to mind—is the war powers resolution. We all know

that it's there. We all know that every President, since the time it was passed, has taken the view that it is unconstitutional and will not be obeyed.

Mercifully, we have never come to a test of that, and I hope we will never come to a test of that. What's happened is, each branch has understood that push can't come to shove on certain issues, that we have to try to work it out the way people work things out in a democratic society, such that not everybody gets everything they want, and sometimes both sides walk away saying, "Could have beat them." But we don't have to find out who could have beaten whom.

Senator DURBIN. For the record, do you believe the McCain torture amendment or statute is an unconstitutional infringement on the power of the President?

Judge MUKASEY. I do not.

Senator DURBIN. I also asked you about Guantánamo. You referred to it with a colorful phrase. You referred to it as a "fright wig" used by critics of the administration, and defended Guantánamo on the grounds that detainees receive "three hots and a cot, health care better than many Americans, and taxpayer-funded Korans". That's what you said when we met. What I heard in response to your questions from Senator Kohl, is that that may not accurately characterize your feelings about Guantánamo.

Judge MUKASEY. My feelings about Guantánamo, a place which I have not visited—I have not visited it, but I have spoken to people who have, is—my feeling is pretty much what I told you in a rather pungent, conversational way. I don't think people are mistreated there. That is not to say that the problem of indefinite detention of a large number of people has not become a problem for us. It is a problem for us. It's an ongoing problem. We've got to get our hands around it and resolve it, and it's due, as I indicated before, in large measure to the fact that getting ownership of that problem is a difficult thing in government. I recognize that.

Senator DURBIN. I suppose this treatment is a matter of interpretation. If one is speaking of torture of the Guantánamo detainees, that is one category of mistreatment, for sure. Detention without due process may be another category of mistreatment that Senator Specter has addressed, along with Senator Leahy, on the issue of habeas corpus. Would you concede that holding these detainees without charges for years, and then in many cases releasing them without charges, is a form of mistreatment?

Judge MUKASEY. What one regards conversationally as mistreatment or not, I think, is probably in the eye of the beholder. Under *Hamdi*, it is lawful. *Hamdi* said, as far as I know, unequivocally, that it is lawful for the President to detain people, even Americans, captured on a field of battle indefinitely.

That's not to say that, as a matter of policy, it's a wise thing to do, that it doesn't hurt us with allies on whom we rely for support in fighting the people we have to fight, and that it might not pay to carry forward a principle for the sake of carrying forward a principle when we wind up cutting our nose off to spite our face.

Senator DURBIN. I won't go any further, because I think your responses to Senator Kohl's questions were very clear. I think that's a matter of record, your position on Guantánamo.

I'd like to ask you about the Office of Legal Counsel in the Department of Justice, currently being held by an interim appointment, Mr. Bradbury, who has been brought before this committee and pending before the Senate for some time now. I have a hold on his nomination because of his refusal to answer questions, to produce memos, even some most recently disclosed by the New York Times involving some things that he's said or done in that capacity.

I would like to ask you, and I might also add one area that you're probably aware of, the Office of Professional Responsibility initiated an investigation into the Justice Department's offices relative to the NSA program. In an unprecedented move, President Bush personally denied security clearances to Justice Department investigators and blocked the investigation. Documents provided to the Senate Judiciary Committee suggest that the internal investigation was looking into whether that office, under Mr. Bradbury, engaged in misconduct while he was the acting head.

I've sent a letter with Senators Kennedy and Feingold asking the President to allow the investigation to go forward, and yesterday sent another letter saying it's time to remove this interim appointment because this man is going nowhere unless there's much more complete disclosure.

Do you agree that it would be inappropriate for the Senate to confirm a Justice Department nominee who's under investigation by the Office of Professional Responsibility?

Judge MUKASEY. I don't know the investigation. I have not heard of the investigation by OPR to which you refer. I know there was an OIG investigation. I know of an OIG investigation with regard to national security letters and the conclusions that it drew. I was unaware of an OPR investigation.

Senator DURBIN. I don't want to catch you by surprise then. I'll send a followup set of questions to you, and one of them will be specifically, if you're confirmed, will you recommend to the President that the OPR investigation of the Justice Department's role in the NSA program be allowed to proceed?

Judge MUKASEY. That's not something I can answer in the abstract. I need to see what the investigation is about.

Senator DURBIN. I understand that.

Judge MUKASEY. I am aware, from my own experience, of how relatively easy it is to have an OPR investigation get under way because of some comment in an opinion or something of that sort.

Senator DURBIN. Let me send you that in writing and allow you to reflect on it and take a look at it before you give a complete response, out of fairness.

I have very few minutes, and I wish I had much more time for this particular question. As the chief law enforcement officer in our Nation as Attorney General, you will have special responsibilities. One that continues to recur throughout your lifetime and mine, and even as recently as the last week or two, is the issue of race and justice in America. Clearly, we still have a major hurdle to overcome in establishing equality under the law.

I'd like to ask you, if you were prepared, what initiative would you take to try to bring some closure to this issue which continues to tear America apart?

Judge MUKASEY. I can't, unless I indulge in a conceit that I don't really have, entertain the view that we're going to achieve closure in my lifetime, or even in my tenure. I believe that the Civil Rights Division of the Justice Department—I was trying to say this to Senator Feinstein when our time ran out, and I'm glad you asked about it because now I get the chance to continue.

The Civil Rights Division is part of a movement and a process that is nothing less than genius in our politics, and that is that is that a stain on our history can start to be lightened, and hopefully at some point wiped out through the use of the law rather than in the streets and with arms, as it has been elsewhere. We have to make sure that bit of genius is preserved.

I would make absolutely certain, and will make absolutely certain, that the Civil Rights Division, which celebrated its 50th anniversary this year, that people there understand that that's the mandate and that they don't forget it.

Senator DURBIN. I might say that that is one division which many of us believe has very low morale at this point, for a variety of reasons. I share your feeling about the important mission that we have, and I certainly hope that you will dedicate yourself to restoring morale and giving them the tools and support they need to restore their reputation.

Judge MUKASEY. Let me say just one thing. In the course of preparation for these hearings, I was staying near the Justice Department and happened to run into, on a couple of different days, lawyers from the Civil Rights Division lining up to get their coffee as I was lining up to get mine. And they were energized, they were focused. They seemed to be very happy and pleased in their task, and I think they are very much characteristic of the people within that division, the people within the Department, and those are the people who I think we're going to depend on.

Senator DURBIN. Perhaps it's a hopeful view on their part of your nomination. Thank you very much.

Chairman LEAHY. Thank you, Senator Durbin.

Senator GRAHAM?

Senator GRAHAM. Thank you, Mr. Chairman.

Judge, I am sure you're going to make a fine Attorney General, and this is just the price you have to pay to talk to all of us. But I think it will be worth it, for you and the country at large.

But you've had a lot of good questions on both sides of the aisle here about the role of the Congress, the courts, and the executive branch when we're at war. And I guess the first question I would like to ask you, since you're a New Yorker, do you consider the attacks of 9/11 a criminal act or an act of war? And you've got to pick between the two.

Judge MUKASEY. If I've got to pick between the two, they're an act of war.

Senator GRAHAM. Well, I agree with you, so you're in good standing with me already. See, I think we're at war. I think the law that one would apply, if you looked at this as a war, would be different than domestic criminal law. I've been a military lawyer for 25 years and I'm very proud of our military legal system. Because you apply the law of armed conflict doesn't mean you don't have due process.

Now, when it comes to detention and interrogation of unlawful enemy combatants, here's some of the laws that I have made a list of that apply to the situation about how we detain and interrogate someone that we believe to be an unlawful enemy combatant. The Supreme Court, in the *Hamdan* case, said the Geneva Convention applies. Do you agree with that? That is now the law. I don't agree with the court's holding, but that's what they said.

Judge MUKASEY. If what they meant is that it applies to interrogation, then it clearly applies to interrogation. I—

Senator GRAHAM. Judge, they said that Common Article 3 applied to the war on terror. Now, I disagree with that, but that is the law as I understand it. That Common Article 3 now applies to the war on terror.

Judge MUKASEY. If that's their reading on something other than a procedural basis—

Senator GRAHAM. I think that's their—to go back. If you disagree with me you can tell me in writing, but I believe it does. Even though I wouldn't have decided it that way, that's the court.

The Uniform Code of Military Justice is a congressional statute that regulates the conduct of the military vis-a-vis many things, but including how one treats a detainee. Are you familiar with that?

Judge MUKASEY. I know of that. Yes.

Senator GRAHAM. Do you think that's a lawful thing for Congress to do, to replace restrictions on our military when it comes to how they will treat somebody in their capture?

Judge MUKASEY. On our military?

Senator GRAHAM. Yes.

Judge MUKASEY. Yes.

Senator GRAHAM. It's a crime—OK. Good. So for the soldiers who may be watching this hearing, the Uniform Code of Military Justice regulates your conduct regarding someone that you may find or capture on the battlefield, and I think you're taught what to do there. I just wanted to acknowledge it, and that is a power that Congress has and we're going to have to live within that.

The Military Commissions Act also regulates the detention, trying, and the treatment of enemy prisoners. That's a congressional enactment. Do you agree that that's a valid legal document?

Judge MUKASEY. Yes.

Senator GRAHAM. OK.

The Detainee Treatment Act is an enactment by Congress that regulates—I think you've talked about it pretty well—what we can and can't do to someone we capture, cruel, inhumane, and degrading treatment. Do you consider that a valid source of law?

Judge MUKASEY. Yes.

Senator GRAHAM. OK.

We have many international treaties that regulate our conduct because we're signatories to those treaties. Do you think it's incumbent upon us to live up to those treaty obligations?

Judge MUKASEY. I think it's incumbent upon us to live up to them. The question of whether they're self-executing or not is a very delicate question and I'm—

Senator GRAHAM. Fair enough. The only point I'm trying to make is that we've had a fight that's been unnecessary for far too long

between the Congress and the administration over what roles we play. I am convinced that we're only going to win this war if we act in concert to the best of our ability.

I really applaud your testimony earlier when you said that America is at its strongest, not only from a legal point of view but from just an effective point of view, when all three branches are on the same sheet of music.

Now, here's where I part from some of my colleagues about what the law requires of the United States: would you advise the President of the United States to allow unlawful enemy combatants to have habeas rights, to grant them habeas corpus rights at Guantánamo Bay?

Judge MUKASEY. I would not advise the President to grant rights beyond those that they already have, which include, as I read it, eventually, an appeal that is, certainly on an appellate level, more substantial.

Senator GRAHAM. Right. The big issue for us as a country is, who should determine the status of a potential enemy combatant? It is my view that, under the Law of Armed Conflict, under Geneva Convention Article 5, that is a power reserved to the military. A habeas petition would allow the potential enemy combatant to take their case to a Federal court of their choosing and the power to determine the status would be given to a Federal judge, not to our military, and I object to that.

How long have you been a Federal judge?

Judge MUKASEY. I was a Federal judge for 18 years and a bit. Almost 19 years, actually.

Senator GRAHAM. My concern is that if we allowed every enemy combatant to have a full-blown habeas trial, we would be giving Al Qaeda and other groups that fall into the designation more rights than the Germans and Japanese, and that we would be creating chaos for our country in the war on terror.

I would read a quote here from Justice Jackson in the Eisentrager case. Are you familiar with that at all?

Judge MUKASEY. Yes.

Senator GRAHAM. He said, "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he's ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home, nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion, highly comforting to enemies of the United States."

Do you associate yourself with that concern?

Judge MUKASEY. Yes, I do.

Senator GRAHAM. Now, as I understand the Military Commission Act, every detainee at Guantánamo Bay will have access to Federal court. Is that your understanding?

Judge MUKASEY. Eventually. After the c-cert process is completed.

Senator GRAHAM. And the DC Circuit Court of Appeals will be able to look at two things: whether or not the evidence justifies the finding by the military of a preponderance that the person is, in fact, an enemy combatant; and they will also look at whether or not

the procedures in question are constitutional. Is that your understanding of the law?

Judge MUKASEY. It is.

Senator GRAHAM. And that's the *Vismuller* case, is that correct?

Judge MUKASEY. I believe so.

Senator GRAHAM. I have proposed for many years now, and I will reassert this idea, that one way to make this c-cert process better would be to provide military legal counsel to unlawful enemy combatants. How does that idea strike you?

Judge MUKASEY. I don't know what the process is now. I certainly—I mean, I said when—in the *Padilla* case that once you conceded that somebody had the right to file a habeas petition, there was no practicable way, particularly in that case, for them to do it other than through a lawyer.

Senator GRAHAM. One of the practical effects of an enemy combatant determination is that there could be a de facto light sentence, because this is a war without a definable end. Do you agree with that?

Judge MUKASEY. Yes.

Senator GRAHAM. So we need to come up with a process that's a bit of a hybrid of the traditional Law of Armed Conflict.

Judge MUKASEY. Yes.

Senator GRAHAM. I've also suggested in the past, and will suggest again in the future, that the tribunals in question, the combat status tribunals, be managed by a military judge. Do you have a problem with that?

Judge MUKASEY. I do not.

Senator GRAHAM. OK.

Well, we'll be talking much further in depth about these issues because they're new, they're novel, and they're important.

I would end with this, Mr. Chairman. I am often asked about, why do you want people to have lawyers who will cut our heads off, and why do we not waterboard people to get information to make us safe? Because at a certain level, Americans understand that the people we're fighting have absolutely no boundaries, and some of them believe the law is a nicety and is a weakness.

I believe that the law is one of the strongest things we have in our arsenal against our enemy. Do you agree with that statement?

Judge MUKASEY. I do.

Senator GRAHAM. And if you want to throw everything that America has against the enemy, the best thing we could throw at the enemy is a process that the world would want to emulate and be proud of. Do you agree with that?

Judge MUKASEY. I do.

Senator GRAHAM. Wouldn't it be nice to show Sunnis, Shi'as and all those who have grudges and seek revenge that there's a better way, and there's no better way for America to lead the world when it comes to the war on terror than to take an enemy who has done us terrible harm and treat them in line with our values, give them lawyers when they would give us none, have a process where a civilian court could review the military work product, and let the world know that whatever happened to the enemy combatant wasn't a result of religious prejudice, anger, or revenge, but was a

result of due process of law. Don't you think that's the best way to fight this war?

Judge MUKASEY. I do. I'm reluctant to add a footnote, but I have to.

Senator GRAHAM. Please.

Judge MUKASEY. And that is that so long as we don't compromise our ability to gather intelligence as we do that.

Senator GRAHAM. And it's my understanding that every one of the provisions I just outlined about what happens to a detainee in our charge, that you support that the law be applied, that when we capture someone, that we do have to live within the law that applies to the detainee's treatment. Correct?

Judge MUKASEY. Yes.

Senator GRAHAM. Now, Sheik Muhammad, I was at his combat status review tribunal, there's allegations that he may have been waterboarded. For about an hour and a half, he spoke about his involvement in 9/11 and other acts of terrorism without one person touching him, so I have no doubt that he did what he said he did. But if there was evidence obtained through waterboarding, would you be comfortable with that evidence being used in a military trial?

Judge MUKASEY. I don't know what's involved in waterboarding. I would be uncomfortable with any evidence being used in a trial that's been coerced. So, I'm—

Senator GRAHAM. And one of the reasons you'd be uncomfortable is because what we set in motion could come back to haunt us. There was a proposal last year—and I will end on this thought—that in our military commission system it would be OK for the prosecutor to hand a document or a piece of evidence to the jury marked “classified” to be considered on innocence or guilt and never shared with the accused because of national security concerns.

My fear of that procedure would be one day that maybe one of our guys or gals would be caught in Iran, trying to figure out what the Iranians are up to and that there would be a trial conducted in Iran where the Iranian judge would receive a document from the Iranian prosecutor marked “classified”, never shared with the American accused. The person would be found guilty, sent to the death chamber, and we would lose the right to object to that proceeding.

The point I'm trying to make is, what we do now on our watch can come back to affect us in other wars. Do you agree with that?

Judge MUKASEY. I agree that it can. Yes.

Senator GRAHAM. You're in a unique position, in a unique time in American history, to make sure that we balance our national security interests against the values that make us stronger than our enemy, and I have every confidence you will do a good job. Thank you.

Judge MUKASEY. Thank you.

Chairman LEAHY. If I might just use the prerogative of the chair, I just want to make sure I fully understand something. You said that you would not want to compromise our ability to gather intelligence. You're not suggesting, are you, that we compromise our ability to gather intelligence if we exclude torture?

Judge MUKASEY. No. The question concerned providing counsel, and there's often a question about the timing of that. People gathering intelligence need time to talk to somebody, to use all the techniques that need to be used to gather intelligence, and to the timing.

Chairman LEAHY. And we speak about, if we had somebody who was a serial murderer, a U.S. citizen committed a series of heinous crimes and would obviously pose a danger to the population was brought before you as a judge and said, we have a confession, we got it after we tortured the person for 3 days, you wouldn't allow that confession.

Judge MUKASEY. Correct. It's out.

Chairman LEAHY. Thank you.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

First, let me just take a moment to associate myself with the several propositions that Senator Graham just enunciated regarding the value of the rule of law as a force for good and for strength on the part of our country and the world, and his remarks regarding a judicial system that the rest of the world would wish to emulate and be proud of. That was very well said.

Second, I'd like to recognize Director Freeh, who is here, who I had the honor of working with when I was the U.S. Attorney for Rhode Island. He was the Director of the FBI, and the Federal Bureau of Investigation, under his watch, did some really exemplary work in Rhode Island.

If I may, I will take a sentimental moment to reflect on the accomplishments of Dennis Aiken, who led a remarkable undercover investigation into municipal political corruption and is shortly to retire. George Rosenberger, who led a very effective investigation into a criminal gang organization that was probably better covered by wire tap and other surveillance than some major Hollywood productions. He was exceptional. He has just retired. And Special Agent John Truslow, who did a spectacular job of making a really precedent-setting environmental case, and shortly thereafter passed away from brain cancer.

I raised these names not only because Director Freeh is here, but because they also represent, along with so many other people who you will shortly, with luck and approval of this committee and the Senate, be supervising and in charge of within the structure of the Department of Justice.

And I have to tell you, I'm worried about the Department of Justice. It is an institution that is very significant in American life, and I think it has sustained significant damage. I'm not convinced that simply replacing the person at the top, although necessary, is sufficient to cure the problems that I see. I wanted to discuss some of these issues with you, Judge Mukasey.

First, just a completely open-ended question, but I would like to get you to say a few words for the record about what you consider the role of the U.S. Department of Justice to be in this country and what its posture should be to the American people.

Judge MUKASEY. The role of the U.S. Department of Justice is to uphold the rule of law. This is a country that defines itself—I think it's the only country in the world that defines itself—by a

written Constitution, the supreme law of the land, and nothing else. We don't define ourselves by blood, or territory, or a particular history. We define ourselves by the rule of law.

So, the Department of Justice is central to this country's definition of itself. I don't mean to put myself at the center of this. As I said in my introductory statement, this isn't about me. It's about the Department of Justice. That is, to me, its role.

Senator WHITEHOUSE. And what should the American people be able to look to it for?

Judge MUKASEY. They should be able to look to it for the constant, impartial, principled application of the law.

Senator WHITEHOUSE. The Department of Justice is an institution. It is an organization. It is a bureaucracy. It has rules. It has regulations. It has structure. It has traditions. In my view, many of those structures, traditions, practices have been developed over many years by people who work in that Department and who see it as you do, as safeguards to help assure that the decisionmaking that takes place in the Department of Justice is protected from political interference, personal animosity, other improper motivations.

As much as I think there has been a failure of leadership at the Department of Justice and a rot from the top, as I said, I don't think replacing leadership alone is necessarily enough, because my sense is that there are structural issues that need to be set right.

I think of things like the rule that lasted for many years, that limitation between the—conversation between the White House and the Department of Justice over pending investigations would be strictly limited, which was taken apart by two separate memos in the previous administration of the Department of Justice.

I think about the longstanding policy that investigations would not be announced shortly before elections where they'd be likely to influence the outcome of an election, a restriction that was recently removed from the manual of the Department of Justice.

I think about the independent appointment of U.S. Attorneys as men and women from their local communities who get advice and consent of the Senate and who are not fired, except for cause, as a structural protection that helps the Department in a kind of internal check-and-balance mode.

I think of the role of career employees as a sort of steadying influence on the Department of Justice, and I think of, even in the book by Mr. Goldsmith that Senator Schumer mentioned, he discussed, just within the OLC component of the Department of Justice, the "norms and practices" that had developed.

My question to you, sir, is what will you do to inquire into what norms, and practices, and protocols, and rules, and regulations need to be restored, need to be brought back into service to perform the function that they were set up to, which is to provide those protections for the Department of Justice in the exercise of its duties?

Judge MUKASEY. To the extent that I've done any management, including management of the court that I served on—which I recognize was, compared to the management that I'm about to undertake, a sandbox. I acknowledge that. I'll bring that out on direct—my style has been a hands-on style. I'm not talking about micro-management, I'm talking about taking responsibility for decisions and making myself aware of what was going on in the organization

that I was nominally the head of so that I didn't get surprises. I will do the same thing in the Department.

I will talk to the people in the Department. There is such a thing as the Attorney General's Advisory Committee, which, as you know because you were a U.S. Attorney, is a body of U.S. Attorneys drawn from all over the country on a regional basis who do, or should—and will if I'm confirmed—meet regularly with the Attorney General so that the Attorney General understands what is going on in those offices, what their problems are, and can do something to help them out and to maintain uniformity of standards.

I will talk to not only the Assistant Attorneys General at the head of each of the divisions within the Department, but also the people within their units. I want to hear not only what the person at the top is saying, but what the people below are saying so that I can figure out whether decisions are being properly made, and if necessary, tweak them a bit.

I believe that I should have confidence in Assistant Attorneys General who were appointed to head each unit, and I will. But they're not going to be the exclusive source of information for what's going on. I am also going to talk to people who have served in the Justice Department in the past, people I know, some people I don't know.

Senator WHITEHOUSE. I would—

Judge MUKASEY. And finally, I'm going to talk to, as I told Chairman Leahy when I met with him, this body and the members of it on a regular basis. Your collective experience with the Justice Department is way greater than mine, and would exceed mine if I served from now until I'm cold. So, I would be foolhardy to abandon that kind of resource, and I won't.

Senator WHITEHOUSE. I appreciate that you have said that, and I will be very interested in pursuing that process because I think that when we spoke earlier—by the way, I appreciate not only the time you spent with me, but the time you spent with all of my colleagues. You have reached out to the Senators in a very forthcoming fashion and I'm grateful to you for that.

In the course of our discussion, I used the example of a ship's captain who has a fire on board or who hits a rock, and once you've got the fire out or stopped the water coming in, the very first thing that you do is a damage assessment. I would urge you to take the discussion that we have just had and go forward with a really fairly formal damage assessment using all of the tools that you have just indicated you were willing to use and see what needs to be put right.

In that regard, two specific things I'd like to ask you about. One, is there were memoranda that widely opened the Department of Justice to contact about ongoing investigations from the White House and other officials that is counter to very recent traditions documented in letters between the previous Attorneys General and previous White House counsels.

Senator Feinstein again discovered that the manual had been rewritten to take out the provisions discouraging the announcement of investigations at a time when they'd likely influence elections. There may be hundreds of other such matters, but those are two

that, in the one minute I have left with you, I'd like you to touch on.

Judge MUKASEY. The question of contact of people within the Department about cases is something I've had occasion to address in meetings, beginning with Senator Schumer and continuing to other meetings as well. There is a very small list of people who can be contacted by anybody who is an elected official or who purports to speak for an elected official about a case.

The only proper response by anybody else who's contacted is to make that person aware of the people that they can properly contact and end the conversation. That's going to be the standard that will govern, and I will do that. I will make that known and that will be the policy, and that will be the rule.

Senator WHITEHOUSE. And "elected official" includes the President?

Judge MUKASEY. Most emphatically, it includes the President.

Senator WHITEHOUSE. Very good.

And with respect to the manual regarding the disclosure or announcement of investigations immediately before elections?

Judge MUKASEY. I think it is obvious that the closer you get to an election when you have a politically sensitive investigation, the less and less can be the justification for announcing it, unless there is some overriding need to go forward, such as a lapse of the statute of limitations or something of that sort. But other than that, that window keeps closing.

Everyone involved in an investigation has to be sensitive to the possibility that announcing an investigation or a prosecution can influence the outcome of an election, and that that is not what investigations are supposed to be for, or prosecutions are supposed to be for.

Senator WHITEHOUSE. Thank you, sir.

Mr. Chairman?

Chairman LEAHY. Thank you. We'll take about a 5-minute break and then come back. Probably a 10-minute break, then come back. Thank you.

Judge MUKASEY. Thank you.

[Whereupon, at 4:06 p.m. the hearing went off the record.]

AFTER RECESS [4:20 p.m.]

Chairman LEAHY. Thank you. Judge, thank you very much. And, I must say, your family are the most patient people. I was talking with Judge Freeh, Louie Freeh, a few minutes ago during this time that we were—his patience and all your support is here.

Senator Cardin? Speaking of patient people, Senator Cardin of Maryland.

Senator CARDIN. Well, thank you very much, Mr. Chairman.

Judge, the good news might be that I might be the last person to question this round. We'll see whether other members show up.

But, first, I want to thank you. I want to thank your family for your willingness to serve our country. These are difficult times and we very much appreciate your willingness to step forward. And I must tell you, I've been very impressed by the direct answers that you've given to very important questions.

When you and I met, I talked about the independence of the Department of Justice and the Attorney General and, I must tell you,

I'm very impressed by your answers today. I think they are pretty clear and I think we need that and I think it will go a long way to the morale within the Department of Justice.

I want to return to the Civil Rights Division. It seemed like that got tacked on as the end of two rounds of questions, but I want to spend a little time on it with you, because I think it's very, very important.

I am concerned about what's happening within the Civil Rights Division. This is the 50th anniversary of the Voting Rights Act, in which the Civil Rights Division was created, and it has a proud tradition of fighting to enforce antidiscrimination laws passed by Congress in the areas of voting rights or civil rights or housing, elections, employment, so many areas that the division has been active over the last 50 years.

I usually judge how a company or an employer does by the record, the facts. If a company tells me that they support diversity and open opportunity, if we look at their employment practices and see few minorities, I question that.

So in the Civil Rights Division, I am extremely concerned about the lack of types of cases that have been brought and the type of cases that have been brought over the last 6 to 7 years. There are very few cases that have been brought to help minorities as far as their rights to vote and there have been very few disparate cases brought in employment and in housing compared to previous administrations.

So I do want to give you a chance to tell us your commitment to making the Civil Rights Division the priority it needs to be, and it starts, first, with the Assistant Attorney General. That position is vacant and I would like to know your game plan for filling that office.

I must tell you, one more point and then I'll give you a chance to respond. It seems to me that we should have somebody in the Civil Rights Division that has experience in civil rights law. You wouldn't put somebody at the Antitrust Division that didn't know the antitrust laws. You wouldn't put somebody in the Criminal Division that didn't know criminal law.

You need somebody that has a background in civil rights and someone who is respected among the advocacy community.

I hope this will be a priority and I hope you will give us—maybe shed some light as to how you plan to proceed with the Civil Rights Division.

Judge MUKASEY. I spoke briefly to the current head of the Civil Rights Division. I spoke briefly, also, to a woman named Grace Chung Becker, who is in the Civil Rights Division in a senior position, and impressed me, during our, admittedly, brief conversation, with her familiarity not only with the law, but what, in fact, the division is doing and I—she's a person who inspired, in my meeting with her, a great deal of confidence.

I'm not, as you know, the nominating authority for doing this, but I was very well impressed with her and I would hope that someone of her caliber, if there's to be a change at the top in the Civil Rights Division, would step forward and undertake the leadership of that department.

Senator CARDIN. My expectation is that the President is going to rely heavily on your views on many of these decisions. There's a lot of openings at key positions within the Department of Justice, many that require confirmation by this committee, and I expect the President is going to be relying heavily on your recommendations for many of these appointments.

I would feel a little more comfortable just to hear your priorities for the Civil Rights Division. I think that's an area that requires the Attorney General to spend some time in understanding the importance and letting it be known to the Department of Justice the importance of that division.

Judge MUKASEY. The priorities of the Civil Rights Division are both the historic and the current. Historic, equal protection is a principal goal and a principal mandate of that department.

More recently, prosecution of hate crimes has become, sadly, much a priority and, regrettably, when you have one of those crimes, other adult people get it into their minds to do the same and you get an outcropping and a proliferation of that sort of thing, and we've seen some of that, although I think it's being tamped down gradually.

And the prosecution of hate crimes is something that the Civil Rights Division is very actively involved in and has to continue to be actively involved in.

Senator CARDIN. Well, since you mentioned hate crimes, I'm glad you did, because I think the number of episodes in this country has increased dramatically, including my own State, where we had the newest episode at the University of Maryland and there's been throughout the country recently, it seems like, a lot of new episodes that are very disturbing.

There have been hate crimes that involve not only race, but religion, ethnic background, and sexual orientation.

I'm glad to hear of your interest in having the Department of Justice be aggressive in that area. I hope that they will be. We have a bill working its way through Congress to try to strengthen that law and I would encourage you to take a look at it, because it works in conjunction with State governments and local governments, because I think Department of Justice can assist in local prosecutions in regards to hate crimes.

And I would hope that you—I'm glad you mentioned and, I can tell you, you'll have partners here in Congress encouraging you to be as aggressive as possible. Of course, I think that's one of the most important things we can state, as a nation, is to not tolerate any forms of hate crimes.

Let me talk about election law for a moment, if I might.

This is, I guess, a typical example of my concern about the Civil Rights Division. The Civil Rights Division traditionally has worked to enfranchise, to provide more opportunities for individuals to vote, to remove obstacles.

Yet, in 2002, there was a major shift, when it looks like the Department of Justice Civil Rights Division was aimed at more of trying to prevent fraud than it was to remove obstacles to voter participation. And it reached, I think, the low point with the sign-off on the Georgia Voter ID.

Even though the Secretary of State of Georgia could give us no examples of people using false identification or false persons to vote, Georgia moved forward with the voter identification.

The Civil Rights Division signed off on it, against the advice of the career attorneys, signed off on it. The courts ultimately decided that it would not go forward, it violated the law, and it would work to disenfranchise particularly minority voters and those who are homeless, those who are of lower income, from being able to participate and vote.

So I guess my question to you is, will your priority and your instructions to the Civil Rights Division be the traditional role of the Department of Justice in trying to remove obstacles to particularly minorities being able to vote or will it be more to try to do the Georgia type of voter ID laws?

Judge MUKASEY. Respectfully, I don't think it's an either/or proposition. I think that voter enfranchisement, voter empowerment, opening up the vote and opening up access to the vote and preventing people who shouldn't vote from voting are essentially two sides of the same coin.

That coin is a very valuable one. It's the value of the vote. I guess one of the joyful duties I had as a judge was swearing in new citizens and a big part of the talk that I gave, the brief talk that I gave to them afterwards, always involved their obligation to inform themselves and to vote.

Nobody who votes wants to see his or her vote diluted by the vote of someone who is not entitled to vote. But people who want to vote, who are authorized to vote and should vote, have to be—have to have access to that and everything has to be done to keep that open.

Senator CARDIN. Do you agree with the court decision in Georgia that said that the voter ID was the “modern day poll tax” and that it would not be allowed to go forward with in Georgia?

Judge MUKASEY. I don't know whether that—

Senator CARDIN. I think that's a direct quote from the judge.

Judge MUKASEY. I think if a means of identification is made available and accessible and every step is taken that allows people who have a right to vote to get access to that, to be informed about its availability, then to say that it's the modern day equivalent of the poll tax seems to be a little bit over the top.

Senator CARDIN. If you're a homeless person, if you're a person with a disability, if you're in the immigrant community, these ID cards are very difficult and sometimes offensive.

Judge MUKASEY. If they're difficult, then that difficulty has to be overcome and a way has to be found to get people with disabilities—to make those cards available to the people with disabilities. If they're homebound, have people go to their homes, if necessary.

I'm not saying that those cards should be difficult to get or have.

Senator CARDIN. I guess my point would be that I would certainly want the Civil Rights Division looking at the balancing between making sure that only those who are qualified to vote vote, but to try to get the largest possible participation in our election process.

And if we put our energy into trying to weed out the few that maybe are committing fraud and, as a result, we end up with a

huge number who are disenfranchised, that shouldn't be what the Department of Justice is doing.

I hope you agree with that.

Judge MUKASEY. I certainly do.

Senator CARDIN. Thank you. Appreciate that.

Let me just mention, very quickly, we had some problems—there's some new problems developing in the election procedures, where candidates and parties are using an effort to disenfranchise voters as a way to win elections.

We saw that with misinformation sent out in the most recent elections concerning voting dates, giving the wrong dates to voters, to tell minority community—targeted to minority communities that if you have unpaid parking tickets, you'll be arrested if you try to vote, if you haven't paid your taxes, you'll be arrested, things like that that are aimed at minority communities to suppress their votes.

I hope that you will show interest in trying to figure out a strategy where we can combat those types of practices. There's legislation moving through Congress that Senator Obama, Senator Schumer and myself have cosponsored. I hope that you would take a look at that.

Judge MUKASEY. I certainly will. I certainly will. I mean, that's flat-out fraud and that's pernicious fraud.

Senator CARDIN. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Thank you very much. And we will—I think you're probably going to be getting a lot more questions on these areas of voters and how that is set up, especially as we go into next year.

I agree with what you said about telling people who are new citizens, who have just been sworn in, the right to vote. I found that—I've been privileged to be in many of those ceremonies when Federal judges in my State have sworn people in.

This is the most eager thing, they can vote. You hear that from everybody. My grandparents, when they immigrated to this country from Italy, they told me that one of the most exciting things, they could go in and vote.

Senator SESSIONS? I'm sorry. That did not come out of your time, I assure.

Senator SESSIONS. Thank you, Mr. Chairman. I think it's been a very good day, indeed, Mr. Chairman, that you and Senator Schumer and others feel confident in supporting this nominee.

I think it is important, at this point in history, Judge, that we have an Attorney General that people on both sides of the aisle can support and have confidence in. You've earned that, I think, over a lifetime.

You seem to have the gifts and graces, at this important time, to do the job. I think, having been in the Department of Justice for 15 years, and nothing I've done I've been more proud of than working with that fine team of people I had the honor to work with, I think it is time for a steady hand, a professional.

I think it's critical and one of the things you're going to have to do, and you've already felt, from the questions you've received, is to bring some clarity out of the confusion of national security issues.

I mean, we are quite confused about that. I think the public is confused about it and I think we've got to get that clarified. I hope that will be one of the legacies that your tenure will allow you to accomplish.

I've said repeatedly that the Attorney General has got to say no to the President if he wants to do something, just like a good corporate lawyer has to tell the CEO sometimes, "We can't do it that way, Mr. CEO" or "Mr. President. You can do it this way, but you can't do it that way." And then you've got to be able to articulate and defend the legitimate actions of your President, the head of the executive branch, and I'm not sure we've done that very well. And so things have gotten pretty confusing.

Do you feel that is a responsibility of yours and do you feel that, at this present time, the President's popularity numbers are not high, Congress has just changed hands, and people are beating up the administration in every way, right and left, do you feel an obligation and do you feel that you're ready to give us honest, straight answers and to provide a good defense for the legitimate prerogatives of the executive branch?

Judge MUKASEY. I do, and I particularly agree with your statement that we need to clarify. We need to be clear about what it is we're doing and why it is we're doing it. People need to understand that and that case has to be made.

Senator SESSIONS. Well, you're a man of good judgment and clear thinking, by all accounts. You have broad experience, integrity.

I believe Senator Schumer said you were a man of the law. I like that phrase. I think that's what you need to be. And you've certainly had great experience.

So I think that you can make those—help those who are placing their lives at risk for us this very day all over the world in hostile lands in order to execute policies that we sent them to execute, that they don't need to be denied wrongfully the intelligence and support they need to be successful, that the American people are entitled to a vigorous and effective defense against terrorism and people who would attack innocent men and women and children, and that requires intelligence and hard work, and some of these issues are tough.

But we have a lot of legitimate powers and I hope that you will be effective in helping us articulate that so that we can be safer.

Judge MUKASEY. If I'm confirmed, I'm going to do my best.

Senator SESSIONS. Thank you. I agree, I think, with Senator Cardin that assembling a topflight staff is going to be a top priority of yours. You're going to have to work hard at that.

I believe you can get those people. I think it'll be easier for you than your predecessor to attract the topflight people and, as someone who's been a part of the department, I know a lot of those deputies and associates are critical to success, and I hope that you will do that.

And don't hesitate to criticize or stand up to the Congress and some of the legislation that gets passed or gets promoted.

I remember, after 9/11, we had the FISA Act and the PATRIOT Act and there was no disagreement that it was a mistake to have created a wall between the FBI and CIA. There was no disagreement that the law that prohibited our intelligence officials from ne-

gotiating and talking with or developing relations with people who have had bad reputations and had done bad things was a bad idea, and we changed that.

And I just say that to say they passed those bills in an effort to improve civil liberties and it ended up to not be necessary. It ended up to be a big mistake and may well have contributed to 9/11.

So I'll ask you, will you be willing to tell us if we're trying to push something through here that's in error?

Judge MUKASEY. I am not a bashful person and I'm not going to become a bashful person if I'm confirmed. I will speak up when I think I have to.

Senator SESSIONS. Well, I was actively engaged in the immigration debate this summer and last year. We had a remarkable national debate.

The matter had been bubbling for about 2 years and I think the American people spoke clearly. Their will is very clear. They want a lawful system of immigration. They want to be compassionate, they want to do a lot of things, and we have different agreements about some things, but one of the things that they're committed to is creating a lawful system of immigration.

Would you agree that's a good goal for America?

Judge MUKASEY. I do.

Senator SESSIONS. I believe the American people would like to maybe hear you say something about your commitment to that. I say that because there's a great deal of cynicism.

For 40 years, no President and no Attorney General has given a high priority to enforcing our immigration laws. We arrested, last year, a million people attempting to enter the country illegally.

Can you share with us and place at ease those who feel strongly about this, as a chief law enforcement officer, your willingness to take the steps necessary to be effective?

Judge MUKASEY. I hope I can. This is, as has been said many times, a nation of immigrants. Franklin Roosevelt once sent a letter to the DAR, began with the salutation, "My Fellow Immigrants," and my father was an immigrant to this country.

This country has been made great through the contribution of immigrants. In fact, the immigration problem that we have, our border problem, is an aspect of how successful we've been. Other countries have border problems, we have border problems.

Generally, theirs involve people trying to get out. Ours involve people trying to get in. We need to control that. We need to control it for a wide variety of reasons, including maintaining our national security, and we can't have a system in which the only sanction that results from an attempt to come into this country illegally is that you get to try it again. That's the kind of catch-and-release program that we've had and it's brought us trouble.

When we met, you described to me a program or an initiative that was being carried out, I think, in Del Rio, is it, that had been successful in the bringing of some misdemeanor prosecutions against people who are unlawful entrants. I think that's something we need to try to look at and followup if we have the resources.

I recognize this is a question of allocation of resources and I'm not talking about filling up the jails with people who are crossing the border, if we can't do that, but I think we need to try to inves-

tigate the possibility of bringing to bear some sanctions so that the only result of coming in illegally is not that you get to try it again, because, otherwise, we're just going to buy ourselves more and more of what we've had, which is not satisfactory.

Senator SESSIONS. I think you said that truly. We have seen, in two areas of the border, where misdemeanor prosecutions have been brought for illegal entry and they are those offenses, that, in one area, a 50 percent decline in entry and, another area, 70 percent decline.

We've passed an amendment that I offered yesterday or the day before that was accepted that would allow us to expand that program.

Would you commit to examining that program and, if it works, like perhaps the Broken Windows program that worked so well in New York, start with those little things and maybe the whole system can be turned around in ways we can't anticipate today, would you look at that had?

Judge MUKASEY. I will commit to looking at it hard. I should recognize that this is not exclusively a matter within the control of the Justice Department. The Department of Homeland Security has an important voice.

Luckily, I know Secretary Chertoff from another movie, as they say, go back a ways, so I can talk to him comfortably about that.

Senator SESSIONS. Well, I do feel like there are a lot of things that can be done and one of them is to create an impression, a correct impression that our borders are no longer open, and that we are serious about it and even misdemeanor prosecutions can be effective. And I think the squeegee guys in the Broken Windows are sort of a comparative example there of how to restore law and it starts oftentimes with not just the biggest cases, but with smaller cases.

You're probably aware that Federal law requires the deportation of convicted criminal aliens, those who are here legally or illegally, but are convicted of serious crimes.

Do you support the enforcement of that law?

Judge MUKASEY. Yes, I do.

Senator SESSIONS. It's not being effectively enforced now. Department of Homeland Security Inspector General says that at least half of those that are serving time in prisons today will not be removed according to the law.

Attorney General Gonzales admitted there was a problem in July in this committee. He said, "The level of cooperation between DHS and DOJ is not what it should be."

So will you take a leadership role to see if you can confront this issue and make sure that we are effectively identifying those who either committed—I'm not talking about entry crimes. I'm talking about violent crimes, drug dealing and the like once they've been in the country.

Judge MUKASEY. I will certainly take an active role in it. I think there's a third party to that conversation and that's the country to which they have to be deported, and I can understand that some of those countries may not be eager to receive alumni of our prison system. But that's something we're going to have to overcome.

Senator SESSIONS. Well, you know, that is true, but that is a matter that can be overcome if we have the will to overcome it, I believe.

I know Senator Specter raised a question one time of, well, maybe we should stop entries from those countries if they don't agree to take them back. You have to send the clear message that we're serious about it.

On the question of voting rights—my time is up, Mr. Chairman—I do think that—I hope that you will not ignore the requirements of the Voting Rights section that fraud be prosecuted, also. I trust you will not ignore that responsibility.

Judge MUKASEY. I will not ignore it.

Senator SESSIONS. Thank you, sir. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Well, I think, one, I will say, Judge, I've been pleased to see you engage with Senators from both sides of the aisle. I appreciate the succinctness of your answers, with the clarity of them.

I think that we have a—as I told you before, we have a Department of Justice which has been badly shaken by a prolonged crisis of leadership and I think these hearings can begin to repair that.

A number of your answers have indicated your independence, your agreement that political influence has no place in law enforcement. Any of us who have had the privilege of serving in law enforcement know that that has to be the case.

And I think we agree the Department of Justice is far too important an institution to remain dysfunctional and want to get it back to its law enforcement mission.

Tomorrow we will start and Senator Specter and I will have questions. There will be no opening statements from anybody. I want to go back to the price of executive privilege, how you're going to test such claims, how you resolve them.

I've got a couple other matters that I want to followup that I did not have time to this morning, and I would urge Senators who wish to ask questions to be here. I thank all the Senators who have been here today.

After we finish that, we'll then have a panel of experts who are going to testify on some of the issues we've had here.

But you've had a long day, Judge. Your family has had a long day. At least you had the adrenaline and the ability of being there answering the questions. They have to sit there and think, "Is he really going to say that?" No. So I appreciate you being here.

We'll stand in recess until tomorrow.

[Whereupon, at 4:50 p.m., the hearing was adjourned.]



**NOMINATION OF MICHAEL B. MUKASEY, OF  
NEW YORK, TO BE ATTORNEY GENERAL OF  
THE UNITED STATES**

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**THURSDAY, OCTOBER 18, 2007**

U.S. SENATE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The Committee met, pursuant to notice, at 10:07 a.m., in room SH-216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, Kyl, Sessions, Graham, Cornyn, Brownback, and Coburn.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S.  
SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Good morning. "Good morning," he said subtly, for the sake of the photographers.

Judge, at one of these hearings, before we start, I should mention that there was a screen on the front here. Without thinking one time at one of these hearings, I started kicking on the screen. I thought it was solid. I realized, to my embarrassment, I was kicking the back of one of the photographers. Within 15 minutes, the word had gotten around, and my son-in-law, Lawrence Jackson, who is an AP photojournalist, sends me an e-mail saying, "You really shouldn't be that rough with them. They are very nice people." And so I am being careful not to do that today.

I would repeat what I said yesterday. I do not think it would be necessary, but obviously, if there are any demonstrations either for or against any position of Judge Mukasey, Senator Specter, myself, or anybody else in here, the demonstrators will be removed. We want everybody to have a chance to have these hearings.

So if I might start, what we will do today, I will ask a series of questions, Senator Specter will, and then we will go back and forth in the usual order.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Judge, I want to go back to your last answer to me yesterday, and you and I discussed this a little bit outside. You said a U.S. Attorney could only refer a contempt citation of Congress to a grand jury as required by law if he or she believed reliance on the President's executive privilege claim was unreasonable.

I have some trouble with that. I do not think you rule on claims of privilege when they are raised by seeing whether they are reasonable but whether they are valid, so let us talk a little bit about this.

If Congress were to refer a contempt citation—and there is a real probability there will be some as a result of the U.S. Attorney scandal—you are indicating that the U.S. Attorney would undertake an independent analysis and assess the claim of privilege in determining whether to bring the matter before a grand jury. Is that right?

Judge MUKASEY. Well, let me flesh out a little bit what I understand the process to be and to have been and maybe put a little bit of flesh on the bones of my answer.

As I understand it, when the White House get a subpoena, they refer it to the Department of Justice, as, in fact, happened here because I was shown the letter from Paul Clement relating to the assertion of the privilege. If the White House then, relying on that letter—the President, since he is the only person who owns the privilege, if he relying on the Justice Department asserts the privilege and there is nonetheless a contempt citation, we are in the position where the Department of Justice would have to prosecute someone who followed the advice that originated with the Department of Justice.

I am told that there are not one but two opinions of the Office of Legal Counsel, one of them from Ted Olson and the other from a man I know and whose name I can picture—and I cannot come up with it now—who served in the Clinton administration, who I referred to yesterday. I am sure I will think of it after I leave here.

But, in any event, there are two OLC opinions saying that that would not be appropriate, and—

Chairman LEAHY. What would not be appropriate?

Judge MUKASEY. That for the U.S. Attorney to prosecute someone for a contempt based on reliance on an opinion letter that originated in the Department of Justice would not be appropriate. It would be different if a letter from the Justice Department said, “You can assert the privilege as to A, B, and C, you cannot as to D, E, and F,” and the President were to say, “I do not care. I am going to assert it as to all of them.” That would be a different story.

Chairman LEAHY. But in some instances, I think we are talking about some things that are somewhat *ex post facto*. If you have—after the people are called, there had been no assertion of executive privilege before. Now they get called about their actions. They were involved in actions in which nobody had raised any question of executive privilege, but all of a sudden when they are called before Congress under subpoena, now somebody starts claiming executive privilege, don't you have something a little bit different? Isn't it somewhat difficult to claim you are acting under an assertion of executive privilege when that issue comes up after the fact?

Judge MUKASEY. I think the basis for the assertion has to be evaluated, and that basis often includes reliance on opinions of the Justice Department because it is hard to envision that the White House—although it is not impossible to envision, I would think that the White House would seek the view of the Justice Department before it took any position on executive privilege. If somebody

went off on a tear without consulting the Department of Justice, I agree that would present a different set of facts.

Chairman LEAHY. Well, you have a bit of a problem here because some of these claims were extremely broad. You had people cannot testify, saying, "I never talked to the President. I never sent stuff to the President. The President never asked me any questions, never interacted with me. But I am claiming executive privilege." Now, that seems kind of a broad claim.

Judge MUKASEY. As you describe it, it sounds broad. But I think the executive privilege covers communications other than those directly to and from the President. There is a whole range of interests that have to be protected by executive privilege that include setting aside matters of national security, setting aside matters of current litigation. There are—

Chairman LEAHY. Well, what—

Judge MUKASEY. I am sorry.

Chairman LEAHY. Well, what if the President broke the law and somebody wanted to look into it, and he said, "Wait a minute, executive privilege. We can't have anybody talk about what I did breaking the law because I claim executive privilege"?

Judge MUKASEY. I think part of the content of what it is in a communication has to be considered. There is a weighing process that goes on.

Chairman LEAHY. Well, last July, when the House Judiciary Committee was considering a contempt citation for a former White House official, somebody in the administration said a U.S. Attorney would not be permitted to bring contempt charges or convene a grand jury in an executive privilege case, and the U.S. Attorney would not be permitted to argue against the legal opinion the Justice Department provided.

Now, the law requires them to bring contempt charges to a grand jury. The White House says you cannot bring it. What do you do in a case like that?

Judge MUKASEY. I fall back on two things. First of all, there are two OLC opinions—and the name of that other person I could not think of before is Walter Dellinger—that say that when the person asserting the privilege—when the President in the assertion of the privilege is relying on a Justice Department opinion, that it simply cannot be appropriate for the same Department that offered the opinion then to turn around and prosecute somebody who followed it.

Chairman LEAHY. But if the U.S. Attorney does not follow the statute, which is very clear, how does the claim of executive privilege get evaluated? How does the conflict with the Congress get resolved?

Judge MUKASEY. I think—I have not read the text of the statute recently. I think it requires the convening of a grand jury. I do not know whether it goes so far as to say—I do not think it goes so far as to say that a charge shall be a filed or that an indictment shall be requested. But I do not want to start parsing words delicately—

Chairman LEAHY. Well, Judge, I will spell this out a little bit more clearly with you, but I would like your answer back in writing

before this matter is brought up before the—before the nomination is brought up before the Committee.

And, last, Congress has clearly legislated in areas—we have done it in the area of surveillance with the FISA law, something we have amended repeatedly at the request of various administrations. If it has been legislated and stated very clearly what must be done, if you operate outside of that, whether it is with a Presidential authorization or anything else, wouldn't that be illegal?

Judge MUKASEY. That would have to depend on whether what goes outside the statute nonetheless lies within the authority of the President to defend the country.

Chairman LEAHY. Where does the President get that authority? I am thinking of the Jackson opinion and others. Where does he get the authority if it is very clearly enunciated what he can do, a law that he has signed, very clearly enunciated? I mean, the President can say, "Well, this authority, I am going to order the FBI to go in and raid 25 houses because somebody told me they think someone is there. We are not going to wait for courts. We are not going to do anything else. There is no urgency. But we just kind of like to do that."

Judge MUKASEY. "We kind of like to do that" is not any kind of legitimate assertion of authority. And I recognize that you have posited the case that way for a reason. But the statute, regardless of its clarity, cannot change the Constitution. That has been true since the prize cases, and it was true before that.

Chairman LEAHY. Can a President authorize illegal conduct? Can a President put somebody above the law by authorizing illegal conduct?

Judge MUKASEY. The only way for me to respond to that in the abstract is to say 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. Can the President put somebody above the law? No. The President does not stand above the law. But the law emphatically includes the Constitution. It starts with the Constitution.

Chairman LEAHY. We will go back to this. I am troubled by your answer. I see a loophole big enough to drive a truck through, and so we will go back to it. I do not think—well, we will go back to it.

Senator SPECTER, I am sorry. I have gone over.

Senator SPECTER. Thank you, Mr. Chairman.

Picking up on this issue, you testified yesterday that the President could not order torture because it would violate a statute. In light of your answer a moment ago, would you say that is because the President does not have Article II power to protect the country to authorize torture?

Judge MUKASEY. The President cannot authorize torture because torture is barred both by statute and by the Constitution. And I would be happy to walk back through that if you wish.

Senator SPECTER. Well, where in the Constitution is torture barred?

Judge MUKASEY. It is barred by the Fifth, the 14th, and the Eighth Amendments. The Fifth and the 14th Amendments bar conduct that shocks the conscience. They have been so interpreted.

Senator SPECTER. Fine. I see your rationale. Let me move on the same issue to the Foreign Intelligence Surveillance Act, FISA. That provides that the exclusive procedure for obtaining a wiretap is to go and get a warrant on probable cause. Was the President permitted to violate FISA because of his Article II powers? Or was his violation of FISA a violation of law?

Judge MUKASEY. I am not sure what violation it is we are talking about. If we are talking about the Terrorist Surveillance Program, I think I said yesterday—

Senator SPECTER. We are talking about the Terrorist Surveillance Program, which has warrantless wiretaps, contrasted with FISA, which says the exclusive procedure to have a wiretap is to get a warrant, and what the President did violates FISA. Is it justifiable on his Article II powers because—well, that is the question.

Judge MUKASEY. As I understand it, the President believed at the time and still believes that FISA was not the only applicable statute, that he was acting with authorization under the Authorization for the Use of Military Force.

I understand that there is more than one view on that. He gave a long—

Senator SPECTER. Judge Mukasey, I do not think anybody—

Judge MUKASEY. I am sorry?

Senator SPECTER.—ever really seriously contended that our resolution of September 14th authorizing the use of force encompassed a violation of FISA. But let me move on. There are so many issues to cover that I want to move into another area. I think the record is fairly clear as to your views on Article II power and the statute and what you said on torture.

Before proceeding to some other issues, I want to make a comment about Steve Bradbury, who is the Acting Assistant Attorney General, Office of Legal Counsel. There has been a request—some members of the Committee, some Senators have asked that he be withdrawn from that position. I believe he is very competent, and I believe he ought to be confirmed. And people disagree with things he has done, but those acts on Mr. Bradbury's part have been carrying out the President's orders.

And I think he has no choice on that, and we have been into that in some detail with Attorney General Gonzales when we had an issue about having the Office of Professional Responsibility see if the Terrorist Surveillance Program was properly authorized under the law. And Attorney General Gonzales said that was the President's decision, put it squarely on the President, and I think that is what has happened with Steve Bradbury.

In June and July, there was considerable discussion about the telephone companies' responsibilities, and the Committee, when I chaired it, was moving for subpoenas, and Vice President Cheney intervened and talked to members of the Committee on the Republican side without talking to me, and I want to put in the record a letter I sent to the Vice President on June 7, 2006, and his reply to me on June 8, 2006.

Chairman LEAHY. Without objection, that will be part of the record.

Senator SPECTER. Because they are relevant to my comments about Steve Bradbury.

Following those letters, Mr. Bradbury and my staff and I had very extensive conversations about legislation which I had introduced to put the Terrorist Surveillance Program under the Foreign Intelligence Surveillance Court, and I found him to be very competent and very professional and very direct and very able—candidly, unusually so for someone in the Department of Justice. And that led to a direct meeting I had with President Bush, who agreed to support the legislation, which Mr. Bradbury and my staff and—Mr. Bradbury, others in the administration, and my staff and I had worked out. And I thought Steve Bradbury was A-plus, and I have had dealings with him since on a lot of very complex legal issues, and I think he ought to be confirmed. He certainly ought not to be ousted.

Now on to the issue of reporter's privilege. There is legislation pending which would give the reporters a qualified privilege. You and I discussed this informally. There have been many subpoenas issued in both State and Federal courts, and the Hearst Corporation summarized them as 97, the majority—since 1991, the majority of those since the year 2000, many celebrated cases where people went to jail. The Barry Bonds case was celebrated as to a contempt citation against reporters.

The No. 1 case was the case of Judith Miller, who was kept in jail for 85 days for reasons still inexplicable to me. She was asked about the source of a leak on the outing of Valerie Plame. At the time there was no national security issue because Ms. Plame did not qualify to make it a national security issue, and it was known who the source was: Rich Armitage, the Deputy Secretary of State. And yet she was kept in jail for 85 days, which led me to push the legislation, and we are pushing it still.

The question I want to ask you—and I understand that you are not in a position to make a final judgment as you would if you were Attorney General. But this matter will be coming up. We are pushing it for floor action. And the question is: There is an exception for national security, and it is a matter of a judge to weigh whether the public interest in disclosure outweighs or does not outweigh the national security interest. And obviously there are issues on national security that are very complex, but in our system it is up to judges, Federal judges, to make decisions. They deal with a lot of very complex issues in many, many contexts, high technical matters. And I would like to hear your views on the subject and beyond that to ask you to study in detail as to whether that is a sensible accommodation because of the importance of news gathering, which has in the history of our country exposed corruption, misfeasance, malfeasance, waste, fraud, and abuse. In the line of the famous Jefferson statement, if I had to choose Government without newspapers or newspapers without Government, he would take newspapers without Government.

But we intend to push this, and we would like to reach an accommodation that satisfies the administration on the national security issue. What do you think?

Judge MUKASEY. First of all, I have my own history of having represented reporters, of having asserted the New York shield law successfully, and as you put it, it sounds almost innocuous. But I have some anxiety when it comes to national security cases because although Federal judges—and I used to be one of those, too, and, therefore, I have high regard for them.

First of all, it is not always possible to show precisely what the outcome is going to be from disclosure of confidential information. The instance I mentioned yesterday involving serving a list of unindicted co-conspirators was one example. Another example is a piece of testimony that was given in the Ramzi Yousef case that was tried before my colleague, Judge Duffy, where somebody testified to somebody having delivered a cell phone battery to someone else.

That piece of testimony disclosed to al Qaeda that a line of communication of theirs had been compromised, and, in fact, it was a line of communication that our Government was monitoring and from which it had gotten enormously valuable intelligence. That line of communication shut down within days of that testimony. And I do not know what we lost. Nobody knows what we lost. But we probably lost something enormously valuable. What I am saying is that it is an imponderable.

Second, although Federal judges decide complex and technical issues, when it comes to weighing intelligence, that is beyond simply complexity. They do not have available to them not only the training but the resources that people involved in, for example, the Department of National Intelligence—the Director of National Intelligence has available to him to weigh issues like that. They rely on their experience, their law clerks, and what is submitted to them, and their own common sense.

That is enough in the mine run of cases because the worst thing that could happen is they will make a mistake, it will go up on appeal, and as often happened to me, they will get reversed. The stakes are much higher when it comes to national security. And, often, even a showing of what the danger would be from the disclosure is itself as bad as the disclosure or worse. Then you get to the entirely separate question of who is a journalist and who is not. We talked about that a little bit yesterday.

So for those reasons, I have got misgivings about it. I do not—the case that you described—there is an old saying that hard cases make bad law. The reverse may very well be true, also. Bad cases can make hard law. And I do not want this to be a situation where a bad case makes a hard law.

Senator SPECTER. Mr. Chairman, just one final comment. I understand the problem you articulate, but I do not think that we can stop short and say that just an assertion by the Federal Government of national security ends the matter. That is just too much authority in too blanket a way. So I would ask that you help us search for a way to accommodate the concerns you express, but at the same time give a shield to a reporter unless there is some very good reason not to.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Before I go to Senator Feinstein, if I might, there is one thing that bothered me in your answer—well, a number of things that bothered me, but basically when I was asking about FISA and you were saying, well, the President to protect the country can—it sounded almost like you were saying he could ignore the law or could authorize others to, but yet you said in answer to Senator Specter, well, of course, the President would not be allowed to authorize torture because that is against the law.

If you use the same reasoning, why couldn't he say, "I am doing this, as a national security matter, to protect the country, so I am going to authorize torture"? Why couldn't he do that?

Judge MUKASEY. Torture violates not only the law; it violates the Constitution.

Chairman LEAHY. Well, so does a search and seizure without a warrant. I mean, the Constitution has pretty clear constitutional provisions on search and seizure.

Judge MUKASEY. The Fourth Amendment says that we are all protected against unreasonable searches. It then goes on to speak about what would authorize the issuance of a warrant and what would not. They are—

Chairman LEAHY. Probable cause supported by oath or affirmation, particularly describing—and so on.

Judge MUKASEY. Right. Those are two separate clauses, and there is—we all, for example, go to the airport, and we are all searched without a warrant before we get on an airplane.

Chairman LEAHY. We also consent to it. We have a choice of doing that or not getting on the plane. I am talking about when somebody goes into my e-mails, goes into my telephone, and it turns out thousands of times it was done for a period of several years until the press reported it. Then they came back and said, "Gosh, I guess we ought to amend the law to allow this," but they ignored a very specific law which said how you go about doing that. I mean, how can the President say, "Well, that is national security so I will authorize you to clearly violate a statute and authorize everybody from telephone companies on through, I will authorize you to clearly violate a statute—why couldn't he do the same thing on torture?"

Judge MUKASEY. I think we have to distinguish very carefully between—I try to distinguish very carefully between monitoring a conversation, telephone content, and telephone records. Telephone records have never been protected by the Fourth Amendment because they are in the hands of a third party. If they weren't, you couldn't—

Chairman LEAHY. Conversations are—

Judge MUKASEY. Of course they are. You couldn't argue with your telephone company over the bill.

Chairman LEAHY. No, but the conversations are, and the conversations, people's lives could be—if they are taken improperly, used improperly, their lives could be ruined. Their jobs could be lost and so on. I think we will come back to this, Judge, and we should think about this a little bit, because I do not think you can say when you have a very clear statute that the President can suddenly step above the law or authorize others to break the law, which is what it appears you are saying, and in other cases like

torture you cannot do it even though we find out now that they have broken the law, the torture law, supposedly having been told they could do it by the White House.

Senator Feinstein?

Senator FEINSTEIN. Thank you very much, Mr. Chairman. My discussion, I hope you will take in its full form as a discussion on an important issue.

This afternoon, Judge, the Intelligence Committee will be marking up a FISA bill. I can tell you it is a very big bill. At this stage it is a bipartisan bill. Yesterday the House bill fell apart on the floor of the House. I am absolutely convinced the only way we can legislate in this area is on a bipartisan basis, and much to the commendation of the Chairman and the Vice Chairman of the Intelligence Committee in the Senate, this bill so far is bipartisan. That is good news.

My second point is the so-called Terrorist Surveillance Program could have been within the law from the very beginning. I have never understood why it was not within the law. The formulation of an 11-judge Foreign Intelligence Surveillance Court prepared to sit 24/7 is a very important thing in our Nation, and I think the big guarantee that we give our people is the guarantee of law to the greatest extent we possibly can, and that law is there.

I took some time when I went on the Intelligence Committee some years back to read the Church Report that was put out after 1978 and the passage of the FISA bill. And the Church Report outlines a major historic trend by this Nation in our 200-year history to essentially take foreign intelligence, exploit the loopholes, and use it for political intelligence gathering domestically. And there is example after example after examples, through a whole host of Democratic and Republican administrations, which points out, to me at least, the real need for a Foreign Intelligence Surveillance Act that we can say to the American people is the exclusive authority.

Now, yesterday we began this discussion. Unfortunately, I did not have the time. Senator Feingold followed up, and let me quote you on these points: "...in the area between where that statutory authority left off and where his authority left off under the Constitution in Judge Bell's view—and it is one I share—I think he would have"—meaning the President—"the authority to act. I think it is important"—and you went into the Fourth Amendment then. "But there is very scant, if any, case law on the question of whether intelligence gathering, as distinct from gathering of evidence for criminal cases, is something that may very well be much more flexible than matters relating to the gathering of intelligence."

In terms of evidence that is legislative intent, there is not scant evidence. There is very fulsome evidence, I believe, that every effort was made in 1978, and even since then, to provide that electronic surveillance be under law—the setting up of the court, the report language.

You mentioned the AUMF today. I do not believe in terms of the legislative history of the AUMF—and I was part of or sat through some of these discussions—there was any intent to allow the President to wiretap outside of the law. It was never discussed. It never came up. The full focus was whether to confine this to Iraq or more

broadly. And I think I sent last night part—page 101 of the report on the FISA bill, and I want to read a couple of sections to you and then ask you to comment in view of what I have just said.

“When a President takes measures incompatible with the express or implied will of the Congress, his power”—and we know this—“is at the lowest ebb, for then he can rely only on his own constitutional power minus any constitutional power of Congress. Courts can sustain exclusive Presidential control in such cases only by disabling the Congress for acting upon the subject.”

It then goes on that, “Despite any inherent power of the President to authorize warrantless electronic surveillances, in the absence of legislation, by this bill and Chapter 119 of Title 18, Congress will have legislated with regard to electronic surveillance in the United States. That legislation with its procedures and safeguards”—FISA Court, 11 judges, 24/7—“prohibit the President, notwithstanding any inherent powers, from violating the terms of that legislation.”

Then the report language goes on to describe how the bill essentially repealed those provisions which state that nothing in those relevant chapters shall limit the constitutional power of the President. They repealed that section, expressly repealed it.

And then they go on to say, “In short, Congress simply left Presidential powers where it found them. The Foreign Intelligence Surveillance Act, however, does not simply leave Presidential powers where it finds them. To the contrary, this bill would substitute a clear legislative authorization pursuant to statutory not constitutional standards. Thus, it is appropriate to repeal this section which otherwise would suggest that perhaps the statutory standard was not the exclusive authorization for the surveillance included therein.”

See, I do not think the President, based on the legislative history, has—unless there is something that expressly grants it to him. The AUMF did not expressly grant nor was it discussed, nor, I believe, was it contemplated that he would use that as authority to go outside of FISA. And, again, I conclude with this: He did not have to go outside of FISA. Subsequently, that became clear and the program is within FISA now.

So what bothers me is that you yesterday sustained that gap where I believe that gap has been closed, and hopefully will be further closed by what we do in an intelligence bill, which will then, after Intelligence, come to this Committee. Could you respond?

Judge MUKASEY. All I can say is I share your hope, and I share the view that if the President can act within FISA, then that is where he has to act. I think based on the history that you read, the only—and I do not want to look for areas of disagreement. I was told not to look for areas of disagreement.

Senator FEINSTEIN. Well, I think this is a conversation worthwhile having, so you go ahead.

Judge MUKASEY. OK. The only place where we might conceivably have a disagreement—and I am not certain we do there either—is in the view that, notwithstanding the Congress saying specifically we are restricting the President’s—what might otherwise be the President’s authority under the Constitution, that that can actually restrict the President’s authority under the Constitution.

Whether a past Congress said we acknowledge the President's—that the President might have authority that lies beyond the statute, to repeal that cannot change the constitutional reality. If, however, it was always possible for the President to act within FISA, then there is no need for that authority.

And, for example, under FISA as it stands now, as I understand it, there are procedures that are approved by the Foreign Intelligence Surveillance Court that the President is then free to use without each time having to go for a separate warrant because that is simply unfeasible, regardless of how many judges we have got. And that is obviously the way to go. That is the way I want to go.

Senator FEINSTEIN. Exactly. My point is this: the administration did not try to do that, before the heat got very hot and then they went and did it. And that is the reason why FISA really should be the exclusive authority for this kind of public action, because it is all hidden action. And, therefore, the Fourth Amendment does come into play, I think, too. So perhaps, you know, the best I can say for your argument—and it is wonderful for me because I am not a lawyer so I can say that—is that you have two budding amendments, perhaps. But when you listed the AUMF, I think the history counters the AUMF. That is all I wanted to make. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. The AUMF is the weakest reed this White House could ever hold onto, and it does not stand up. I think the fact that they are bringing so much pressure on the Intelligence Committee—and if the press is to be believed, the Intelligence Committee is about to cave on this—and bringing pressure on this Committee to immunize past illegal conduct, it is because they know that it was illegal conduct, and that there is no saving grace for the President to say, well, I was acting with authority. Otherwise, there would not be so much pressure on us to immunize illegal conduct by either people acting within our Government or within the private industry.

Senator KYL was here yesterday, and as it grew late in the day, he was willing to wait until today, and I appreciate that very much, Senator, because we were then able to wrap up, and I yield to you.

Senator KYL. Thank you very much, Mr. Chairman. With all due respect, let me suggest there is another way to read the President's strong interest in trying to get a good FISA reauthorization, a much more benign reason, that he believes that it is important to our national security that we be able to secure this intelligence information against terrorists, and with regard to the retroactive liability, that there could be a very chilling effect on the ability of telephone companies or others to cooperate with the Government if we do not protect them from potential suit. It does not have to be that the administration knew that its activities were illegal and, therefore, it has been working with us hard to get this legislation passed. In fact, I think that is a most uncharitable and incorrect assessment of the situation.

I would like to agree with Senator Specter just a moment with regard to his comments about Steve Bradbury. I think Senator Specter said it well, and I just note those to you, Judge Mukasey.

Also, with regard to the question of the reporter's shield law, you took a question on this yesterday and commented on what Senator Specter said. I would like to correct the record just with respect to one thing Senator Specter said, but agree with him that it will be important for us to be able to work with you, and I will ask you that question in just a moment.

But from the Department of Justice's own report, the numbers demonstrate a decrease in the number of cases in which the Department has approved the issuance of subpoenas seeking confidential source information in recent years. Of the 19 source-related matters since 1991, only four have been approved since 2001. So this is hardly a situation in which, as was said, there are many cases where reporters have gone to jail. There are almost none. Very, very few. And the Department of Justice has clearly been very discreet in the kind of source-related matters that it has been seeking in recent years.

We have all been seeking to reach that point that Senator Specter alluded to, the accommodation of national security interests, prosecution of criminal matters, as well as the free flow of information. And my question to you is: Since the legislation has come under the Judiciary Committee but with an agreement among us that we will continue to work on it, it would be very important to have your insights as well, and obviously the question is—you have already answered it to Senator Specter, but to reiterate your willingness to work with us as that legislation proceeds so that we can try to accommodate all of these interests in the most efficacious way.

Judge MUKASEY. I agree, and I think it bears some mention in connection with this subject that there are within the Department very elaborate procedures before anyone is permitted to subpoena a reporter. Some AUSA with a subpoena and a typewriter does not decide whether to subpoena a reporter. There are many levels of approval that have to be gotten—in Main Justice, not just in the Assistant's own office—before a subpoena can issue to a reporter. And it was my own view—and I do not know, obviously, all of the cases—that the system worked passably well up until now.

But one thing about internal procedures is that if you need to change them, they are relatively easy to change. You can adjust the regulation. You can adjust the procedure. You can put more levels in. You can change standards. It is relatively easy to do.

It becomes much harder when it is etched in stone in the form of legislation, and that is part of the reason for my uneasiness.

Senator KYL. I appreciate that. You know, Mr. Chairman, yesterday when Senator Lieberman introduced Judge Mukasey, he talked about a Contracts professor that loved to grill them on the law. I suspect that Judge Mukasey might have viewed the questioning by our colleagues as somewhat akin to that, and I think you have come through it with flying colors.

I thought it would be interesting to just get back to the Department of Justice mission statement. We have been fairly far afield with a lot of different things here, and I found it interesting to review it, that your job, if you are Attorney General, is to enforce the law and defend the interests of the United States according to the law; ensure the public safety against threats, foreign and domestic;

provide Federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans. And that is a mission statement I think we can all agree with.

And in thinking about that mission statement—in other words, exactly what your job is and what you would be doing during the next year that we would be interested in with respect to our oversight—I found it interesting that the people who have worked with you in those various areas—enforcing the law, providing leadership and preventing and controlling crime, seeking just punishment and so on—have been impressed with the way that you have executed your responsibilities, suggesting that in your position as Attorney General of the United States you would carry that same experience to the fulfillment of your responsibilities.

Perhaps it has been read into the record already, but it bears repeating perhaps. Mary Jo White, the U.S. Attorney for the Southern District of New York from 1993 to 2002, commented that during the Sheik Rahman trial, you had 10 defendants on trial, controlled the courtroom very tightly. She said, “He has dealt with some of the most complicated, novel issues that any judge will ever see. That is who he is—tough-minded, clear-eyed person. DOJ is very lucky to get him.” And, of course, there have been so many other comments from others that have worked with you.

I just thought it important to note that with respect to your actual responsibilities as opposed to some of the things that have been discussed in this hearing, your reputation fits in very tightly, it seems to me, with your responsibilities as Attorney General. And I am pleased that you have had that kind of support from the people with whom you have worked.

I have discussed these things with you personally. I have listened to your testimony here, and it seems to me that you are extraordinarily well suited for this position, pretty much as well as anybody who has not served in the position before could be.

And I just wanted to close by asking if you have any insights for us with respect to how you view your job. You have got roughly a year left, and the last year of an administration. There has been some tumult in the Department. There have been huge challenges coming from this threat of terrorism, in addition to all of the usual things the Department of Justice has to deal with, but to bring your experience to bear on it and basically speak directly to the American people about how you can take that experience and represent them in the Department of Justice as the chief law enforcement official of the country.

Judge MUKASEY. What you have described is a job that would humble somebody with twice my ability. The one great consolation that I have is, to go back to my opening statement, the people in the Department are the people who carry that responsibility. My job is to make sure that they have as few problems as possible and let them do their jobs. And they are enormously talented, dedicated people. I mentioned running into people on the coffee line. Two of those people were 30-year veterans of the Department. Thirty years. And there are thousands of them. That is what allows me to sleep at night when I say yes to wanting to do this job, because

I am going to have available to me the kinds of people who are there.

Yes, it is an awesome responsibility, but look at the people I have helping me or will have helping me if I am confirmed.

Senator KYL. I appreciate that. Thank you.

Mr. Chairman, by the way, both relative to Senator Specter's comments and mine, I would like unanimous consent to insert in the record at this point a Washingtonpost.com piece dated Friday, October 12th, titled "In Defense of the Office of Legal Counsel."

Chairman LEAHY. Without objection, it is so ordered.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman. Judge, good morning.

Judge MUKASEY. Good morning.

Senator FEINGOLD. I know there has been a great deal of discussion this morning, which actually followed our conversation yesterday, about the effect of the FISA law and whether the President has the authority to violate that law. And I would just like to associate myself with Senator Feinstein's excellent description of congressional intent when passing FISA. And I must say that your answer to her appeared to be directly contrary to the *Youngstown* approach to Executive power, which you and I discussed in detail yesterday, and you appeared to accept as important and valid law.

The Supreme Court has held that Executive power is affected very significantly by what Congress does, so it sounds like overnight you have gone from being agnostic, as you and I have gone back and forth since our first meeting on this question, to holding what is a rather disturbing view. You have said today that you believe the President may violate a statute if he is acting within his Article II authority. Now, that position, which I find alarming, makes it extremely important to know what you believe the exact scope of the President's Article II authority to be.

So are you telling the Committee, Judge, that anytime the President is acting to safeguard the national security against a terrorist threat, he does not have to comply with statutes?

Judge MUKASEY. You have suggested that I have gone overnight from being an agnostic to being a heretic. And—

Senator FEINGOLD. Explain why you have not.

Judge MUKASEY. I think all I am saying is that, obviously, I recognize the force of Justice Jackson's three-step approach, but I recognize also that each branch has its own sphere of authority that is exclusive to it.

For example, just to take an example that has nothing to do with the subject under discussion immediately, you have the exclusive authority to vote me up or vote me down, for any reason or no reason. If I am displeased with the result and displeased with the reason, I could not validly go down the street to the courthouse and file a lawsuit and claim that I had been denied a right, even I got some judge who was willing to entertain the lawsuit and even if I prevailed. There are a lot of ways you could describe that outcome, but the rule of law is not one of them, because the authority belongs only to you.

There are areas of Presidential authority. I also said that we are not dealing here with necessarily areas of black and white. I under-

stand that, which is why it is very important that push not come to shove on these questions because the result can be not simply discord but disaster.

Senator FEINGOLD. Well, Judge, I will take your example. In the case of the *Youngstown* case, people did have the right to go down to a courtroom, and they did it, and they won. And Justice Jackson indicated a three-part test, which your analysis today I think renders essentially meaningless. So I believe that this is contradictory, and it does trouble me. And I have great respect for you. And I do believe, as Senator Schumer indicated yesterday, you have a similar opportunity to change the tenor of this administration in a way that Levi did in a prior era of this country.

Let me just say with all respect that this area is perhaps the most important one where the repairing has to be done, getting away from this notion of ever expanding, infinite Article II power. And I would ask you to take that very seriously.

Let me switch to a different topic. As you know, the decision whether to seek the Federal death penalty in any given case rests with the Attorney General alone. Attorney General Gonzales has been criticized for not being personally involved in that decision-making process. In one case, he apparently refused to speak personally with a U.S. Attorney about a case in which he ordered that the death penalty be sought over the U.S. Attorney's objections, and then he told this Committee that this was one of the reasons that that particular U.S. Attorney was fired.

How personally involved would you be in decisions about whether to seek the Federal death penalty?

Judge MUKASEY. I am going to be personally involved, and I am going to review every such decision. I took sentencing seriously when I was a judge. I never had occasion to pass a death sentence, although I did preside over cases where that was at least a possibility at various points in the case.

There is obviously no penalty that is analogous to the death penalty. There are other penalties, and there is that one. And that means that I am going to review every such case in excruciating detail.

We have a system in place, as I understand it, that was put there I believe under Attorney General Janet Reno in which we have tried—I am already saying “we,” and that is presumptuous—in which the Department has tried to assure that the decision about whether to seek the death penalty or not seek the death penalty depends only on the underlying facts of the case, the history of the defendant, the acts involved, the seriousness of—obviously the seriousness is always ultimate, but the cruelty that accompanies a murder, and other indicia.

Senator FEINGOLD. Will you refuse to speak personally with a U.S. Attorney who disagrees with your decision and wants to discuss it with you?

Judge MUKASEY. That is a difficult question for the following reason: If there is a defendant in a jurisdiction where the United States Attorney wants to speak to me, then it may very well be that that defendant's crime is no better, that his background is no better than the background of a defendant in a jurisdiction where the United States Attorney, because in that jurisdiction they are

more accustomed to or inured to or favorable to the death penalty, the United States Attorney does not feel he wants to intervene. The system was supposed to treat—the system that was created in the Department is supposed to treat those two people the same way.

Senator FEINGOLD. Well, why wouldn't you speak to the U.S. Attorney about this? You didn't specifically say that, but that was my question. Would you agree to at least discuss it with him?

Judge MUKASEY. I would want to have that United States Attorney's views made known to me. I do not want to be in a situation of succumbing, if you want to call it that, to a plea by a United States Attorney who does not want for good and conscientious reasons—and there are people who have good and conscientious reasons, and I recognize that—does not want to seek when the same case may be getting different treatment in another jurisdiction.

Senator FEINGOLD. Should the additional cost of pursuing the death penalty rather than a life sentence be a consideration?

Judge MUKASEY. There is a whole range of considerations. That is, I guess, one of them, but I—

Senator FEINGOLD. All right. Let me move to another topic because I am running out—unless you feel you need to elaborate there.

Judge MUKASEY. No, I just do not want to create an incentive for—obviously, the most costly you make it, then the more the equation—

Senator FEINGOLD. Fair enough. Fair enough. Judge, as is the case in every Federal agency of all three branches of Government, there are gay, lesbian, bisexual, and transgendered Americans serving honorably and effectively at the Department of Justice, and the Department sponsors commemorative events to recognize the contributions of various minority groups. But under Attorneys General Ashcroft and Gonzales, in contrast to Attorney General Reno, it has refused to do so for GLBT Americans. In addition, while DOJ Pride, an organization of GLBT employees, is permitted to use Department space to hold events, it is prohibited from advertising those events on public billboards in Department buildings, again, unlike other organizations for minority employees at the Department.

Similarly, the Department refuses to recruit at job fairs aimed at GLBT attorneys, but sends recruiters to job fairs aimed at other minority groups.

I am troubled by this. I suppose there is not much to be done about this administration's attitude toward gays and lesbians, but as Attorney General, you would have the power to end this shameful conduct. Will you stop the disparate treatment of gay and lesbian employees at DOJ?

Judge MUKASEY. I do not understand the reason for that treatment. When I was a district judge, I interviewed and hired without regard to any matter relating to the personal life of a prospective law clerk, any matter of that kind, and I see no reason why there should be any different standard at the Department.

Senator FEINGOLD. I will take that as saying that you will stop the disparate treatment of gay and lesbian employees at DOJ.

Judge MUKASEY. It sounds like I am going to.

Senator FEINGOLD. Pardon me?

Judge MUKASEY. It sounds like I am going to.

Senator FEINGOLD. Sounds good to me.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Normally we would go to Senator Grassley next, but Senator Grassley has advised us that Senator Coburn, like most of us, has about five different places to be and is willing to yield his place now to Senator Coburn. So we will go to Senator Coburn, and the next Republican in line will be Senator Grassley.

Senator COBURN. Thank you, Mr. Chairman, and thank you, Senator Grassley, for your consideration.

Mr. Mukasey, Judge Mukasey, here is your quote: "The Department faces challenges vastly different from those it faced when I was Assistant U.S. Attorney 35 years ago, but the principles that guide the Department remain the same: to pursue justice by enforcing the law with unswerving fidelity to the Constitution."

You have answered throughout yesterday many questions in regard to that. I was one U.S. Senator who thought that the previous Attorney General should resign, not for the similar reasons that many of my colleagues did, but because of the management that I saw at the Department of Justice.

What will you do to ensure that this quote and this axiom of loyalty to the Constitution before loyalty to any political appointment is carried out through the depths of the Justice Department?

Judge MUKASEY. Well, Dr. Coburn, I believe in a couple things. One is you lead by example. You do things that you want other people to do, and you do not ask people to do things you do not want to do yourself. That is one way.

Another is to make certain that if there is any suggestion that there is any problem that would compromise a constitutional standard, is to get in it up to my elbows, or further, if necessary, and to stop it. I have pursued up until now hands-on management to the extent I have managed at all. And I recognize that I do not have a business degree and I have never managed anything like a 100,000-person agency with a \$22 billion budget. Never done it. But I have had a hands-on management style, and I want to continue that. I want to consult with people not only in the immediate leadership but people from below that so that I understand what it is that is really going on and so that I am not caught by surprise. I do not like surprises.

That is the way, I think, to make sure that the standards I try to articulate are maintained, and that is what I hope and plan to do if I am confirmed.

Senator COBURN. Thank you.

The Justice Department is unique in the Federal Government in that it is the only agency that is allowed a percentage of its unexpended balances at the end of the year to use discretion to enhance what they do, both in terms of IT and things. We allow the Justice Department to do that. We do not allow any other agency to do that.

We recently passed a limitation on conferences in the Senate with specifics to certain groups that were unindicted co-conspirators and others, and real concern about the amount of money the

Justice Department spends on conferences. I realize there have to be conferences.

Can we have a commitment from you that you will approve the budget for conferences and that, in fact, that conferences will be exactly what is needed and not more, and not more frequent, and a real conservative action at looking at your fiduciary responsibility in terms of the budget of the Department to make sure that the dollars spent there are not wasted?

Judge MUKASEY. I emphatically agree with that. I did not attend many conferences when I was a judge. I attended the Judicial Conference because I was required by statute to do so. I am not a big fan of publicly funded get-togethers for the sake of getting together.

Senator COBURN. OK. My final question, and then I will refer back and will not use all my time. I am concerned about morale in the Justice Department. There is no question some management decisions have affected that. We have impacted that by the controversies that, either real or otherwise, have put before it.

What is your plan in this limited amount of time that you have to create a vision and a leadership plan that will bring the morale and the esprit de corps and the positive thinking back to the Justice Department?

Judge MUKASEY. I agree that perceptions about morale are going to be part of the landscape that I am going to face at the Justice Department. But I do not want by my words or my actions to create a self-fulfilling prophecy in which talk about bad morale creates bad morale.

I think what contributed to and what accounted for the esprit de corps in the office that I served in 35 years ago was that we were doing exciting, worthwhile work that had no standard other than what served the public interest, and that excited and energized people and contributed to great esprit de corps.

I want to help people to do that. I want to fill positions. I want to make it possible for people to do their jobs. That is what accounted for the esprit de corps in the office that I was in, and I think that is what promotes it in the Department.

Senator COBURN. Thank you. I want to thank you for your commitment to take on this task for a very short period of time, and to just compliment you for being willing to sacrifice. You do not have to do this. You could do other things. And I think it is admirable, and it is one of the qualities of Americans that they will serve knowing that the positive benefits for you personally are not going to be great. Thank you.

Thank you and I yield back.

Senator FEINSTEIN. [Presiding.] Senator Schumer?

Senator SCHUMER. Thank you, Madam Chairperson, and thank you again, Judge Mukasey.

Now, I know you care as much as anyone about rooting out public corruption. In fact, I note that when you were at the U.S. Attorney's Office, you ultimately headed up the Official Corruption Unit for a few years. Both you and I know that sometimes the mechanism for pursuing public corruption can itself become corrupted. And you and I both know that when political considerations get enmeshed in political cases, the public suffers and justice suffers. You have already given comforting answers about some things you

would do in the future about making sure political actors and elected officials do not themselves corrupt investigations of corruption. So I want to ask you a few more questions along those lines.

First, how would you react if it came to your attention that the White House Director of Political Affairs or a similar official had pushed the United States Attorney to pursue a case against a Democratic official?

Judge MUKASEY. How would I react?

Senator SCHUMER. Yes.

Judge MUKASEY. I think a euphemistic description would be negatively.

Senator SCHUMER. OK. I will be specific here. Would you confront the White House official?

Judge MUKASEY. I would first have a conversation with the United States Attorney involved and find out what it was that had been said or not said and what pressure had been brought or not brought. And if I thought that pressure was being brought, I would have a conversation with the White House official, and if necessary, with the President.

Senator SCHUMER. Right. Well, that was my next question. Would you inform the President of the behavior? And you have answered that. What would you do to rectify the situation?

Judge MUKASEY. I would make absolutely certain that whatever the effect was of the pressure was undone, and how to do that obviously is going to vary on a case-by-case basis. But one way might very be to take over that investigation with someone from Main Justice who was not subject to that pressure. But that is a hypothetical. I recognize that and I do not want to—I would rather confront—I would rather not confront the issue. But if I have to confront it, I would rather confront the facts and not just a hypothetical.

Senator SCHUMER. Sure. Understood. Well, let me go to a specific fact case, because there are troubling allegations from several quarters that such behavior did actually occur in the past. And so I want to talk not only prospectively but retroactively, retrospectively.

In Alabama, there was a recent prosecution of a former Democratic Governor named Don Siegelman. Although he was ultimately convicted of several counts, there are serious allegations that his case was politically motivated and selectively prosecuted. A Republican lawyer from Alabama, Jill Simpson, has apparently sworn under oath that an Alabama political figure told her that Karl Rove pushed the Justice Department to bring political corruption charges against Mr. Siegelman. She also testified that the son of Alabama's current Governor told her that a Republican judge would "hang Don Siegelman."

It has also been suggested that when the case against Mr. Siegelman was faltering, this political pressure caused people at the Department to demand prosecutors "take another look at everything." And there are other troubling allegations that are a matter of public record.

Given what we have seen in the Justice Department, again, no smoking gun but a series of these types of issues—I have read about this. I do not know the specific facts, but it greatly troubles

me. It greatly troubles me that perhaps, perhaps, perhaps, this case was politically brought. My chief counsel, who was a prosecutor in the U.S. Attorney's Office, the same one you served in, said, "Well, he was convicted." But that does not really answer the question per se.

So I am not accusing anyone of anything, and I do not know all the facts, but I would like you to learn the facts and report back. And so I am asking you—you know, you have demonstrated you are a no-nonsense public servant. As good as your intentions are, we cannot have a proper housecleaning without resolving lingering issues and doubts.

In the spirit of making a fresh start and restoring public confidence that politics has been removed from the Department, I would ask you to personally look into the Siegelman matter and just report back to us what you find. Would you be willing to do that?

Judge MUKASEY. Well, I do not know what stage the Siegelman case is at.

Senator SCHUMER. He is convicted. He is in prison.

Judge MUKASEY. I understand that. Is the case on appeal?

Senator SCHUMER. I do not believe it is—yes, it still may be. But as you know, under Federal rules he is serving time in prison right now.

Judge MUKASEY. I understand that, but I think that it may very well be that the first cut at the facts that you have described and suggested ought to be had by the court. And it is not unheard of for there to be a motion in an appellate court to remand when facts come to the attention of lawyers after a case is tried that warrant hearing by the court that tried it.

Senator SCHUMER. Not to interrupt you, I do not know the details of this, but I think that many of these facts came out after the trial and conviction at the district level and might not be admissible before the court of appeals.

Judge MUKASEY. What I am suggesting is maybe there ought to be a remand or a request for a remand. The reason I am hesitant to say, well, I am going to get into it and do something is that when a case is in the process, as this one is, I—

Senator SCHUMER. Let me rephrase the question. Would you take a look at it? If there is a possibility and the case is ongoing because of appeal, would you be willing, if after the appeal is completed, particularly if there is no remand, or it is not admissible, these new facts are not admissible, determined by that court, would you be willing to take a look at this?

Judge MUKASEY. I would certainly be willing to take a look at it.

Senator SCHUMER. OK. Thank you.

I have a brief amount of time left. I just have a couple of questions here about, again, disproportionate prosecution of Democrats. I am going to be quick here because my time is running out.

Donald Shields from the University of Missouri and John Cragan from Illinois State University did a study of prosecutions. Again, we see this in the backdrop of what we have seen over the last few months and what we have learned through the Chairman's leadership on this investigation. The two professors of communication

compiled a data base of 375 investigations and indictments of candidates and elected officials by U.S. Attorneys. The preliminary findings suggest that Democratic office holders and office seekers are investigated 7 times as often as Republican ones. Obviously, there may be the situation where there was 7 times as much corruption brought to the attention of the U.S. Attorney among Democrats, but if you believe bad people are sort of sprinkled throughout the political system rather evenly, that is not one that goes down easy or well.

I would ask you to take a personal look at the study, see what you think, and if you thought it had some merit, undertake a study of your own to determine whether there is not improper or uneven treatment going on.

Judge MUKASEY. I will take a look at the study, and I also can tell you I believe that neither party has a monopoly on either virtue or vice.

Senator SCHUMER. I would be interested, should you become Attorney General—and as you know, I hope you will be—that you report back to us in some way or another your view of that study.

My time has expired.

Chairman LEAHY. [Presiding.] Senator Grassley?

Senator GRASSLEY. Thank you for the opportunity—

Chairman LEAHY. Incidentally, and restart the clock, just so people will know the schedule. We will go until 12:30, and if all questions have not been asked, we will recess until 2 and then come back, just so that—is that satisfactory?

Senator SPECTER. Yes, Mr. Chairman, I think that is a good idea. As I had commented to you earlier, there are a number of subjects and a great many matters pending before the Committee legislatively and on the executive privilege where we have subpoenas outstanding, and Judge Mukasey has been very cooperative and very helpful and very forthcoming, and I think that he is responding to our questions. But it is not a fast process, and they involve very complex subjects, and we have to take the time necessary, and it is longer than we like to keep you here, quite frankly, and it is longer than we like to stay here, quite frankly.

As you see from the rotation around here, everybody has got—Senator Coburn, it was announced you had to be in only five places at one time. I am managing an appropriation bill that is supposed to be on the floor, but we will have to just rotate back and forth and cover these subjects, which, as I say, are important.

Thank you for your cooperation, judge, and thank you, Mr. Chairman.

Chairman LEAHY. Senator Grassley, thank you. We will set the clock back.

Senator GRASSLEY. Thank you.

Judge, I have one question about whistleblowers before I go back to where we left off yesterday, and we left off about that non-disclosure form. But why I emphasize, as I hope I told you in the privacy of our office, the need to worry about whistleblowers is because—you probably know this, but if you do not, you will soon find it out—there is a great deal of peer pressure to go along to get along within Government bureaucracy. And I do not mean just Justice. I mean Government generally, and I mean all levels of Govern-

ment. Whistleblowers tend to be skunks at a picnic and are treated the same way. We have laws that protect them, and I want to make sure that at least within your jurisdiction you do what you can.

So what initial actions would you personally take to abate any fears of retaliation against individuals who are critical of procedures, practices, or policies that do not guarantee or execute the primary mission or goals of the FBI within the Justice Department or the entire Justice Department?

Judge MUKASEY. I think I will tell people specifically and I will tell them in action that I am receptive to and supportive of anyone who can disclose any impropriety, whether it is in the way rules are applied or in the rules themselves, and who can help the Government stop impropriety and stop waste, and making that explicit and then acting on it I think are the only two ways to do it.

Senator GRASSLEY. I think you are very sincere, but let me tell you, one time I said to the President, you know, this President, that you ought to have a Rose Garden ceremony honoring whistleblowers, because for the most part they are patriotic people and just want Government to do what Government is supposed to do and point out things that are wrong. And I got some sort of a comment back about if he did that, every nut would come out of the woodwork, you know.

So with that sort of an attitude at the highest level of Government, you know, it is very important that people a little lower down, as you are—not very low down but somewhat lower—make sure that the spirit of the law is carried out as well as the law.

Where I left off last week, I have learned that the FBI and the Justice Department Office of Inspector General have been using an overly broad non-disclosure form during administrative inquiries. This issue came to light recently in the course of the OIG's investigation into the FBI's misuse of National Security Letters. This form broadly states that no information may be, quote-unquote, released in any form to anyone, and indicates that if any portion of the information is released, quote-unquote, beyond this room then further investigation could result.

This is not a threat to be taken lightly coming from the FBI particularly, but also from the Justice Department OIG. While non-disclosure agreements may be a necessary and important part of an internal investigation, executive branch employees must remain free to provide information to Congress. Section 820 of the Appropriations Act for the Department of Justice prohibits any non-disclosure policy form or agreement that does not contain specific disclaimers, ensuring that Congress is not cutoff from crucial information.

I would like to have a copy of that statement put in the record, that non-disclosure statement put in the record at this point, Mr. Chairman.

As you can see, it is plain that the form does not contain the disclaimers required under Section 820. As you know, the Justice Department's budget was authorized for fiscal year 2007 under a continuing resolution, so Section 820 remains in effect. But according to the Inspector General, the FBI has been routinely using this broad non-disclosure form during administrative hearings.

One, if you are confirmed as Attorney General, will you conduct a review of non-disclosure agreements used by the Justice Department and subordinate agencies and ensure their compliance with 820 of the Appropriations Act of the Department of Justice as well as other Appropriations Acts in the future that might have similar provisions? And I guess it would seem to me that without this disclaimer, it is kind of a thumbing-the-nose attitude toward the Congress, I mean, like there is no respect for the law we pass.

Judge MUKASEY. Senator, part of the concern for the integrity of national security that I have had occasion to express this morning because I have been asked about it, the only way we respect legitimate claims about national security is if we do not promiscuously attach the phrase "national security" to anything that we would rather not discuss, that we would rather not have other people discuss. And so I think we have to be very careful in rationalizing non-disclosure obligations based on a claim, oh, this is national security.

I also obviously believe, as I have said, that the oversight authority of this Committee is enormously important in helping the Department fulfill its role.

So for those two reasons, I would be very, very critical of non-disclosure agreements and make sure that they are used only when it is necessary for them to be used and not simply as an everyday way of doing business.

Senator GRASSLEY. Well, I should accept your answer. It seems to me, though, that that information about Section 820 ought to be broadly reminded of everybody as part of a document.

Let's go to the Office of Inspector General. As I have said so many times, oversight is very important. You cannot do it in Congress if we do not get some help. We obviously need in this regard strong Inspectors General to provide another independent assessment of operations within the executive branch.

One, do you agree that independence is the hallmark of the Inspectors General's integrity and effectiveness?

Judge MUKASEY. I do.

Senator GRASSLEY. Please explain what kind of relationship you would intend to have with the Justice Department Inspector General Glenn Fine, assuming he stays on in that position, or whoever might succeed him, and describe what steps you will take to ensure that his office will function as an aggressive and independent check on the Department and its components. And I speak here particularly of the FBI, and I will get into something in just a minute on that, but not just the FBI.

Judge MUKASEY. I hope to have a cordial and effective relationship with him, as I would with any other officer in the Department. And he is a person—he in particular is a person of great experience. He has been at this for a long time. And his views get a lot of respect, and they are entitled to a lot of respect, and they are going to get a lot of respect from me.

Senator GRASSLEY. Earlier this year, the Office of Inspector General released an important report on the FBI's misuse of so-called exigent letters and National Security Letters. Some of the findings suggested that more inquiry was necessary in determining whether officials had knowingly approved FBI information requests con-

taining false statements or improperly characterizing requests as emergencies to obtain records without legal process.

At first, the OIG was going to merely allow the FBI to investigate itself. However, after this Committee had a hearing, the OIG decided to conduct further investigation jointly with the FBI Inspection Division. While this is better than having no role for the Inspector General, it seems that allowing the FBI to actively participate in an investigation of its own potential wrongdoing could undermine the credibility and public confidence in the final product by providing an opportunity for the FBI insiders to tamper with the investigation.

One, do you believe conducting joint investigations with the entity under investigation is consistent with the principle of Inspector General independence?

Judge MUKASEY. I agree that having an agency investigate itself is generally not the optimum way to proceed. The one fact, as I understand it, that gives me pause here is that I believe that one of the preliminary conclusions—that among the preliminary conclusions reached by the Inspector General in his first report—and I understand this matter is still under investigation.

But a preliminary conclusion was that there were no controls in place, there was no monitoring in place, and that that was in part what led to the abuse, where a form that originated in one place where there were grand juries sitting was then sent around and nobody bothered to read the form, they used it, and told people that they were to produce information for use you a grand jury when there was no grand jury, which is inexcusable, I agree; but that what happened was that when they saw that report, the FBI did, as I understand it, put controls in place and monitoring in place, and I think that given that that has been the response, that we ought to at least give those controls and that monitoring an opportunity to operate. And so their participation in the ongoing investigation is not perhaps as inappropriate as it might at first seem.

Senator GRASSLEY. OK. Well, I hope you are right, but I hope also you will try to do as much as you can in having the Inspector General just by himself do that work.

Mr. Chairman, I do not think I will be back for a third round, and I will submit some questions on agricultural antitrust and things of that nature that I would appreciate some answers for.

Thank you.

Judge MUKASEY. Thank you very much.

Chairman LEAHY. Thank you. We're going to go to Senator Durbin in just a moment. Before we do, just while Senator Grassley is still here, followup on the Inspector General.

Right now, this is something totally unprecedented. I happen to support what he's doing. The Inspector General is reviewing the sworn testimony of your predecessor, because questions were raised by members of this committee that some of the answers were not truthful. He's also reviewing sworn testimony of others to determine whether they were truthful.

Could I have your assurance that you will not in any way interfere with that review that he is doing?

Judge MUKASEY. You have that assurance.

Chairman LEAHY. Thank you.

Senator DURBIN?

Senator DURBIN. Thank you, Mr. Chairman.

Several of our colleagues this morning have said a few words to Steven Bradbury, who's the interim, or acting head, of the Office of Legal Counsel. I would, without returning to yesterday's line of questioning, say that until it's clear in my mind why the investigation of Mr. Bradbury's conduct relative to the warrantless wire tap program by the Office of Professional Responsibility was not completed and was, in effect, preempted in an unprecedented way by the President refusing security clearances to the Office of Professional Responsibility, I will continue to hold his nomination and believe that serious questions about his fitness to serve remain, in my personal opinion.

I would like to ask you, Judge Mukasey. We talked briefly yesterday about ongoing issues involving race in America. There is another issue which is troubling and is in the papers on a regular basis, and it's the issue of immigration.

In my town, I'm fortunate to represent the city of Chicago. The chief of police has said to me that they have made a conscious decision to give confidentiality to witnesses and victims when it comes to their immigration status in the belief that this is the only way to encourage cooperation and the reduction of crime, particularly violent crime. Other cities have made that same decision—your city of New York, under Mayor Guiliani; cities like Minneapolis and Houston have reached similar conclusions.

I would like to ask, since there's clearly a question to be raised here of policy, in that immigration laws are Federal in nature and the decisions are being made at the State and local level to have confidentiality agreements, which in the eyes of some suspend the enforcement of those Federal laws by local agencies, what is your position or opinion on these confidentiality agreements? Or I should say confidentiality statutes.

Judge MUKASEY. I wasn't aware that there were statutes. I thought these were simply matters of—

Senator DURBIN. I think you're right. More a matter of policy.

Judge MUKASEY. Policy. Wholly apart from that, the governance of every political subdivision is the responsibility of the executive in that subdivision—the mayor of a city, Governor of a State—and they have to answer to their constituents for the safety, for the welfare of their locality. It seems to me they have to use their own good judgment as to what is necessary to protect that safety and welfare and they can't take a principle, which is that we don't want to tolerate unlawful immigration—we don't.

We can't take a principle like that and go over a cliff with it. They can't say we're going to let this town be as lawless as it has to be because we are going to turn in anybody who comes in as a witness who is not properly here. We can't say that we're going to let children starve because their parents are not lawfully here. There has to be—there is a reality to be dealt with, and they are the people that have to deal with it. I am very sympathetic to that, and very much loathe to second guess them, and I won't second guess them as Attorney General.

I may try to persuade an executive to adjust a policy one way or another in a way that accommodates reasonable needs, but that's a very different thing from saying that the sacrifice, the physical welfare of people in a particular jurisdiction, because we have a principle here and illegal immigration is a hot-button issue, therefore everything else goes by the wayside—you can't say that.

Senator DURBIN. Can I conclude, or would you conclude from that statement that the primary responsibility for enforcement of immigration laws and policies is a Federal responsibility?

Judge MUKASEY. The primary responsibility is a Federal responsibility. Often you can't do that without the cooperation of local authorities. I would seek it, but certainly it is principally the Federal Government's responsibility.

Senator DURBIN. We spoke about the issue of race yesterday and I thought your answers were consistent with my values, and the values of most Americans in terms of trying to reduce the tension between whites and African-Americans when it comes to justice in America.

I'd like to ask you about a specific case that you were involved in, *Jordan v. LeFevre*. This case involved a murder charge. The prosecutor struck multiple African-American jurors, potential jurors. The State trial judge refused to allow the defense attorney to have a fair opportunity to challenge the striking of these African-American jurors, the so-called Batson challenge.

You denied the defendant's habeas challenge and allowed the conviction to stand, and were reversed by the appellate court. The appellate court said, "The court insufficiently protects the defendant's equal protection rights when, in its haste to speed along the proceedings, it declares that a reason is rational without making the critical determination as to purposeful discrimination."

On reflection, do you feel the appellate court's observation is correct and that you overlooked what could have been purposeful discrimination by the State in the selection of jurors?

Judge MUKASEY. The appellate court's observation was certainly correct. What I recall—from what I recall of that case—it's been a while since I looked at it—one of the elements in my consideration was giving deference to the judgment of the State court that made that decision in the first instance.

The case came back to me. We had a hearing and went through each of the jurors that were struck, each of the reasons that were given, and ultimately the Batson challenge was rejected and that, I believe, was sustained on appeal. I don't actually recall whether it went up or not. I believe it did, and it was sustained.

But I certainly agree that you have to give people an opportunity to make a record, and if I too hastily thought that somebody had been given an opportunity to make a record and that was not the case, then, yes, I regret that.

Senator DURBIN. We had questions yesterday about the issue of torture and the Geneva Conventions. The techniques which have been attributed to this administration involve painful stress positions, threatening detainees with dogs, forced nudity, waterboarding—that is, simulated drowning—and mock execution.

When we had the Judge Advocates General testify, I asked point-blank whether they believed these techniques violated the Geneva

Conventions and they said yes. And I asked if they felt if those techniques were used against an American detainee they would be violative of the Geneva Conventions and they answered in the affirmative.

What is your opinion?

Judge MUKASEY. They—I mean, I’m certainly not in a position here to argue with the Judge Advocate General’s view that they violate the Geneva Conventions and that, whether used against us or against anybody else, that they would. That said, I think we have to also recognize that when we’re talking about coercive methods of interrogation, this is not a matter of choosing pleasant alternatives over unpleasant alternatives or good alternatives over bad alternatives. It’s a choice among bad alternatives.

What the experience is of people in the Judge Advocate General’s corps, who are enormously well-disciplined and very skilled, what that experience has been with captured soldiers, captured military people, from enemies we fought in the past, may very well be far different from the experience that we’re having with unlawful combatants that we face now. It’s a very different kind of person.

Senator DURBIN. Well, I want to make sure I understand your response, because I think you may have created a division here in treatment, arguing that if these techniques were used in the past before the current threat of terrorism, it would be a different circumstance under the Geneva Convention than it might be today. I want to make sure I don’t draw the wrong conclusion from that previous answer, so if you could clarify it for me, please.

Judge MUKASEY. I’m not sure how I can—I mean, I’m not sure I can clarify.

Senator DURBIN. Well, let me go back. I understood you to say that the Judge Advocates General, speaking about the Geneva Conventions and these specific methods of torture, may have been referring to previous times, previous conflicts, and that this conflict and this challenge of terrorism may present a different set of challenges that might be viewed or interpreted differently under the Geneva Conventions. If that is not what you said, please clarify.

Judge MUKASEY. I’m not sufficiently familiar with interpretations of the Geneva Conventions to be offering views on what would or would not come within it or outside it. What I thought I was talking about is procedures that are acceptable to the military that are authorized in the Field Manual and that represent the limit of what it is that the Armed Forces can do. There are other techniques that are, as I understand it, that may be used by, with proper authorization, people outside the military. Those are not covered in the Field Manual.

Senator DURBIN. But I’m speaking of the Geneva Conventions. The Judge Advocates General said the techniques that I described to you violated Common Article 3, and this is the baseline test that applies to everyone, not just soldiers. I believe that the Supreme Court agreed with that conclusion in *Hamdan*. Do you see that differently?

Judge MUKASEY. What part of Common Article 3 the Supreme Court found in *Hamdan* was applicable through—I believe through the Universal Code of Military Justice, unless I’m confusing my cases. I can’t, as I sit here, recall precisely what part of Article 3

the Supreme Court found applicable. I thought they were talking about the need for trial and for an opportunity for a detainee to get a hearing. I did not think that concerned interrogation techniques.

Senator DURBIN. Let me try to bring it to the bottom line, because I want to make sure if there is common ground, we find it, and if not, that it's clear on the record.

I want to understand, as to these interrogation techniques, whether you believe that they would constitute torture and, therefore, could not be used against any detainee, military or otherwise, by the United States Government?

Judge MUKASEY. I don't think that I can responsibly talk about any technique here because the very—I'm not going to discuss, and I should not, and I'm sorry I can't discuss, and I think would be irresponsible for me to discuss, particularly the techniques with which I am not familiar. When there are people who are using coercive techniques who are being authorized to use coercive techniques, and for me to say something that is going to put their careers or freedom at risk simply because I'm going to be congenial, I don't think it would be responsible for me to do.

Senator DURBIN. This is not a congeniality contest, and I'm sorry that I've gone over, Mr. Chairman. But, for instance, I just want to—if I could make one last point on the issue of waterboarding, simulated drowning. The United States has long taken the position that this is a war crime. In 1901, U.S. Army Major Edwin Glenn was sentenced to 10 years hard labor for waterboarding a captured insurgent from the Philippines. U.S. military commissions after World War II prosecuted Japanese troops for engaging in waterboarding.

The torture statute makes it a crime to threaten someone with imminent death. Waterboarding is a threat of imminent death. I'm hoping that you can at least look at this one technique and say "that clearly constitutes torture, it should not be the policy of the United States to engage in waterboarding, whether the detainee is military or otherwise".

Judge MUKASEY. It is not constitutional for the United States to engage in torture in any form, be it waterboarding or anything else.

Senator DURBIN. There's your answer. The Chairman will followup.

Chairman LEAHY. I just want to make sure I fully understand. But I wrote down about three different times when you said "unless it is authorized". Are you saying that techniques can be authorized that are not constitutional?

Judge MUKASEY. No, that is emphatically not what I'm saying. What I'm saying is that techniques can be authorized that are beyond the Army Field Manual. I should not get into a discussion of what they might be, or in what combination they might be authorized.

Chairman LEAHY. But simply because something is authorized, if you have a law that says it is torture and it's not allowed, is there any way it could be still authorized?

Judge MUKASEY. If it is torture, as defined in the Constitution, as defined by constitutional standards, it can't be authorized. We don't have the Nuremberg defense.

Chairman LEAHY. Is the current statute outlawing torture constitutional?

Judge MUKASEY. I believe it is.

Chairman LEAHY. So that if something was authorized outside that statute or that violates that statute, that authorization is illegal?

Judge MUKASEY. Correct.

Senator DURBIN. Thank you. Thank you, Judge. Mr. Chairman.

Chairman LEAHY. Senator Whitehouse?

Senator WHITEHOUSE. Just to finish that thought, so is waterboarding constitutional?

Judge MUKASEY. I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional.

Senator WHITEHOUSE. "If waterboarding is constitutional" is a massive hedge.

Judge MUKASEY. No. I said if it's torture—I'm sorry. I said, if it's torture.

Senator WHITEHOUSE. If it's torture. That's a massive hedge. I mean, it either is or it isn't. Do you have an opinion on whether waterboarding, which is a practice of putting somebody in a reclining position, strapping them down, putting cloth over their faces and pouring water over the cloth to simulate the feeling of drowning, is that constitutional?

Judge MUKASEY. If it amounts to torture, it is not constitutional.

Senator WHITEHOUSE. I'm very disappointed in that answer. I think it's purely semantic.

Judge MUKASEY. I'm sorry.

Senator WHITEHOUSE. As you consider this, I'd like to offer you at least a thought that I'd ask you to consider. This comes from testimony brought before the Senate Intelligence Committee that is declassified. It comes from a military officer who has conducted interrogations who was team chief during the Gulf War, who had all of the services under his command, interrogating literally thousands of prisoners. He was an advisor to Special Operations task forces during Iraqi Freedom.

He says, "I've had a chance to really look at the academic, theoretical side of interrogation and I am steeped in the operational side." I asked him, "From the point of view of intelligence-gathering effectiveness, would you, could you, or should you go beyond the Army Field Manual and the techniques that are authorized in the Army Field Manual in order to obtain intelligence?"

His answer: "Senator, I thank you so much for that question, because I've been waiting 20 years to answer it. That is: absolutely not. I am not at all limited by the Army Field Manual in terms of what I need to do to generate useful information. That's the key: accurate, useful information, not leading questions to force somebody to say what they think I want to hear, but the full spectrum of their knowledgeability; not answering only the questions I ask, but developing what I call 'operational accord', a relationship that they see it's in their best interests under non-pressure, non-

coercive circumstances that it would be in their best interests to answer these questions fully.”

He gives an example of critical intelligence gathered in a search for SCUD sites in the Iraq war and explains that he received it because the individual said: “I’m so amazed at my treatment. I wanted, if I was going to be captured, to be captured by one of your allies, not by the Americans, because I was told you were animals. You’ve treated me like a gentleman. You’ve treated me with respect. You are clearly knowledgeable of my customs and my culture. I am more than happy to answer any questions that you have.”

So I asked him to confirm this: “What you mean to say was, you don’t see the constraints of the Army Field Manual, the moral constraints, the legal constraints as in any way inhibiting the effectiveness of your examination techniques, that you could do everything you wanted to, that you missed for nothing because of those restrictions, is that what you intended to say?”

The answer: “That’s precisely what I meant to say. I don’t see those as limiting my ability to work, the spirit or the letter of that guidance. My approach was what we called a relationship-based approach. I’ve never felt any necessity or operational requirement to bring physical, psychological, or emotional pressure on a source to win their cooperation. So, following the guidance in the Field Manual, I feel unconstrained in my ability to work in the paradigm I’ve taught for so many years—22 years, 100 percent interrogation experience.”

So then I asked him, “Why don’t other countries do this?” He said, “That gets to the very heart of the matter, and it is this: there are two objectives that one can pursue in interrogation, either winning cooperation or compliance. They seem very similar, but there are profound differences. Compliance means to take action that is against your interests that you don’t support.

It has nothing to do with intelligence. Cooperation is winning a source’s willingness to provide useful information. If the Chinese were interested, the Koreans, the North Vietnamese, it was maybe 5 percent intelligence, 95 percent compliance, meaning creating propaganda. That’s a whole different paradigm. The approaches that they use, like sleep deprivation and torture, ultimately will get any one of us in this room to do things we couldn’t imagine today, but it doesn’t necessarily mean our ability to provide useful information.”

He concluded later by saying, “So I think the key point, sir, is are we trying to produce compliance, which is propaganda, or cooperation, which leads to intelligence?” I hope, as you’re evaluating these techniques, you will also consider the, I believe, widely held view of career professionals—the FBI, the military—in the interrogation field who think that these techniques are not only wrong, but ineffective.

Two quick questions. We talked yesterday about the rules and regulations, the norms, practices, and protocols, and traditions of the Department. I urged you to consider those. You said that you would do so, and you referred to a variety of people.

I want to pin you down and ask you, sir, if you would pledge to undertake some formal process of review and evaluation of those

internal protocols, norms, and practices so that you get a report from experienced people on what needs to be repaired?

Judge MUKASEY. I'm going to pledge to undertake to review the practices. I'm going to pledge to consult with people, both inside and outside the Department in the course of that. Convening a formal process is something I can't commit to now. If it is necessary and if I find that the results of inquiry and consultation don't yield a satisfactory result, I will consider that.

Senator WHITEHOUSE. Do you agree to keep me informed of your activities in this area?

Judge MUKASEY. I will.

Senator WHITEHOUSE. Thank you.

Finally, in the event that you are sworn in as Attorney General of the United States, do you believe that you will be working for the people of the United States of America or the President of the United States of America?

Judge MUKASEY. I will be working for all the people of the United States of America, and I see no antithesis between that and the President's Cabinet. I am here because I've been nominated by the President. If I am confirmed, I will be a member of the President's Cabinet. I will serve as I believe the certificate says, "at his pleasure". That said, my oath is to uphold the Constitution, and that's what I'm going to do.

Senator WHITEHOUSE. There is a distinction that I believe your predecessor failed to appreciate between who has the appointing authority for a position and where the duties of that position run. Do you agree with that?

Judge MUKASEY. I don't want to sit here, and I'm not going to sit here, and criticize my predecessor. I have no—

Senator WHITEHOUSE. I'm sorry. Let me rephrase the question. Do you agree with that distinction?

Judge MUKASEY. I have no such confusion.

Senator WHITEHOUSE. Very good. OK. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Judge Mukasey has requested a 5-minute break. We'll take a 5-minute break. I've been told you requested one. No?

Judge MUKASEY. Somebody missed a signal.

Chairman LEAHY. Well, if you're not, then we will go to Senator Cardin.

Judge MUKASEY. Fine.

Chairman LEAHY. Thank you.

Senator Cardin?

Judge MUKASEY. Maybe somebody thought I should have requested it. I don't know.

[Laughter.]

Senator CARDIN. Thank you, Mr. Chairman.

Let me just ask a few more questions on torture, just to complete the discussion here. If I understand your answers, if you determine or if it's determined by the Department of Justice that an individual has violated the torture statute or the Constitution, and even though that person has acted under authority of the commander or the President, that if the determination is made that in

fact the constitutional statute has been violated, you would move to hold that person accountable?

Judge MUKASEY. I would move to hold that person accountable after reviewing the facts of that case.

Senator CARDIN. Certainly. I implied that in the question. This is not trying to be a trick question. I'm just trying to determine, you've been pretty clear about torture being unconstitutional. You've been pretty clear that our statutes are to be enforced. I understand there could be some challenge as to the interpretation of the statute. I understand that.

Which gets me to the second point that we've been going back and forth on, and in response to Senator Whitehouse's questions. What I guess I'm looking for, and I think I feel comfortable with your answers, is that you're going to be advising the President, advising our Department of Defense, advising our different agencies as to your independent judgment within the Department of Justice as to what constitutes torture, and that you're not going to be just responsive to try to defend what some commander may want because that person believes it's effective in getting information.

Judge MUKASEY. That's absolutely correct. Now, I'm going to request a short break.

Chairman LEAHY. Thank you. We will take a break for 5 minutes?

Judge MUKASEY. Yes.

Chairman LEAHY. Five minutes.

[Whereupon, at 12 p.m. the hearing was recessed.]

AFTER RECESS [12:09 p.m.]

Chairman LEAHY. The committee will be in order.

I understand somebody is still trying to figure out how to turn this away from being a meat locker.

Judge MUKASEY. I'm glad someone else noticed.

Chairman LEAHY. I apologize. Even as a Vermonter, I find this rather chilly.

[Laughter.]

Chairman LEAHY. Senator Cardin?

Senator CARDIN. Thank you, Mr. Chairman.

Judge Mukasey, I'd like to followup with the discussion we had yesterday on voter suppression. In your response, you said that voter fraud and voter suppression should go hand in hand and it should not be an either/or situation, and I agree with that. There's no disagreement that we want to make sure that those who are qualified to vote are the only ones that do vote, and we want to fight voter suppression issues.

The reasons for my questions, is that many of us believe there have been resources taken away from voter suppression. My question to you is whether you will commit to make sure there are adequate resources and attention in your Department to voter suppression issues.

Judge MUKASEY. I well understand the reason for your concern, and I share it, and I will try to assure that.

Senator CARDIN. Thank you. And I very much appreciated your response in regard to the more recent types of attempts at voter fraud, to suppress vote by wrong information given out on election

day. I very much appreciate your attention and response on that issue.

Judge MUKASEY. And when I characterized that as fraud I wasn't trying to be cute and say it's distinct from voter suppression. It is fraudulent voter suppression. It is to be put down.

Senator CARDIN. Thank you.

Judge MUKASEY. So there's no ambiguity.

Senator CARDIN. I appreciate that definitive answer.

Let me also return to one other subject we talked about, and that was the hate crimes activities, and just bring to the attention of this hearing the community relations services within the Department of Justice, because I think it's a very valuable resource that would help provide assistance to communities and individuals who have been subject to discrimination issues.

I would just urge you to make sure there are adequate resources and attention given to that particular service. I will point out in the Jena situation, I think it took over a year before there was any attention by that agency to the problems in Louisiana. I just think that's a good community service offered by the Department of Justice and would urge you to take advantage of it.

Judge MUKASEY. I will. Thank you.

Senator CARDIN. Let me bring up a subject that has not been brought up, and that is ethnic and racial profiling, to try to get your assessment of your commitment in this regard. This type of activity has unfortunately been present in America for many years. In the 1900's, the early 20th century, we had the Palmer raids that dealt with immigrants; during World War II, we had Japanese-Americans who were interred, and Congress has taken steps to try to acknowledge and correct that mistake in our history.

More recently, there have been actions by law enforcement to target certain communities by profiling. Many of us believe that this is not what America stands for, and I would just like to get your thoughts on the use of ethnic or racial profiling.

Judge MUKASEY. I'm one of the people who believe as you say: this is not what America stands for. We don't single out people by group. People get treated as individuals. Singling out groups and putting particular focus on groups or looking for particular groups when law enforcement activities are being conducted is not consistent with a system that evaluates each person individually. I understand that and I want everybody else in the Department to understand it. I believe they do, but I want to make sure they do.

Senator CARDIN. And last, let me bring up another issue which I don't believe has gotten too much attention during this hearing, and that's the disparate case issues where you have a supposedly neutral action taken that has a negative impact on a minority community, whether it's in housing, employment, or elsewhere. The concern is that there has been less attention given to these types of cases during the last several years by the Department of Justice than historically has been given, whether it's in housing, or whether it's employment, or other areas.

I would just like to get your assessment as to the importance of going after those types of activities that on the surface may appear to be neutral, but have had a negative impact on advancing rights for all Americans.

Judge MUKASEY. I think when you find that a rule or a practice is having an impact on one group that is very different than the impact that it's having elsewhere, you have to take a very close look, subject to very close scrutiny, any such rule or practice to make sure that we're not talking about something that is simply a cover or a code for something else.

Senator CARDIN. I thank you for that response. I think you will find, among your career attorneys and staff within the Department of Justice, tremendous experience in this area. I think there has been a sense of frustration, at least as has been expressed to some of us, that that analysis has not gotten the type of attention that it should at the highest levels of the Department of Justice.

So, I would just urge you to please take a look at those numbers, take a look at those cases there that have not been brought forward, because I do believe that there has not been the type of attention given to these types of cases that not only affect the specific practice, but gives clear guidance to the private sector as to what will be accepted and not accepted in our society in order to try to improve opportunity for all Americans. So I would just urge you to please take a look at what's been done, and once again I thank you for your patience with this hearing and wish you well.

Judge MUKASEY. Thank you very much.

Senator CARDIN. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Specter is managing a bill on the floor which we'll be voting on very soon. He wants to come back for another round which, as a matter of courtesy, of course, I'll grant as the ranking Republican on this committee. He will come back at 2. But before we break, I'd like to do two things. One of the concerns I've had—actually, Senator Cornyn from Texas has joined me in this—is the practice of the previous Attorney General, who has abetted the Bush administration's abuse of secrecy and encouraged the Department of Justice officers to withhold information under the Freedom of Information Act, or FOIA. It's a bedrock statute that opens our Government to our citizens, as I've seen many times.

No matter whether you have a Democratic or Republican administration, they're going to be happy to send out press releases saying all the things that they did right. It is usually up to the press to find out the things they did wrong, and FOIA helps in that regard.

Will you commit to review and consider overturning some of these policies, Number one, and second, will you look at the legislation Senator Cornyn and I have put together with strong bipartisan support to reform FOIA? The reason we want to do it now is so we can say we are doing it, not having any idea who the next President is going to be, or whether it's a Republican or Democratic administration. We feel strongly about this, and it should be done now so that whoever's in that administration will have an open administration.

Judge MUKASEY. I will certainly review the policies. Obviously I can't say that before we had FOIA we didn't have a democratic system in this country, we did. But we have certainly enhanced it substantially with that statute, and I understand the value of it and

the utility of it. I'm going to look at the policies you mentioned with that in mind.

Chairman LEAHY. We'll come back. I may have some further questions. I am concerned that a number of your answers yesterday, there was a very bright line on the questions of torture and the ability of an Executive, or inability of an Executive, to ignore the law. That seems nowhere near as bright a line today. Maybe I just don't understand. You're a lawyer from New York City. You've been a judge. I'm just a lawyer from the small State of Vermont. I may not fully understand the nuances.

But I'm going to be asking further questions because I don't know whether you received some criticism from anybody in the administration last night after your testimony, but I sense a difference, and a number of people here, Republican and Democratic alike, have sensed a difference. I want to make sure we clear that up before we finish.

Judge MUKASEY. I received no criticism. I had dinner with my family last night.

Chairman LEAHY. You did a lot better. I did, too. I turned down a public event so I could have a quiet dinner with my family. You're probably a lot better off that way.

Judge MUKASEY. Well, I should also point out that when you say I'm a judge from New York, I am a judge from New York and I've watched a lot of cross examinations, and I know the way cross examinations proceed: you start with an easy step and you go down the road. I don't want to go down the road on interrogation techniques. That's obvious. Did the things that were presented to me seem over the line to me as I sit here? Of course they do. They were intended to, and they did, and they do. But part of this is, it's not so much the question as it is the next question and the one after that. That's what concerns me. I need to be, I think, very careful about where I go on that subject.

Chairman LEAHY. Let's think about it during the noon hour, because I will come back to it on the questions. It's one thing to say the statute allows this or doesn't allow this. That said, I am concerned that you leave some opening that different parts of our Government may be held to different standards, or that some may be authorized to act outside the law. I'm careful in choosing my words in an open session, but we may want to go back to that issue.

Judge MUKASEY. Thank you.

Chairman LEAHY. Thank you.

We'll stand in recess until 2. I thank you. We'll try to get the place warmed up before then.

[Whereupon, at 12:20 p.m. the hearing was recessed.]

AFTER RECESS [1:59 p.m.]

Chairman LEAHY. Judge, I think it should be a tad warmer.

Judge MUKASEY. It is. Thank you.

Chairman LEAHY. I thank those who arranged that.

I mentioned that Senator Specter was managing a very significant bill on the floor, and he had another couple of questions he wanted to ask. So I'll yield to him, and then I think we'll be able to wrap up with you. Although I must point out, as I did earlier, I will followup on one point we covered earlier this morning. I will

have some followup questions, and I would hope you would look at them very seriously.

Senator SPECTER. Thank you, Mr. Chairman.

Judge MUKASEY, there has been a lot of controversy over the so-called Thompson memorandum and the McNulty memorandum with respect to the issue of attorney/client privilege with a practice by the Department of Justice to obtain waivers of the attorney/client privilege, and some controversy as to whether they're voluntary or to what extent they are not voluntary. Legislation is pending which would eliminate that practice.

My concern arises on two fundamental propositions: one, is that the commonwealth, the government, the State, has the burden to prove its case; and second, the right to counsel is a constitutional right and the attorney/client privilege is an indispensable part of the constitutional right to counsel.

I have had some experience in the field, having been D.A. of the city of Philadelphia, and I would never have considered asking a defendant to enable me to prove his case, metaphorically speaking, out of his own mouth. The Department has made some modifications from the Thompson memo to the McNulty memo by raising the level within the Department of Justice, from Assistant Attorney General to Deputy, whether there's a request for a waiver on facts or a waiver on opinions given by the attorney. You, of course, are very familiar with this issue, for many reasons. You have ruled on the issue. Is there any real justification for having a waiver on anything other than a purely, purely voluntary basis?

Judge MUKASEY. First of all, I should start out agreeing with you on how fundamental privilege is. Absent the privilege, the right to counsel is nearly meaningless. You can't get counsel—you can't be expected to disclose the facts to your lawyer so as to get good counsel if what you think you're doing is disclosing them ultimately to the prosecutor.

In a corporate setting, the issue—the overriding issue—on whether to prosecute a corporation or not prosecute a corporation is what happened, who did it, how pervasive the conduct was, and whether all of this rises to the level that requires prosecution, not only to individuals, because after all, corporations can act only through individuals, but of the corporation itself. And in the course of that, a lot of that has gotten lost with focus on looking for waivers of attorney/client privilege or other rights of the corporation.

I think part of this is because corporations are run by directors who have an obligation, a fiduciary duty, to find out facts, and because they often do appoint committees to find out facts and do reports, it is—those—the existence of those reports is well known, and their availability is, in a way, tempting. They help prosecutors save time in finding out facts.

Senator SPECTER. Well, if the directors want to waive the corporate privilege, they could do that. It is their voluntary decision. That wouldn't necessarily involve the employee who has a separate privilege. But the difficulty arises that if the privilege is not waived, there are tougher charges. The prosecuting attorney has vast discretion, as we all know, on charging.

In many ways, the prosecuting attorney is the most powerful person in the government, said to have the keys to the jail in his pock-

et, not only on charging, but on recommendation of sentence. An awful lot of coercive power. That's where the problem comes in. If they want to do it voluntarily, nobody ever told them before the Thompson and McNulty memos that they couldn't do it.

Judge MUKASEY. Particularly when it involves a corporation, where the very bringing of a charge is often the end of the road. I think that the problem that's arisen under those memoranda is that when corporations want to say that they're cooperating with prosecutors, we want to get the deferred prosecution or non-prosecution agreement, the prosecutors are told that when they're evaluating the standards for determining whether the corporation is, in fact, cooperating or not, the degree to which the corporation discloses facts, and thus waives its privilege, is one measure. I think, though, that—

Senator SPECTER. Well, why should cooperation or a waiver of a right determine what the charge will be or what the sentence recommendation will be?

Judge MUKASEY. I think it's not—

Senator SPECTER. If you plead guilty, it's well known that if you show contrition it has to be taken into consideration as a mitigating factor. But why should failure to waive a constitutional right be an aggravating factor?

Judge MUKASEY. I think it's not intended to be made an aggravating factor, but simply that if a corporation, through its individuals, which is the only way that a corporation can act, if there's been a violation of law, there's always a question of whether the corporation should be prosecuted or not. It's not a question—

Senator SPECTER. Do you think the McNulty memorandum is a solid approach to this issue?

Judge MUKASEY. I haven't reviewed the McNulty memorandum recently. I think it has to be examined very, very carefully, and the point made that we are not—that that is not to be used as a club, and the corporation is not to be told, you're not going to be—you want to say you've been cooperative? If you haven't waived the privilege, you haven't been cooperative, and the conversation stops.

Senator SPECTER. Well, if it's not to be used as a club, that's fine. But it is a club and it is used as a club, from all we hear. Senator Leahy and I sat down with Deputy Secretary McNulty and tried to find some common ground and we couldn't do it. So let me ask you to—you say you haven't reviewed it, and I know there are too many things for you to review in the short period of time between your designation here. But if you would do that, we'd like to talk to you more about it, because the legislation is going forward.

There's a great hue and cry because there's a great feeling far and wide that it is unfairly used. We recognize the seriousness of corporate crime. We know the impact. We see what's happening with Enron and other companies. We're concerned that the aiders and abettors may be held responsible, civilly at the minimum. But when a constitutional right is involved, we'd like to see a little closer, more careful analysis.

On the issue of the request for the resignations of the U.S. Attorneys, we are at an impasse. I was consulted by Attorney General Gonzales as to what he should do, and I recommended to him early on privately, and then said it publicly in this room, that the best

course would be to make a full disclosure as to everything that had happened and lay it all out as to whether there was justification for the request for those resignations.

Right now, there are some subpoenas outstanding and they involve high-profile people, such as the White House Counsel and Deputy White House Counsel, Ms. Meirs and Mr. Rove. We have tried to find a way of accommodating what the President wants to do. He undertook this issue himself in a nationally televised news conference to say that he did not want them to be questioned by both House's Judiciary Committees, and there's agreement there that we don't have to do that.

We can have a few members of the Judiciary Committee from each House, bipartisan, question them. He didn't want them under oath. We prefer them under oath, but said, OK, no oath. There was no penalty for a false official statement in any of that.

He didn't want them with a transcript, and we said that's not a good idea, we should have a transcript. I had a chance to talk to him personally about it. The transcript is more for the protection of the individual; you walk out of a meeting, and there are five different views as to what was said. But we had even agreed to forego that, at least I had.

Then they wanted the commitment that we wouldn't go any further if we were dissatisfied, but we felt we couldn't make that commitment without abrogating our responsibilities. If we wanted to proceed any further, we were going to do that. And, of course, you haven't been inside this issue. What I'd ask you to do, is to take a close look at it and see if you can help us resolve this impasse, at least on the transcript.

Let me ask you, did you see any problem, or isn't there a great benefit to everybody, especially the person being questioned, to have a transcript so there's no doubt as to what was said?

Judge MUKASEY. There is often—there is often a great benefit to everybody from having a transcript. But I think it has—it's true of many conversations, it's often a lot easier to talk and to actually get facts when somebody isn't sitting there watching every syllable they say so as to be sure not to make a misstep.

Senator SPECTER. I'd like us to go off the record and cease the transcript here, Mr. Chairman. I think we might find something further here.

Judge MUKASEY. I'm sorry. I did not mean to suggest that we should cease the transcript.

Senator SPECTER. Well, you're weighing every syllable just as you described it, Judge.

Chairman LEAHY. We haven't ceased the transcript. I don't want you to be fooled by that. I think it's probably still going on. Besides, there are four or five cameras.

Judge MUKASEY. Beg your pardon?

Chairman LEAHY. A half a dozen cameras here. You can assume every word is being followed.

Senator SPECTER. Pardon my interruption, Judge Mukasey, but you were just describing yourself. I couldn't help but note that we might find out more from you if we stopped the transcript.

Judge MUKASEY. I think what you found out from me is everything that's there.

Senator SPECTER. Well, if you have doubts about a transcript, I'd ask you to take a look at it.

Chairman LEAHY. We'll come back to that.

Senator SPECTER. I'm trying to move these hearings as fast as I can. I gave you a letter when I saw you recently, Judge Mukasey, about oversight. This is a very sticky issue. I've made it a practice to give a letter, as I did to Attorney General Gonzales, to the Deputy Attorney General, and to others on the essential question of the breadth of congressional oversight, and it was summarized, as I pointed out to you, by the Congressional Research Service analysis, which essentially says that DOJ has been consistently obliged to submit to congressional oversight, regardless of whether litigation is pending, so that Congress is not delayed unduly in investigating malfeasance or maladministration at DOJ or elsewhere.

And it includes, as the memo from Congressional Research Service says, "testimony of subordinate DOJ employees, such as line attorneys and FBI agents. Investigating committees were provided with documents respecting open or closed cases that include prosecutorial memoranda, FBI investigative reports, summaries of FBI interviews, memoranda of respondents prepared during the pendency of cases."

Would you agree that that's an accurate statement of the legitimate scope of congressional oversight?

Judge MUKASEY. I have no way to dispute the accuracy of the history that's set out there. There have been instances in which each of those categories of information has been produced. As I sit here, it seems apparent that there are also instances when the pendency of a case on some other issue, or some issue of privilege, if there is one, is going to result in hesitancy to produce the kind of information that you read off. I think it needs to be approached very carefully on a case-by-case basis.

I've said in the past, and I am now having a hard time distinguishing between the private meetings and this session, that I don't think that oversight is a zero-sum game in which everything that gets disclosed is somehow a loss for the Department, and everything that doesn't get disclosed is somehow a gain. You have a very broad oversight authority and it's something that benefits not only the process, but the Department as well, because it assures that it keeps a high level of performance.

I recognize that and that's why disputes in the past, to the extent that there have been any, historically, have been worked out. Going to extremes has been, as I understand it, very much the exception. I hope it will remain very much the exception. I hope there won't be any.

Senator SPECTER. Well, is there some exception—is what you're saying is that you agree with what I read as a generalization?

Judge MUKASEY. I agree what you read has happened in the optimum case, yes.

Senator SPECTER. What is the "optimum case"?

Judge MUKASEY. The optimum case is the case in which the kind of information that you mentioned can be disclosed without any adverse impact on pending litigation, on privilege, on the ability of the Department to function.

Senator SPECTER. If the sole determiner of adverse impact is the government, we don't get very far.

Judge MUKASEY. That's not the sole determinant. That's why I said this is something that's always been worked out, or almost always has been worked out, in discussions between the Department and the committee, and people on the staff.

Senator SPECTER. So that's a fair generalization to be worked out on a good-faith basis between Congress, say, and the Department of Justice?

Judge MUKASEY. It is. It is.

Senator SPECTER. Did you say it is?

Judge MUKASEY. I did, yes.

Senator SPECTER. I'm almost finished. Just a couple more questions.

Judge Mukasey, the Combat Status Review Board was a subject of an inquiry yesterday, and it's a very long subject and I'm not going to take up the time to do it now. Instead, I'm going to ask you to review it. I'm going to ask you to review the case I called to your attention under the caption of in re: Guantánamo case, which recited a proceeding before the Combat Status Review Board where a detainee was charged with associating with Al Qaeda people.

As for the name, nobody could give it to them. As the report says, "there was laughter in the courtroom, the proceeding was so ludicrous." I would ask you to take a look at the statement of Lieutenant Colonel Steven Abraham, describing what goes on in the Combat Status Review Board from a person on the inside, who shortly after this received a lot of notoriety when the Supreme Court granted the petition for re-arguing the case now pending. I think, in anticipation of that oral argument, the government has now come up with another procedure which has not been fully explained.

It is true that you can have a substitute, under *Swain*, that it has to be an adequate substitute. The *Swain* case dealt with habeus corpus in the District of Columbia, the equivalent of a State court, with the only difference being the tenure of the judge, very close to Federal court habeus corpus. I'd like you to take a look at that.

And the final question I have for you is on the question of the government notifying people under investigation that it's over whenever it is over. I've heard a lot of complaints of people who are under investigation that the matter goes on forever and they never know whether they are or are not, and there's a great deal of apprehension, understandably, of people under investigation.

We are advised that some U.S. Attorney's Offices tell the person when the investigation is over, if they really know it's over. There, I'd like you to take a look at that again to see what the uniform policy could be handed down. Do you think, as a general matter, that fair play—wouldn't you agree that fair play would be best served by telling people when it's over, if it is over?

Judge MUKASEY. If it's over, I agree that it's desirable for people to know that it's over. There are a myriad of cases where it's frequently uncertain. In different kinds of cases, in organized crime

cases and so on, it's, regrettably, hardly ever. I agree to take a look at it. That, I will agree to. Yes.

Senator SPECTER. Well, I would agree with you that if it's not clear that it's over, they aren't entitled to be notified. I would hope that there would be a policy that they would be.

Judge MUKASEY. It's also, in part, a difficulty because it can hurt somebody more when there's a policy to notify somebody that an investigation is over, and for some reason it can't be done in a particular case for a person not to be notified, than if there were not a policy of doing that. It's kind of—in a way, it's kind of a two-edged sword. It is difficult. I would like—you'd have to be—

Senator SPECTER. Well, if you'd take a look at that again, like so many other matters.

Judge Mukasey, you have been a very impressive witness, very impressive credentials coming to this nomination, very impressive, your testimony here. And unless the witnesses who are here today who were called in support of your nomination change their minds and give highly damaging testimony, I think you are virtually certain to be confirmed.

We're glad to see the appointment, glad to see somebody who is strong, who has a strong record, take over this Department. The Chairman and I, and all the members of the committee, and probably many in the Senate, will have a lot of contacts with you. We look forward to being helpful to you and we look forward to cooperative efforts on many very important problems which face the Department of Justice in this country.

Judge MUKASEY. Thank you very much.

Senator SPECTER. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter.

I would note, as I said earlier today, you've been extremely careful in your answers. I have a problem because some see you to be backing off from yesterday. But I will say this, that I much prefer, at least, a careful answer to 75 or 80 times of "I don't know the answer" or "I can't answer that", which we used to have from your predecessor.

I mentioned Jack Goldsmith in my opening remarks. He was the former head of the Office of Legal Counsel. His book, "Terror Presidency", which I understand you've read—you can see how well annotated it is here—PBS program "Frontline" this week had an extraordinary program. It had a Pulitzer Prize-winning reporter from The Boston Globe, Charlie Savage. He wrote "Takeover: The Return of the Imperial Presidency and the Subversion of the American Democracy".

I know some of the people written—goes across the political spectrum, but all of these reports conclude the Office of Legal Counsel has been changed from the traditional place it has had in administrations, where you just go to get a clear-cut legal definition.

Instead, it's been the place where the administration has gone—a lot times they find under the law they can't do something, they go there and it's kind of like, you put in and ask for your customized legal opinion so they can go ahead and do it. For example, on the opinions on torture, Professor Goldsmith wrote, "It, in effect,

gave interrogators a blank check,” and he said “the opinions read like a bad defense counsel’s brief.”

You testified yesterday that, as Attorney General, you would review the legal opinions in the Office of Legal Counsel. Can you add to the list of opinions that you’re going to review those on executive privilege?

Judge MUKASEY. I will.

Chairman LEAHY. And those on immunity of executive officials from congressional testimony?

Judge MUKASEY. I will.

Chairman LEAHY. And if you disagree with them, will you change them?

Judge MUKASEY. I will do that.

Chairman LEAHY. And I will go by that assumption that, if you don’t change them, you agree with them. Would that be a fair assumption?

Judge MUKASEY. That will be a fair assumption.

Chairman LEAHY. Thank you.

Would you agree that the office has to have independence?

Judge MUKASEY. The office has to adhere to one standard and one standard only, and that is what the law requires.

Chairman LEAHY. I would hope that you would try to get it back to that. I have been here six administrations, Republicans and Democrats, and they’ve always appeared to have independence in the Office of Legal Counsel before now. I don’t believe, for example, that a President can step outside the law on issues of torture or wire tapping.

So I hope that the hearings turn out to be a step on the road to restoring the Department of Justice. It needs it desperately. I have talked to you privately about the fact that I hope that you would put back a Department of Justice that could be in good hands for whoever your successor might be as the 82nd Attorney General.

That might be in a year, it might be in several years; I have no way of knowing. I have no way of knowing whether we’re going to have a President in my party or a President in your party. I think we can both agree that no matter what party you belong to, you need a strong, independent Attorney General in the Department of Justice.

Now, I think we face the most serious threat to the effectiveness and professionalism in the Department of Justice since Watergate and the Saturday Night Massacre. After President Nixon became the only American President to resign from office, President Ford appointed Edward Levy and former Judge Harold Tyler, somebody both you and I admire, to begin the process of restoring the Department of Justice.

It is too important an institution in our country to remain dysfunctional. I might say as a personal—just as the Senator from Vermont, I hope that Judge Mukasey, like Judge Harold Tyler, with whom you worked, will begin to restore the Department’s integrity.

You’ve testified that the Department must stand for the rule of law. I agree. But I also add this mandate: it must stand for justice. Nothing is more fundamental to our constitutional democracy than the precept that nobody is above the law, neither you, nor I, nor

a President. I believe this administration has undercut that precept time and time again.

The President commutation—and I realize he has the power to do this—of the sentence given to Scooter Libby, former Chief of Staff to the Vice President, who was convicted after a jury trial of lying to the FBI and to a grand jury, and obstructing justice. He commuted the sentence, even before the appeal was heard.

We see them promoting immunity over accountability, and certainly secrecy over congressional oversight, with unilateral power over the checks and balances that define this Nation. Actually, I might say those checks and balances not only define the Nation, they have protected your liberties and mine for over two centuries.

I don't believe the President is above the law, even though many in the administration seem to feel he is. The view that he may override the laws he chooses is as extreme a view of Executive power as I've witnessed, and he's dead wrong. I think it's extremely dangerous to our democracy. The cost to our American liberty, our standing in the world, the security of our soldiers and citizens, can be staggering if we allow the President to be above the law, even more staggering than the trillion-dollar cost of the war in Iraq.

I think when the administration compounds this lawlessness by cloaking its policy and its miscalculations under a veil of secrecy, it leaves the Congress and the American people in the dark about what it's doing. I have not known any administration, Republican or Democratic, who hasn't been helped in the long run by having real, searching oversight and having to admit, publicly, mistakes.

You and I have had some time to talk, we've had private meetings, and we've had open meetings here. I have been here for virtually all your testimony and listened to it. I do worry that there's been a retreat today from the clearer statements of the rule of law and the President not being above the law made yesterday. It's why I will followup with some very specific letters.

If you have questions about what I have, just call me and we'll sit down and go over them. I don't want to see you appearing to posit a system where a President's over-broad and invalid claims of executive privilege can't be tested. So, we'll continue to meet on that, and I know that Senator Specter and the others will want to.

The Attorney General has to uphold the Constitution and the law. He can't bend the law to fit whoever the President is. I will say that no matter who the President might be. You can't define torture down in secret in fundamental conflict with American values and law.

I agree with what you said in your opening statement, which I thought was very good. You spoke of protecting civil liberties and people's confidence with those liberties, and protecting them as a part of protecting national security. I agree with that, and also add they are a fundamental American strength, American value, one of the things I'm sure that appealed to your father when he came to this country; it certainly did to my grandparents, my great grandparents when they came to this country.

So the hearing is going to be the start of a new chapter: American laws and our values are no longer undercut and secret. You know, the question in this hearing is not whether you'll be confirmed. The real test is going to be what kind of an Attorney Gen-

eral you will be. That's the test. That is also a legacy you will leave to your family, to—I hate to call your children; you are far beyond that—but I've been very, very impressed with both your son and daughter. Certainly it's a legacy that you and your wife can cherish, and it's one that you want—you want to be able to leave this office, as we all do in ours, with your head high.

The oversight process, and the Attorney General's cooperation with that process, can forge a working partnership. To paraphrase Ronald Reagan, a confirmation by the Senate is an act of trust. Oversight helps us verify. This Committee, and all parties, are ready and willing to work with you. I think we've already begun.

Judge, I don't mean to take the last word here. If you want to add something to that before we go to the next panel, please feel free.

Judge MUKASEY. I couldn't add in any way that would improve it. The only thing I can tell you is, if you ultimately do repose trust in me, I'll spend the next however many months it is trying to vindicate that trust. I am grateful to you for this. Thank you.

Chairman LEAHY. Well, you have your family, my family, and you have 300 other million Americans who need you to do that. Thank you.

We'll stand in recess for 5 minutes.

Senator CARDIN. Mr. Chairman?

Chairman LEAHY. Yes?

Senator CARDIN. It's my understanding that there is now scheduled votes on the floor starting at 2:30, and there are four votes that are scheduled, so it may be better for us to recess until about 3:45 and start the next panel so we don't conflict.

Chairman LEAHY. Recess until the call of the chair. Thank you.

Thank you, Judge.

[Whereupon, at 2:30 p.m. the hearing was recessed.]

AFTER RECESS [3:47 p.m.]

Senator CARDIN. [Presiding]. The Judiciary Committee will come back to order on the confirmation hearings of Judge Mukasey for Attorney General of the United States.

I want to welcome the panel of outside experts. We thank you very much for your cooperation and being here today. It's very important that the record, in regards to the confirmation of an Attorney General, that there be opportunity for witnesses that know the nominee or could add to the consideration of the committee, have an opportunity to give that testimony. And we thank you all for agreeing to be here today and to be witnesses at this hearing.

As is the tradition of the Judiciary Committee, I'm going to ask you all to rise in order to take an oath.

[Whereupon, the witnesses were duly sworn.]

Senator CARDIN. We will start with Mr. Thornburgh. Mr. Thornburgh has served as Governor of Pennsylvania, Attorney General of the United States for two Presidents, and was the highest ranking American at the United Nations.

Elected Governor of Pennsylvania in 1978 and reelected in 1982, Governor Thornburgh was the first Republican ever to serve two consecutive terms in that office.

Governor Thornburgh served 3 years as Attorney General of the United States in the cabinets of Presidents Ronald Reagan and

George H.W. Bush. During his service as Undersecretary General at the United Nations, Governor Thornburgh was in charge of personnel, budget and finance matters. He also served as a consultant to the United Nations and the World Bank on efforts to battle fraud and corruption.

Governor Thornburgh received his bachelor's degree from Yale University and his law degree from the University of Pittsburgh, which is where I graduated from undergraduate school.

Governor Thornburgh, it's a pleasure to have you here.

**STATEMENT OF DICK THORNBURGH, FORMER GOVERNOR OF PENNSYLVANIA, OF COUNSEL, K&L GATES, WASHINGTON, DC**

Governor THORNBURGH. Thank you, Senator Cardin. It is an honor to appear before the committee today and offer my views on the Department of Justice at this important juncture in its history and to tell you why I support President Bush's nomination of Michael Mukasey to be the 81st Attorney General of the United States.

The current situation at the Justice Department is, in some ways, similar to one that I encountered when I became the 76th Attorney General in August 1988.

Two senior Justice Department officials, the Deputy Attorney General, Arnold Burns, and the Assistant Attorney General in charge of the Criminal Division, William Weld, had resigned their positions earlier that year because of their concerns about the ability of my friend and then Attorney General Ed Meese to lead the department while he was under investigation by an independent counsel.

These resignations reflected some degree of turmoil within the department. Although the independent counsel did not seek to prosecute Attorney General Meese, his report, which was issued in July 1988, was sufficiently critical that Ed Meese chose to resign from office early in August 1988.

After confirmation, I was sworn into office shortly thereafter.

I considered it to be a unique honor and privilege to return to the Department of Justice, a great institution that I loved and still love. I had previously served as the United States Attorney for the Western District of Pennsylvania and the Assistant Attorney General in charge of the Criminal Division under President Ford during the immediate post-Watergate era.

Those experiences heightened the most profound respect I held for the Department for its critically important and unique role in our Federal Government and for the legal abilities, professionalism and integrity of the career civil servants who carry out its vital missions.

Early in my service as Attorney General, I established a majority priority, the restoring of morale within the Department of Justice in the wake of the recent turmoil at its very top ranks.

With the indispensable assistance of that distinguished cadre of career employees to whom I referred, I believe that we were able to do so and to lead the department in the successful execution of its law enforcement functions and its vitally important role in the administration of justice.

Today, the Department of Justice is enduring another unfortunate period of turmoil at the top. There is no confirmed Attorney General, no confirmed Deputy Attorney General, and no confirmed Associate Attorney General.

There are no less than six vacancies among the Assistant Attorneys General and more than 20 vacancies among the United States Attorneys.

Although I strongly commend the job that acting Attorney General Peter Keisler and the Solicitor General, Paul Clement, are doing under difficult circumstances, the Department simply cannot function at the very highest level of efficiency and effectiveness with so many major vacancies in its top leadership corps.

Let me comment in particular on the importance of the Justice Department's enforcement of our Nation's criminal laws.

The prosecutorial function is the unique responsibility of the Department of Justice within our Federal Government. Although I am not passing judgment on the recent controversy over the dismissal of certain United States Attorneys, I will say that it is absolutely essential that the unique prosecutorial function of the Department of Justice be carried out in a strictly nonpartisan, unquestionably fair and evenhanded manner, both in fact and in appearance.

In other words, Federal prosecutors must follow the evidence where it leads without fear or favor. Nothing could be more important.

The Department of Justice simply must retain its unique degree of independence, because the Department alone, among the agencies of the Federal Government, has the power of criminal prosecution.

You will hear from a distinguished former United States Attorney, Mary Jo White, and an equally distinguished former district court colleague of Judge Mukasey's, Judge John Martin, to testify about the personal qualifications of Judge Mukasey to be our Attorney General.

While I have only recently met Judge Mukasey, I, like many others, admire his record. He spent 4 years as a career Federal prosecutor in a very important U.S. Attorney's office, that of the Southern District of New York. It is a testament to his record of accomplishment in that role that President Ronald Reagan nominated and, by and with the advice and consent of this body, appointed Michael Mukasey to be a judge of the United States District Court for that same district.

In his 18 years on the Federal bench, Judge Mukasey served with distinction, earning, in particular, a well deserved reputation for the manner in which he conducted the proceedings of his trial court in major cases of importance to the national security of the United States.

Just as the role of Federal prosecutor is a unique, independent and nonpartisan one, so the job of a United States district judge is one that must be conducted in exactly the same manner. Judge Mukasey has a strong reputation for having done precisely that.

At this critically important time for the Department of Justice, in Judge Mukasey, the salient qualities of the person and the critical needs of the moment are well matched. There is no question, in my mind, that Michael Mukasey is the right person at this time

to fill the supremely important, singularly unique role of chief law enforcement officer of the United States.

In closing, let me recall one of the most moving and memorable experiences of my service as Attorney General. It was in 1989, when it was my privilege to lead the Department of Justice during the celebration of the 200th anniversary of the creation of the Office of the Attorney General of the United States.

Nearly all of the living Attorneys General, stretching all the way back to President Eisenhower's first Attorney General, Herbert Brownell, returned to the Department of Justice for an historic commemoration of that milestone. We were also honored to have Ethel Kennedy, the widow of the 64th Attorney General, Robert F. Kennedy, in whose honor the main Justice Department building is now appropriately named.

The group included distinguished Attorneys General appointed by presidents of both parties, including such giants as William Rogers, Nicholas Katzenbach, Elliot Richardson, Edward Levi, and Griffin Bell.

I am confident that when Michael Mukasey takes office as our Nation's 81st Attorney General, the Department of Justice can and will embark on a time of healing, renewal and exemplary leadership. I am equally confident that, ultimately, when he leaves office, Judge Mukasey will have earned his own place among the top ranks of our Nation's finest Attorneys General.

Let me add, before I close, that I would like to associate myself with the views of Senator Specter, expressed this morning in the Wall Street Journal, calling for Judge Mukasey, if confirmed, to end the Department of Justice's assault on the attorney-client privilege in corporate investigations, which began in the Clinton administration and has been carried forward in this administration.

A broad coalition, which reaches from the Chamber of Commerce and the National Association of Manufacturers, on the one end, to the American Bar Association and the American Civil Liberties Union, supports action to restore and reinvigorate this historic privilege, and I hope that Judge Mukasey sees fit to give it his attention.

Thank you, Mr. Chairman. I would be pleased to answer any questions that you may have for me.

Senator CARDIN. Thank you very much for your testimony.

[The prepared statement of Governor Thornburgh appears as a submission for the record.]

Senator CARDIN. We'll now hear from Mr. Chuck Canterbury. President Canterbury joined the Fraternal Order of Police in 1984, when he, along with 11 other officers, chartered their local lodge. He served as a local lodge president for 13 years, during which time he was instrumental in starting the Lodge Legal Defense Plan, purchasing the first lodge building and starting the lodge insurance program.

He began his service on the Grand Lodge Executive Board in 1995, when he was elected to the first of three terms as second vice president. During this time, he has worked to expand the police labor movement in the areas of our country which do not have collective bargaining rights.

President Canterbury retired in January 2004 from the Horry County Police Department in Conway, South Carolina, where he most recently had oversight of the operations bureau.

During his 25-year career as a police officer, he worked in the patrol division, the criminal investigation division, and served as the training division supervisor, during which he was certified as an instructor in basic law enforcement, firearms, chemical weapons, and pursuit driving. He earned his bachelor of arts degree from Coastal Carolina University.

It's a pleasure to have you here, Mr. Canterbury.

**STATEMENT OF CHUCK CANTERBURY, NATIONAL PRESIDENT,  
FRATERNAL ORDER OF POLICE, WASHINGTON, DC**

Mr. CANTERBURY. Thank you, Senator. First of all, I'd like to thank the Judiciary Committee for allowing the Fraternal Order of Police, the largest police labor organization in the country, to have input on such an esteemed position, which has much responsibility in the area that I've spent my entire career.

As the Nation's top law enforcement officer, we feel it's important, as the Nation's largest law enforcement organization, to be allowed this input. We're very pleased and I'd like to personally thank Senator Leahy for the invitation.

As many of you know, we consider Senator Leahy to be a stalwart for law enforcement and the rank-and-file officers in this country, and we're very appreciative of his support and his request for us to be here today.

In the matter of Judge Mukasey, he has a long and distinguished career in public service, which began with him becoming an Assistant United States Attorney in the Southern District of New York. In 1987, he was nominated for the Federal bench in that same district and was unanimously confirmed by the Senate, and he has spent the last 20 years as a Federal judge, including his last six as chief justice in one of the toughest, busiest and most prominent of our Nation's Federal courts.

During this tenure, he oversaw some of the most important and complicated national security cases, including the successful prosecution of Omar Abdel Rahman, the blind sheik who plotted to destroy the World Trade Center in 1993. His handling of this case earned him widespread acclaim and respect from his peers and the nation's law enforcement community.

In fact, the U.S. Court of Appeals for the Second Circuit specifically praised him, noting he demonstrated "extraordinary skill and patience" during that case and superbly handled challenges far beyond those normally endured by a trial judge.

Judge Mukasey has issued the first ruling in the legal challenge brought by Jose Padilla, and it was a very thoughtful and well reasoned decision. He ruled that the President does, in fact, have the legal authority to detain as enemy combatants citizens captured during a time of war, but, yet, he also ruled that those citizens should have monitored access to an attorney.

His deft handling of the issues in the *Rahman* and *Padilla* cases and the challenges he faced as the presiding judge in these cases prompted him to write an article in the Wall Street Journal, which argues that current statutes and institutions which comprise the

U.S. legal system are ill suited to handle the prosecution of terror suspects without compromising homeland security or foreign intelligence sources.

Clearly, in this decision, he has given a great deal of consideration to the challenges faced by our legal system and our law enforcement community when it comes to threats from terrorists.

In the opinion of the Fraternal Order of Police, this strongly recommends Judge Mukasey for the position of U.S. Attorney General, as well as having him there when we're facing the challenges that we are currently on the war on terrorism.

The FOP has had the honor of representing rank-and-file law enforcement officers in many localities and States and we are the bargaining unit for over 300,000 officers in this country. And for this reason, our interest in the cases that Judge Mukasey had been involved in over his career have not been limited to just his high profile cases related to national security.

We are extremely satisfied with his record on the matters in criminal law that involve most of our membership and the labor organizations that we represent. We are also keenly interested in those cases which he has had to make rulings which touch the rights of employees, particularly public employees, and we are pleased to report to this committee that he demonstrated just as much skill and evenhandedness in those cases that we were able to examine as he did in the cases that generated nightly headlines.

His distinguished career has earned him the respect of the law enforcement community and we are very much in favor of his appointment and his confirmation by the U.S. Senate.

And we would be glad to answer any questions for you, Mr. Chairman, or any member of the committee.

Senator CARDIN. Mr. Canterbury, thank you very much for your testimony.

[The prepared statement of Mr. Canterbury appears as a submission for the record.]

Senator CARDIN. We'll now hear from Admiral John Hutson. Admiral Hutson attended Michigan State University, where he received his BA. Upon graduation, he was commissioned in the United States Navy. He then went on to graduate from the University of Minnesota Law School in 1972.

In 1973, he was assigned to the Law Center at Corpus Christi, Texas, where he served as chief defense counsel and chief trial counsel.

In 1980, Admiral Hutson attended Georgetown University Law Center, where he earned a master's of law degree in labor law. He was then assigned as legislative counsel in the first of three tours in the Office of Legislative Affairs for the Navy.

Admiral Hutson assumed duty as executive officer of the Naval Legal Services Office in Newport, Rhode Island in 1987. In 1989, he returned to Washington, DC to serve as a staff judge advocate and executive assistant to the Commander-Naval Investigative Command.

In August 1989, Admiral Hutson moved to the Office of Legislative Affairs as Director of Legislation. Between October 1992 and November 1993, he was assigned as the executive assistant to the

judge advocate general of the Navy and, in November 1993, he resumed duty in the Office of Legislative Affairs.

In August 1994, he assumed duty as Commanding Officer-Naval Legal Services Office, Europe and Southwest Asia, located in Naples, Italy. In July 1996, Admiral Hutson returned to the Naval Justice School as commanding officer. He was promoted to the rank of rear admiral and assumed duties as the judge advocate general of the Navy in May 1997.

Admiral Hutson was awarded the Distinguished Service Medal, the Legion of Merit, with three gold stars, the Meritorious Service Medal, with two gold stars, Navy Commendation Medal, and Navy Achievement Medal.

It's certainly an honor to have Admiral Hutson with us today.

**STATEMENT OF REAR ADMIRAL JOHN D. HUTSON, JAGC, USN (RET.), PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER, CONCORD, NEW HAMPSHIRE**

Admiral HUTSON. Thank you, Senator Cardin. I probably should have sent a shorter bio in to the committee.

Senator CARDIN. It was very impressive. You deserve the entire introduction.

Admiral HUTSON. Thank you. And thank you to the committee for inviting me. I have a written statement that I'd request be made a part of the record.

Senator CARDIN. Your entire statement will be made part of the record, as will all of the witnesses' entire statements be made part of our record.

[The prepared statement of Admiral Hutson appears as a submission for the record.]

Admiral HUTSON. Thank you, Senator. I testified a few years ago in opposition to the nomination or confirmation of the former Attorney General, along with my good friends, Harold Cole at Yale and Doug Johnson at the Center for Victims of Torture.

Unfortunately, our concerns at that time turned out to be prescient. I'm not here today to testify in opposition at all to the confirmation, but, rather, to simply highlight some of the concerns that I have and what I believe to be important areas of consideration. And I'd like, first of all, I guess, to make two points, which may perhaps seem to be unrelated, but, in fact, are very much related.

One is a point that virtually all the witnesses have made and it can't be gainsaid, which is that the United States is a country of laws. We adhere to the rule of law, or we should try to, and that there's no one more important in that regard than the Attorney General of the United States.

The second point that I think is related to that is that most of the great nations in history that have failed have failed as a result of foreign and domestic misadventure. Our adventure right now, foreign and domestic, is the so-called global war on terror, which I think is actually three different wars.

But in that struggle, the enemy cannot defeat us militarily. They don't have the lift, they don't have the command, control, communications. They don't have the weapons systems. They can't defeat us militarily.

Winning for the enemy is to cause us to change, to bring us down to his level, to cause us to be something different than what we have been. Our great strength is support of human rights and the rule of law.

Thomas Paine said that “The cause of America is the cause of all mankind.” The great, more recent geopolitical commentator, Bono, said that “America isn’t just a country, it’s an idea.”

We are engaged in an asymmetric war. In an asymmetric war, the strategy is to pit your strength against the enemy’s weakness, unlike World War II, for example, where it was often strength against strength.

Our great strength is our ideals. Thomas Paine and Bono had it right. The enemy is abjectly devoid of ideals. So the enemy can’t defeat us, certainly can’t defeat us militarily, but we can commit national suicide by disarming ourselves of our ideals, and there are lots of unfortunate examples of how we have started down that road.

The Bybee torture memo, the Gonzales memo with regard to the Geneva Conventions, suspension of habeas corpus, combatant status review tribunals, Guantánamo and indefinite detention, lots and lots and lots of examples of torture. We can all say that the United States doesn’t torture, but all you’ve got to do is read the newspapers and you see lots of examples of it.

And, more recently, the CIA authorized enhanced interrogation, a lovely euphemism, justified by secret memos, legal opinions from the Department of Justice.

Let me give you some examples of where that road is not. Going back to 1950, the United States—this is the armed forces officer—the United States abides by the laws of war. Its armed forces and their dealing with all peoples are expected to comply with the law of war, in spirit and letter. Wanton killing, torture, cruelty or the working of unusual and unnecessary hardship.

We all talk about torture. Back then, they were talking about the working of unusual, unnecessary hardship on enemy prisoners or populations is not justified under any circumstances.

Article 93 of the Uniform Code of Military Justice, Cruelty and Maltreatment. Any person subject to this code is guilty of cruelty toward or oppression or maltreatment of any person, subject to his orders, shall be ordered punished, as a court-martial may direct.

Common Article 3 of the Geneva Conventions, the following acts are and shall remain prohibited at any time and any place whatsoever, including, among others, outrages upon personal dignity, in particular, humiliating and degrading treatment.

The Supreme Court never said part of Common Article 3 applies. The Supreme Court said Common Article 3 applies. That includes outrages on personal dignity.

We don’t need a measured repudiation of those definitions of torture as being mistakes or unnecessary. We need a clarion call. We need a ringing, unequivocal repudiation of those definitions, of what has happened, that is so strong that it brings tears to your eyes and makes small children wince in its force.

We are not engaged in an existential struggle here, unless we make it so. Only Americans can make America change. If we falter now or cower as a Nation in the face of this adversity, if we disarm

ourselves, we don't deserve the gifts that were given to us by those early patriots or by the world's greatest generations.

And it's the Attorney General who, to mix metaphors, stands at the pinnacle and will make the decision whether we're at a pendulum or a plateau.

Thank you very much, Mr. Chairman. I welcome your questions.

Senator CARDIN. Thank you for your testimony and thank you for your service to our country.

The next witness is Professor Dawn Johnsen. Professor Johnsen attended Yale College, where she received her BA in economics and political science. She graduated summa cum laude and was a member of the phi beta kappa.

She then attended Yale Law School, where she received her JD. After law school, Professor Johnsen clerked for the Honorable Richard Cudahy in the U.S. Court of Appeals for the Seventh Circuit.

A year later, she joined the American Civil Liberties Union as a staff counsel fellow. After leaving the ACLU, she spent 5 years as legal director for NARAL.

In 1993, she joined the Department of Justice as Deputy Assistant Attorney General and then became acting Assistant Attorney General for the Office of Legal Counsel.

The Assistant Attorney General for the Office of Legal Counsel is the fifth ranking Department of Justice official, who serves as legal advisor to the President and the executive branch, supervising about 24 lawyers and advising the counsel to the President, the Attorney General, and the general counsels of the various executive departments and agencies.

In 1998, Professor Johnsen became a professor of law at Indiana University School of Law, where she teaches constitutional law, separation of powers, and the First Amendment.

Professor Johnsen has testified before Congress, is a frequent speaker at national conferences, and has appeared on many national television and radio news shows.

It's a pleasure to have you here.

**STATEMENT OF DAWN JOHNSEN, PROFESSOR, INDIANA  
UNIVERSITY SCHOOL OF LAW, BLOOMINGTON, INDIANA**

Ms. JOHNSEN. Thank you. Good afternoon. I'm very glad for this opportunity to talk with you today about the Department of Justice.

I had the great privilege of serving there at the Office of Legal Counsel, OLC, for short, for 5 years, including as the Acting Assistant Attorney General heading that office and I care deeply about its integrity.

OLC's core function is to provide the President and other executive branch officials with the legal advice they need to act lawfully.

The work of OLC, under the current administration, has been dangerously compromised. Excessive secrecy makes it impossible to fully assess the problem, but we do know that on at least some counterterrorism matters, OLC has abandoned its traditional role and instead has facilitated policies that do not comply with the law.

Former head of OLC, Jack Goldsmith, who served in 2003 to 2004, wrote recently that some Bush-era OLC opinions "were deep-

ly flawed, sloppily reasoned, over-broad, and incautious in asserting extraordinary constitutional authorities on behalf of the President.”

Goldsmith correctly notes that even a deeply flawed OLC opinion is akin to a get-out-of-jail-free card, because it is virtually impossible to prosecute someone who relied on an OLC opinion.

Congress should respond to these failures by demanding public accountability, specifically, the release of opinions, and the restoration of OLC’s tradition of independent legal analysis.

I’d like to suggest, as a framework for that, a statement of 10 principles to guide the Office of Legal Counsel.

A group of 19 former OLC lawyers coauthored this statement in response to the infamous 2002 OLC torture memo, in the hopes of helping to prevent any future recurrence of that debacle.

The principles state that they are drawn from the longstanding practices of the Attorney General and the Office of Legal Counsel across time and administrations.

I have submitted the entire statement of principles with my written testimony and now would like to highlight just two of those principles.

The first and most fundamental principle, reads: “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of desired policies.”

In short, OLC has to be prepared to tell the President no. I want to stress that saying no does not mean disabling the government from meeting national security threats. I deeply appreciate the Department of Justice’s critical role in protecting our Nation from terrorism. It does mean, though, helping the President to meet those threats and to proceed in a lawful manner.

In the Bush administration’s most controversial policies—think about warrantless domestic surveillance, the establishment of military commissions, coercive interrogations to the point of torture—the critical question in all of these matters was whether the President would act unilaterally and largely in secret, skirting applicable legal requirements, or whether he would comply with the constitutional process for lawmaking by submitting his recommendations for change to Congress. The President consistently has chosen to go it alone.

The second principle I’d like to mention, and I want to state this most clearly and emphatically, is that the Department of Justice must avoid secret law. And I quote from the principle, “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.”

Of course, the executive branch, at times, has legitimate and even compelling needs for secrecy, but public explanation is critical any time the executive branch does not fully comply with a Federal statute or interprets a statute in a way that would surprise Congress.

Recent reports suggest this may be the case with the recent ban on cruel, inhuman and degrading treatment. Congress cannot effectively monitor and regulate the government unless it knows how the executive branch is interpreting and implementing the laws

Congress already has enacted. Congress needs those secret OLC opinions that interpret the Detainee Treatment Act.

It pains me to see what has happened to the Department of Justice, an institution that I greatly esteem, which is populated by many, many fine lawyers. Congress and the next Attorney General must confront the reality that the problem ultimately lies not with DOJ, but with the President.

Numerous reports confirm that the President and the Vice President and their top advisors have been deeply hostile to any checks on their counterterrorism policies. The next Attorney General will face great pressures and he will need Congress's strong support to do the right thing. He should scrutinize OLC's work, rescind flawed opinions, publicly release many of the opinions, and restore OLC's traditional role through publicly announced principles and procedures.

In conclusion, this committee should engage in aggressive oversight to ensure all of this is accomplished and, beyond this, that the executive branch complies with the laws.

Thank you.

Senator CARDIN. Thank you very much for your testimony.

[The prepared statement of Ms. Johnsen appears as a submission for the record.]

Senator CARDIN. We'll now hear from Mr. Theodore Shaw. Mr. Shaw is the Director, Counsel and President of the NAACP Legal Defense and Education Fund. Mr. Shaw joined LDF in 1982. He directed LDF's education docket and litigated school desegregation, capital punishment, and other civil rights cases throughout the country.

In 1990, he left LDF to join the faculty of the University of Michigan Law School, where he taught constitutional law, civil procedure, and civil rights.

In 1993, on a leave of absence from Michigan, he joined LDF as associate director-counsel. Mr. Shaw graduated from Wesleyan University with honors and from Columbia University School of Law, where was the Charles Evans Hughes fellow. Upon graduation, Mr. Shaw worked as a trial attorney in the Civil Rights Division of the United States Department of Justice from 1979 until 1982.

He litigated civil rights cases throughout the country, at the trial and appellate levels, and in the U.S. Supreme Court.

Mr. Shaw resigned from the Justice Department in protest of the Reagan administration's civil rights policies. The National Bar Association Young Lawyers Division recently presented Mr. Shaw with the A. Leon Higginbotham, Jr. Memorial Award. He's also received the Lawrence A. Wien Prize for Social Justice from Columbia University.

He was awarded the Baldwin Medal, the highest honor given by the Wesleyan University alumni body, for extraordinary service to the university and the public interest. He served on the Wesleyan Board of Trustees for 15 years and was senior vice chair of the board when he retired from the board in June 2003.

Mr. Shaw, it's a pleasure to have you before our Committee again.

**STATEMENT OF THEODORE SHAW, DIRECTOR, COUNSEL &  
PRESIDENT, NAACP LEGAL DEFENSE AND EDUCATION FUND**

Mr. SHAW. Thank you, Senator. As you've noted, I started my legal career with the Justice Department in the Civil Rights Division about 28 years ago, and it was a great place to work. It was a dream job. It was a wonderful start for a young lawyer.

And what I was conscious of, as well as all of my colleagues, was the great tradition of the Justice Department and, particularly of the Civil Rights Division.

I recently attended a reunion of alumni of the Civil Rights Division here in Washington, DC and one of the tragic things about that reunion—the reunion, of course, itself was not tragic, but it was tragic that not one person from the Civil Rights Division or the Justice Department representing this administration was present.

That said volumes about the breach that exists between those who served at the Justice Department in the Civil Rights Division under Republican and Democratic administrations alike and the present leadership of the Justice Department and the Civil Rights Division.

And I hope—I am sure that that's something that will change. There's a lot of healing that needs to be done and a lot of restoration within the Civil Rights Division and within the Justice Department.

The core mission of the Civil Rights Division at its inception was the battle against racial discrimination, particularly as it was visited upon African-Americans. Now, of course, the mission of the Civil Rights Division is much more expansive than that. It represents the interests of all Americans, indeed, all people in this country and protects them against discrimination.

So while the Division's work has expanded, as it should have, and it does work that involves gender discrimination, discrimination on the basis of disability or people who are institutionalized, we believe that there is a manifest imbalance in the Civil Rights Division's work that has cropped up in recent years.

The Division does relatively little work on behalf of African-Americans. To put it bluntly, I think most African-Americans who experience racial discrimination do not feel like the Justice Department is a place to which they can go to take their problems and know that their interests will be protected, and I lament that.

While in office in the last six and a half years, the Department has brought only five cases including allegations of racial discrimination against African-Americans under Section 706 of Title 7.

At the same time, it's brought three so-called reverse discrimination cases on behalf of white claimants. Now, I want to be clear, I am not suggesting nor would I ever suggest that white individuals cannot be discriminated against or that the Justice Department should not protect their interests. But I think that that fact or those facts speak something about a policy difference that the Justice Department has adopted as compared to prior administrations.

Similarly, it has brought only one Section 2 Voting Rights Act case on behalf of African-Americans. That case was filed last year.

I draw the Committee's attention, Senator, to the fact that the Justice Department has also, through its Civil Rights Division, ab-

icated its responsibilities when it comes to voting rights. There are several now well publicized instances in which the department has ignored the advice and analysis of career attorneys in troubling circumstances. I understand that lawyers who are career attorney don't run the Division or the Department, but these decisions have been reasoned not on the basis of law, apparently, but on politics.

In one instance when Georgia enacted voter I.D. requirements, the Justice Department pre-cleared. That requirement was then struck down by no less and no fewer than five courts, three Federal court decisions and two State court decisions.

Let me close by pointing out that perhaps nothing is more telling than decisions, as a matter of policy, by the Department, by the Division, not to enforce civil rights laws using the most aggressive interpretation of the laws that the courts and Congress have made available, and my testimony gives several examples of this.

It is my hope that should Judge Mukasey be confirmed as Attorney General, that the substance and the integrity of the Justice Department and particularly of the Civil Rights Division will be restored.

The Justice Department is the crown jewel in the executive branch when it comes to the law and I hope that that status is recaptured.

I must say, in closing, also, after sitting here and listening to the very eloquent testimony of Admiral Hutson, that I recall, after 9/11, I was interviewed and I was asked about the aftermath of 9/11 and what I said then was that my fear was that even if we could win the war on terror, however that's defined, that we might lose our soul as a Nation, and I think that is exactly the threat that we are facing now, as Admiral Hutson has very eloquently pointed out.

I want to join him. I hope that under new leadership, the Department, again, restores itself and our Nation to where we should be when it comes to the rule of law.

On behalf of the Legal Defense Fund, it is my earnest hope that, if confirmed, Judge Mukasey will restore the Department to its long and proud tradition as an institution that serves the American people well.

Thank you.

Senator CARDIN. Thank you, Mr. Shaw.

[The prepared statement of Mr. Shaw appears as a submission for the record.]

Senator CARDIN. I'm going to recognize Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman. I just wanted to stop by to thank you for coming in and to say that there are so few people in attendance because people have so many responsibilities in so many directions.

I just left the floor. We had a series of votes. I'm ranking on the Subcommittee of Appropriations on Labor, Health, Human Services and Education, and I have to stay on the floor.

But I've had summaries of all of your testimony and we really do appreciate what you have to say. I heard what Mr. Shaw said about enforcement of the Civil Rights Act, and I can tell you that that's a major concern of the Committee and the Senate and the House, that a great deal more needs to be done.

Reference was made to what Admiral Hutson has done on interrogation tactics, and there's a lot of concern here on habeas corpus and the whole range of Executive power, which we've taken a look at.

And I know that there's a strong consensus in favor of Judge Mukasey and we're very hopeful that he will make vast improvements, but I think this Committee was very instrumental in having the change made in the Department of Justice from the oversight hearings which we held.

If you had to summarize the difference between Attorney General Gonzales, former Attorney General Gonzales and Judge Mukasey, it would be on habeas corpus. Attorney General Gonzales inexplicably said habeas corpus was not a constitutional right and Judge Mukasey said you can't have a limitation on habeas corpus if it's not a right, the obvious point, and I think that's illustrative of the takeoff.

So we thank you for coming in and what you have contributed, and, again, my regrets, because I have to go back to the floor.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator Specter. Appreciate your comments.

We'll now hear from Mary Jo White. Mary Jo White was the first woman to be a U.S. Attorney from the Southern District of New York, serving from 1993 to 2002. When Ms. White left her post as a U.S. Attorney from the Southern Division of New York in January 2002, she was acclaimed for her nearly 9 years as a leader of what is widely recognized as the premier U.S. Attorney's office in the nation.

She has supervised over 200 Assistant U.S. Attorneys in prosecuting some of the most important national and international matters, including complex white collar and international terrorism cases. She is noted for having overseen prosecution of John Gotti and the terrorists responsible for the first World Trade Center bombings in 1993.

She's a fellow of the American College of Trial Lawyers and the International College of Trial Lawyers, a recipient of numerous awards, and is regularly ranked as a leading lawyer by directories that evaluate law firms.

In addition, Ms. White served as Director of the NASDAQ Stock Exchange and on its executive, audit and policy committees between 2002 and February 2006. She's also a member of the Council on Foreign Affairs.

Ms. White received her bachelor's of arts degree from the College of William and Mary and later attended Columbia University School of Law, where she received a JD.

Currently, Ms. White is the chair of Debevoise and Plimpton's 225-lawyer litigation department.

Ms. White, it's a pleasure to have you before us.

**STATEMENT OF MARY JO WHITE, PARTNER, DEBEVOISE & PLIMPTON, LLP, NEW YORK, NEW YORK**

Ms. WHITE. Thank you very much, Senator Cardin. It's my privilege to speak on behalf of the nomination of Judge Michael Mukasey. He is a man of great intellect and integrity, with an un-

swerving commitment to the rule of law. He is independent, fair minded, and has a wealth of relevant experience from his years of service on the bench, in the private sector, and as an Assistant United States Attorney in the Southern District of New York.

There could not be, in my view, a stronger or better nominee to head the Department of Justice, particularly at this time, when the Department is in need of a strong and respected leader, as our country faces one of the greatest challenges in its history, to secure the Nation against the threat from Al Qaida and related terrorist networks and to do so consistently with the rule of law and our principles as a free and democratic society.

I have no doubt that Judge Mukasey, if confirmed as Attorney General, will meet that challenge on behalf of the Department of Justice, effectively, intelligently and with sensitivity to all of the complex issues that are inherent to this unique challenge to which there are no easy or obvious solutions.

I am equally confident that Judge Mukasey will be a superb leader of the Department in carrying out its many other important responsibilities and priorities that are vital to the rights, safety and well-being of the American people.

The way I know Judge Mukasey is that when I served as U.S. Attorney in the Southern District of New York from 1993 to 2002, I had the privilege of observing him directly and through the eyes of my 200 Assistant United States Attorneys, and saw him supervise or preside over numerous cases with skill, with dignity and with absolute fairness and evenhandedness with respect to the parties before him.

As a judge, he embodied all of those qualities of intelligence, temperament, preparedness and fairness that bring high credit and honor to our American system of justice. In each encounter I have had with Judge Mukasey, I have come away with deep admiration for him as a person, as a lawyer, and as a public servant.

I, thus, join with the many others who strongly support his nomination, including representatives of the defense bar, as well as prosecutors.

As has been mentioned by Senator Kyl, I believe, this morning, I did, also, observe Judge Mukasey preside over one of the most complex and difficult trials I think in our history, and that was the terrorism trial involving the head of the Al-Gama'a terrorist organization, Sheik Omar Abdel-Rahman and nine of his codefendants, who were charged with an horrific plot to blow up, in a single day, the tunnels connecting New York and New Jersey, the George Washington Bridge, the United Nations, and the FBI's headquarters in Manhattan.

In this day of terror trial, Judge Mukasey was called upon to deal with and decide novel and some of the most difficult issues ever faced by any court. He did so and he did so while keeping his eye on the primary ball in any trial, and that is to ensure a fair proceeding for all parties.

What Judge Mukasey learned, substantively and procedurally, from this trial, I believe, will serve him very well as Attorney General, as he shapes and guides the Department of Justice's role and policies in addressing the grave threat posed by radical Islamic terrorism.

Another daunting challenge that any Attorney General has to do and face is to oversee and manage the over 100,000 employees of the Department of Justice and its many programs and component parts.

While Judge Mukasey, of course, has not been previously called upon to manage an organization of the kind and size of the Department of Justice, very few have, I believe he brings to that task both the right qualities and relevant experience. He is, first and foremost, a leader with credibility, who leads by example and motivates by example professionals to do the best work of which they are capable.

He is organized, efficient, works extremely hard, and has the ability and judgment to prioritize and delegate wisely. As chief judge of the United States District Court in New York for 6 years, Judge Mukasey was called upon to manage what is our oldest and largest Federal court, with over 40 active and senior judges, 15 United States magistrate judges, 11 bankruptcy judges.

The Southern District of New York has one of the busiest and most complex dockets in the country, typically over 12,000 new filings, civil and criminal, each year.

The chief judge in the Southern District of New York is ultimately responsible for, among other things, the budget, security issues, personnel, infrastructure, subcommittees on various issues affecting the court, litigants and juries, interagency communications, and docket administration.

In addition to having responsibility for these issues, Judge Mukasey, as chief judge, guided the Federal court in the Southern District of New York from a paper filing system to the electronic case filing system and put in place the first emergency preparedness program for a Federal court.

As it happened, Judge Mukasey was, fortunately, the chief judge of the Southern District of New York on September 11. His leadership during this time of extreme crisis has been accurately described by many as heroic. The Southern District of New York's courthouses in Manhattan are located just a few blocks from where the World Trade Center stood.

All of us working in the vicinity of the courthouse complex on September 11 personally witnessed the horror of that day and were required to respond to the physical and emotional issues of our staffs and then work to try to restore normal functioning in the aftermath of the most abnormal and jolting experience any of us had ever encountered.

Judge Mukasey directed that the two Manhattan Federal courthouses be closed immediately, but kept the court running from the White Plains courthouse 30 miles north of the city. He then reopened the Manhattan Federal courthouse on September 18, 2001, fully for business, despite badly disrupted phone systems, computer systems, not to mention the emotional stress of the court's employees.

But as the district executive of the southern district who works for the chief judge observed, "Almost everyone who worked at the courthouse was back at their desk." It was very important to come back downtown and to come back to work.

“Everyone wanted to be together, to do our best to show that life would go on in New York.” Well, for the Southern District of New York, Judge Mukasey and the district executive staff he managed made that possible.

In closing, I believe that however he is measured, Judge Mukasey will be a superb Attorney General. He will hit the ground running at the Department of Justice and deal effectively with its full range of priorities and problems. He will lead and inspire the career lawyers at the Department and in the field, as well as the United States Attorneys.

He will remain the person he has always been, a dedicated, hard-working public servant, with the ability and humility to do an outstanding job, of which I’m sure we will all be proud.

Thank you very much.

Senator CARDIN. Thank you very much for your testimony here today.

[The prepared statement of Ms. White appears as a submission for the record.]

Senator CARDIN. We’ll now hear from Judge John Martin. Judge Martin, a member in Martin and Obermaier, LLC in New York City, was a United States District Judge in the Southern District of New York from 1990 to 2003 and worked very closely with Judge Michael Mukasey in that capacity.

Prior to his judgeship, Judge Martin served as the United States Attorney for the Southern Division of New York from 1980 to 1983, worked as an assistant to the Solicitor General of the United States in Washington, DC, and worked in private practice.

A native New Yorker, Judge Martin graduated from Manhattan College and Columbia Law School, and clerked for the Honorable Leonard P. Moore, United States Court of Appeals for the Second Circuit.

Judge Martin has received awards for his outstanding service, including the Emory Buckner Award from the Federal Bar Counsel and the Judge Edward Weinfeld Award from the New York County Lawyers Association.

Judge, it’s a pleasure to have you before our committee.

**STATEMENT OF JOHN MARTIN, MEMBER, MARTIN &  
OBERMAIER, LLC, NEW YORK, NEW YORK**

Judge MARTIN. Thank you very much, Senator Cardin. I’m honored to be here and very pleased to have the opportunity to express publicly my high regard and affection for the nominee for Attorney General, the Honorable Michael B. Mukasey.

I’ve known Mike Mukasey for over 30 years, but I got to know him best when we served together on the Southern District of New York. Michael Mukasey is one of the most decent human beings I know and I think he possesses the qualities of intellect and humanity that we should want in a person to serve as Attorney General of the United States.

We worked together—I was the chair of the Clerks Committee while he was chief judge, and we worked closely together during that time and I saw firsthand his compassion and his leadership.

During that period, our clerk of the court died after a long battle with cancer. No one could have been more caring than Judge

Mukasey was of the concern for our clerk. No one could have been more compassionate in that situation.

In addition, as Mary Jo has pointed out in some detail, he was an able leader, someone who sought advice, and who inspired those around him to do their best.

He also had the unenviable task of trying to organize and lead 40 United States district judges, each of whom was appointed for life. Judge Mukasey handled that task with grace and when he stepped down as chief judge, he left with the respect and admiration of all his colleagues.

To some extent, no individual is qualified to be Attorney General, but the same can be said of United States district judge, because in both cases, you're faced with areas of the law with which you have had no experience in private practice. The breadth of United States law is staggering and the Attorney General and the district judge have to deal with that.

But you learn from that how to listen to experts, to weigh what they have to say, and to make judgments as to what is the right thing in the situation.

In addition, and most important for someone who is to become the Attorney General, you learn that the law is above politics and that your personal political views have no place in the administration of justice.

Michael Mukasey was a superb United States district judge and I have no doubt that, if confirmed, he will be a superb Attorney General. He possesses both the intellectual ability and the openness of mind that will serve him well in formulating the policies to be carried out by the attorneys in the Department of Justice.

While I never had the pleasure of appearing before Judge Mukasey, I have had the pleasure of reading his opinions. He was a thoughtful and intelligent jurist.

I also have one experience with him that I think demonstrates that he possesses one of the most important qualities for someone who would be the Attorney General, and that is the willingness to rethink a position. Several years ago, I decided a case, and I forget what the issue was, but there was only one opinion on point and it was by Judge Mukasey, and it was a rare case in which I disagreed with him.

And I wrote an opinion and said I have great respect for Judge Mukasey, but I disagree with him here. A year or two later, he sent me a copy of an opinion he had just written in a similar case, in which he referred to his prior opinion and my opinion, and said, "I've changed my mind. I think that the other is the right law."

I don't know many judges who possess both the unique quality of self-confidence and humility that would allow them to admit publicly that they were changing a position. But that's, I think, the quality that you have to have if you're going to lead something like the Department of Justice and be faced on a daily basis with complex and difficult questions to decide.

As you might expect, Judge Mukasey's nomination has been the subject of considerable comment in the New York legal community. I can tell you that the unanimous view of everybody with whom I have spoken, friends of Judge Mukasey, former colleagues, and, I think, particularly important, lawyers who appeared before him, is

that Michael Mukasey will provide the type of leadership necessary to ensure that the American people have confidence that justice is being administered fairly and with integrity.

Thank you very much.

[The prepared statement of Mr. Martin appears as a submission for the record.]

Senator CARDIN. Thank you all very much. I very much appreciate your testimony and I think it's extremely helpful to our committee.

Governor Thornburgh, I want to just ask you sort of a loaded question. If Attorney General Mukasey calls you the day after he's sworn into office and asks advice what he should do as some of his first measures in order to restore the type of confidence, not only within the Department, which is in trouble today, but public confidence in the Department of Justice, what type of advice are you going to give him?

Governor THORNBURGH. I don't think I could do much better than the steps that he outlined in his testimony, which really involved taking charge of the Department, and I think that that's the important thing that has to be done, to exhibit those qualities of leadership that I think he's fully capable of, ensure that the present vacancies are filled expeditiously and with people of equal caliber to his own, to visit with the leadership of the Department personally, not just the leadership at the top, but in the various sections and units within the Department.

It's a massive operation and I, frankly, enjoyed, when I was in office, the institution of kind of brownbag lunches with the rank-and-file staff lawyers to kind of get their view of what was going on.

So that I think his task will be really to grab the reins of the Department, to make clear that he's in charge, and to articulate, as often as possible, to the public, through the media and through appearances, his core values, expressed so eloquently during these hearings, that indicate his commitment to the rule of law, his commitment to fairness and justice, and, in every one of the operations that the Department carries out, make clear that he means business when it comes to reinvigorating the Department's very important mission.

Senator CARDIN. Would you be advising him that—there's so many vacancies in the top positions in the Attorney General, Department of Justice. Would high on your list be to try to influence appointments quickly at these top positions, consistent with his priorities within the Department of Justice?

Governor THORNBURGH. I would think that has to be a priority. I deal, from time to time, with the Department of Justice and lately it's discouraging to find that there's nobody home when it comes to key decisions being made.

That's the frustration of a practitioner, but I'm sure it's also a frustration within the Department. And I think one of his highest priorities, which I'm sure he recognizes and will carry out, is to seek out advice and recommendations from his long and rich career of persons who can fill those key positions.

Obviously, that will be done in tandem with the White House and to see that those positions are filled and that the Department is in full running order just as quickly as possible.

Senator CARDIN. Thank you.

Admiral Hutson, I must confess that I concur completely in your testimony. I found it well articulated and some of the things that I think we try to say here in the Senate, but not quite as effectively as your testimony, and I thank you for that, because I think it added greatly to the record here.

I also believe it won't surprise anyone here to learn that Judge Mukasey did an excellent job for our Committee as far as the frankness of his answers, as far as assuring us of his independence.

But there was one area that I think many of us are concerned about and that is whether there will be an effective voice within the Attorney General to speak out against the United States condoning any forms of torture.

I say that because Judge Mukasey was very clear that torture is not allowed. It's unconstitutional and against our laws. He made it very clear, also, that he would pursue holding accountable anyone who violates those statutes or the Constitution, even if that person was operating under the direction of someone in our military or in the White House.

But then he was less than clear as to circumstances in which conduct would not fall within the prohibited areas, including some that are pretty obviously commonly considered to be torture.

There's also the international perception that the United States is playing on definitions here rather than leading and saying clearly that we won't tolerate any forms of conduct that traditionally has fallen within torture.

So I would like to get your assessment as to how you felt. I don't know if you listened to the testimony or not.

Admiral HUTSON. Yes, I did, Senator.

Senator CARDIN. I would welcome your thoughts on that.

Admiral HUTSON. Thank you, Senator. The United States, as a Nation, and the Attorney General, as an individual, has to be absolutely unequivocal. We can't dance around definitions. We can't dance around what is torture and what's cruel and what's inhumane and what's degrading, as we have done.

In the past, we never had to worry about that, because we were never close to the line. We were always a long ways away from the line. But now we want to be right up next to the line. So, suddenly, what those definitions are becomes important.

I think that is a terrible mistake for this country, because that same cleverness is going to come back to bite our troops who because it's our troops who are forward deployed.

When Eisenhower and Marshall and Senator Vincent and others looked at the Geneva Conventions, they were not looking at them as a limitation on our behavior. They were looking at them as a limitation on the enemy's behavior. They were there to protect U.S. troops.

That's what we were thinking. Now, suddenly, we're looking at ways to dance around it so that we can engage in that kind of activity and as then Legal Counsel Gonzales said, so that we can avoid the War Crimes Act.

My goodness, how did we get to that point? Torture is the method of choice of the lazy, the stupid, and the pseudo-tough, and that should not be the United States. No matter how you define torture, it's unconstitutional, it violates statutes, it violates the UCMJ, it violates Common Article 3, it violates what your mother taught you, and it violates what you learned in kindergarten, and we ought not to be even close to it.

Senator CARDIN. Well, I thank you for that answer. One of the hats I wear in the U.S. Senate is the Senate Chairman of the Helsinki Commission, which deals with the human rights dimensions.

And, historically, the United States has used that forum to promote action against inhumane treatment and torture by so many countries in our regions.

I find that I'm spending most of my time trying to answer questions about conduct in our own country, whether it's Guantánamo Bay and the detaining of individuals there or whether it's the signing statements of the President on torture or whether it is dealing with the way that we treated prisoners in Afghanistan and Iraq.

So I agree with you, I think we've lost our standing internationally on this issue and now that when we equivocate on definition, it is really subject to scrutiny and concern by the international community.

Admiral HUTSON. May I make one more point, sir? Other than perhaps rack and thumb screws, waterboarding is the most iconic example of torture in history. It was devised, I believe, in the Spanish Inquisition. It has been repudiated for centuries.

It's a little disconcerting to hear now that we're not quite sure where waterboarding fits in the scheme of things. I think we have to be very sure where it fits in the scheme of things.

Senator CARDIN. Well, I am hopeful that once Judge Mukasey becomes more familiar—he didn't seem to be familiar with that. I hope during the question-and-answers that will still happen as part of the confirmation process, that we can get a clear view from the nominee that that is clearly a prohibited practice under not only our Constitution and our laws, but international standards of inhumane treatment.

So I agree with you and I hope that we'll get that clarified.

Professor Johnsen, I want to go back to a statement you made about the release of the opinions that have been made from the Office of Legal Counsel.

Senator Specter, I thought, was pretty articulate and persuasive that if the U.S. Senate, if the Congress is to do its oversight, that we have to get access to the fundamental documents controlling activities within the executive branch.

And if there's sensitivity to some of these documents, then we'll take it in a closed session, but that we need to have access to what is guiding executive actions.

You were in that office. Are we being unreasonable in our request? Will this put an unreasonable restriction on the prerogatives of the President or the executive branch?

Ms. JOHNSEN. Absolutely not. The issue, of course, of interrogation and torture, I think, is the perfect one in which to explore this. The Office of Legal Counsel, frankly, destroyed our Nation's reputation on the issue of torture with that infamous 2002 opinion.

Congress responded very appropriately, in my view, with the Detainee Treatment Act, which made clear that no torture, no cruel, inhuman, or degrading treatment was permitted anywhere in the world by the United States. And when the President signed that into law, he had a reservation in the signing statement that caused Senator McCain to call him on it.

Now, we hear that, I think, astonishingly, the Office of Legal Counsel, if reports are correct, has issued two more secret opinions interpreting that statute. How can Congress do its job? How can our constitutional democracy work if the President is interpreting statutes in ways that are flatly inconsistent with what Congress intended and with the words of the statute?

How can Congress oversee the executive branch or legislate if it cannot get a straight answer from the President, from the Department of Justice, when asked, "How are you interpreting cruel, inhuman, degrading? How are you interpreting torture?"

Let us see those legal opinions and if they do contain material, as you said, that would, in some way, jeopardize national security, that can be submitted in confidence to the Senate.

I actually am not happy with excessive reliance on that option, I have to say. I think on this issue, the public needs to know how the President is interpreting these laws, regulating coercive interrogations. And so I would say if there are any portions that have to be protected, kept confidential, then a redacted version or a specially prepared version has to be provided to the American public so that we know and the world knows what our policy is on coercive interrogations.

Senator CARDIN. Well, I agree with you on that. I think it should be. I'm just trying to get to at least be able to evaluate the documents and if we have to establish procedures.

I don't necessarily disagree with Senator Specter. If we have to make accommodations in order to get this matter moving forward, I think it's worth making accommodations so that we don't run into a constitutional challenge that could take too long in order to resolve.

But I agree with you. I see no reason why this information cannot be made available to the public, if necessary, in a redacted form. It seems to me that should be able to be accomplished.

There was one other issue that was brought up that you may have a view on or maybe other members of the panel, and that's an issue about the contempt citation that Judge Mukasey talked about.

It seems to me that if there is a challenge, that we need certain documents, and the President believes that that is a part of his executive privilege, there needs to be a way that that can reach the courts. The only way that I know is for Congress—and it's a very serious matter for us to suggest the contempt citation and to move forward with it and get it completed.

But at that point, it seems to me there should be little discretion within the Department of Justice in convening the jury, grand jury, and issuing the necessary indictments.

Am I wrong on that? I mean, Judge Mukasey seemed to be very indefinite about whether he would—he would make an independent judgment as to whether the individual acted reasonably. Well, if

you're in the executive branch, following what the President says, that's acting pretty reasonably, to me, even though the President may not be acting reasonably.

Ms. JOHNSEN. Right. You might remember that Judge Mukasey actually cited an OLC opinion from the time I was there, as well as from earlier administrations, on this point. And so it is a very difficult matter. I think that there should be a way to get it before a court.

Interestingly, Judge Mukasey said if the Department of Justice has issued an opinion to the President saying it's appropriate to assert executive privilege, then there's a very serious problem with the Department of Justice turning around and prosecuting somebody, and I agree with him on that.

But I think the interesting thing about that is the Department of Justice should not have advised the President in the first place to assert executive privilege. I think that's where the problem is. The President has a constitutional obligation to accommodate Congress's needs for information and, on this particular issue, the President has not done so and I don't think the President has received accurate legal advice from the Department of Justice.

But that's the point at which I think the problem occurs. I do agree with Judge Mukasey that it is difficult and I think a due process problem to turn around and prosecute somebody for doing what the Department of Justice said that person should do in the first place.

The real problem, I think, is an erroneous assertion of executive privilege in the first place and not accommodating Congress's compelling need for information on this issue.

Senator CARDIN. Again, I think that's the right analysis. And Judge Mukasey did say that he would weigh in pretty heavily as to whether executive privilege should be asserted or not, and I agree with you. I don't believe that was done by the Attorney General in the assertions that were made in regards to the U.S. Attorney firings and other issues in which we have subpoenaed information.

So, hopefully, the judge, as Attorney General, will be in the beginning stages and giving advice to the President, which I hope the President will follow, which leads to the question as to whether Judge Mukasey has the independence and strength to stand up to a pretty strong President, pretty strong-willed President.

There's a lot of things you can say about our President, but he is strong-willed.

So let me ask, Ms. White, if I could, and Jude Martin, you know him. How do you think he's going to fare standing up to a President who wants to do certain things that perhaps the judge thinks are inappropriate?

Ms. WHITE. If the circumstance presents itself, my money is on Judge Mukasey. He's one of the most independent, straightforward, strong individuals I know, totally principled. So if it comes to that, plainly, he will also be clear in his advice as to the right path, but if it comes to that, I have no doubt whatsoever he'll stand up.

Judge MARTIN. I think serving as United States district judge, you're used to getting—understanding that people have to obey certain laws and that you've got to have the power to enforce them,

and I don't think that Mike Mukasey is going to have any problem asserting his own views as to what's right and wrong.

Senator CARDIN. Well, I think restoring the independence of the Department of Justice is the first order of business. With the political interference, which has been acknowledged and under current investigation, that's going to be the first order of business.

The second is being able to give independent advice and that's going to be another challenge.

Third is establishing the type of priorities and, Mr. Shaw, I couldn't agree with you more about the disappointment with the Civil Rights Division, on the 50th anniversary of its creation. The number of cases that have been brought in regards to the voting rights to remove obstacles to participation, the disparate cases that have been brought, the few numbers in housing and employment have all been, I think, just shocking, in a way, that we've had a tradition, and, of course, the type of cases that the Civil Rights Division has entered have been on the wrong side, in my view, particularly when you look at the historic role of the Civil Rights Division in promoting rights for all individuals.

So I hope that you can perhaps give us some guidelines as to what we should be looking for from the new Attorney General as it relates to the type of cases that you would like to see priority given to.

Mr. SHAW. Senator, let me, first, correct something I may have said. I talked about the Georgia voter ID case. I might have said that that was before the Supreme Court. If I did, what I meant to say was that issue was up before the Supreme Court, but the issue is actually presented in a case out of Indiana.

With respect to what the new Attorney General could do, there are a number of things. I think there needs to be, first, at least within the Civil Rights Division, but throughout the Department, a restoration of hiring in an apolitical way of career attorneys. I'm not talking about the political appointees, obviously. But I think that's vitally important to restore the Civil Rights Division and the Department's legal staff generally, to what they once were.

I also think that it would be a good thing for the Attorney General and the Assistant Attorney General, whoever that might be, of the Civil Rights Division to have some dialog with some of the people who ran the Civil Rights Division under prior administrations, under both parties, as well as some of the career attorneys who have left the Department to get a sense of perhaps how the Department could operate to restore its credibility and integrity.

With respect to substantive issues, we find ourselves in disagreement with the Department and in a position with the Department as adversaries, as often, if not more often, than we are allies. I don't expect that we're going to agree on every case, but to take the Seattle and Louisville cases, for example, the issue of voluntary school integration decided in June by the Supreme Court, there, the Justice Department, for the first time since the 1950s, since *Brown*, effectively came down against school desegregation, against integration.

That is a reversal of historic proportions with respect to the Justice Department's role, and there are other instances in which we've been in adverse positions, where I think we ought not to be.

Of course, we each have our point of view, but the Justice Department really has gone astray.

As I said, I think that the Department needs to revisit the cases on behalf of African-Americans and Latinos that are out there that they're not bringing right now, that they're consciously not bringing.

It's not that those cases aren't there, because we're asked to represent people in those cases all the time and we don't have the resources that the Federal Government has. We can't take on most of those cases. The EEOC still is overloaded with complaints.

So the cases are there. The question is what the Justice Department's role is going to be. So that can be turned around, I think, fairly quickly if the lawyers are unleashed to do the investigations that they've wanted to do, that they have done, and if their suggestions or advice are overridden, as they will be sometimes, I suppose, it ought to be done on the basis of a legal analysis that has integrity and not on something that either gives the perception or the reality of a political decision.

Senator CARDIN. And I think, quite frankly, Judge Mukasey was comforting in his comments in that regard and, clearly, the failure to follow the advice of career attorneys, the reassignment of the individual who was in charge of the election issues in the Civil Rights Division, all that was shown, political interference, not just not following the advice of career attorneys.

It had the imprint of a political agenda more so than a change in a philosophical approach and Judge Mukasey, I think, was pretty clear that he won't tolerate that type of activity.

We need to make sure, in fact, that gets translated to those who are at the Department of Justice in critical positions, and we welcome your review of what happens in the Department of Justice. We thank you for your role in that regard.

Mr. Canterbury, I want to ask you about another aspect of the Department of Justice, which is handling the criminal agenda. Several of the Senators asked questions about violent crimes. You have seen Judge Mukasey as a prosecutor and as a judge and I would like to get your assessment as to the comfort levels that he will be balanced and fair in prosecuting criminal activities, which is a significant part of the agenda of the Department of Justice, or he's supervising them.

Mr. CANTERBURY. We represent 22,000 members in New York State and in our conversation with Federal, State and local officers in that judicial district, our review of cases that the judge has reviewed, we're very pleased with that.

Also, obviously, the Attorney General also has oversight of the FBI and ATF and other law enforcement organizations that we deal with on a daily basis and we feel the experience that he has will help to foster State and local cooperation.

There's been some great strides in the last eight or 10 years in local and State cooperation, but it's pretty obvious to us, from the judge's no-nonsense approach, that that will continue and we look forward to that.

Senator CARDIN. Thank you for that. I was just checking with our staff, because they were supposed to start a vote at 5, which they didn't start, which I'm thankful for.

I want to, last, ask one other question, which is an open-ended question for—I'll give any of you an opportunity to comment, if you like.

That is, trying to summarize the concerns raised during the confirmation hearings, I think I would put them probably in three categories. There were other issues raised, I'm not over-simplifying it, but it's the ability of Judge Mukasey to be an independent Attorney General; obviously, being in the Bush cabinet, but being an independent voice on behalf of the American people.

Second, to not tolerate at all any political activities that would relate to the hiring or promotion or firing of career attorneys or involved in influencing decisions on criminal investigations in any way.

And the third would be the priorities of the Department, whether this Department will carry out its historic role to protect the rule of law and to protect the civil liberties of the people in this country and move ahead on the civil rights agenda and deal with those types of issues.

So this is somewhat of an open-ended question. If there's anything more you would like to add to the record in regards to those issues, I would welcome an opportunity to give you that chance now.

Judge MARTIN?

Judge MARTIN. Let me start just with a question of the whole political nature. Judge Mukasey hasn't come out of the political system. He was selected by Senator D'Amato's traditional selection committee, which was set up to be independent and to pick people on the merits.

So he doesn't come here, I think—and I think he was nominated for this position because of his stature in the legal community, not because of his Republican credentials.

So I don't think he comes to this as a political figure. He comes to this as a man of independence, a man of stature, a man of great intellect, and I think those qualities are what he will apply as the Attorney General.

He is not a politician, and I don't mean to use that as a bad phrase, but he doesn't come out of that background. He comes out of the rule of law. That's what he did as a judge. That's what I think he will do as Attorney General.

Ms. WHITE. Senator, also, if I may just add to that quickly. He also comes out of the tradition of the Southern District of New York U.S. Attorney's office, where independence and being apolitical are—you're imbued with that from day one.

The district and the office is known not so fondly in Main Justice as the Sovereign District of New York, but mostly I think that's very good and I think it's very good in terms of what it says about how he will be as Attorney General.

Governor THORNBURGH. May I offer just three observations that were reassuring to me in my reading of the record of these hearings?

One, on the issue of independence, of course, an Attorney General is not independent in the sense that a justice minister in a European system might be.

But the other side of the coin in independence is a willingness to stick by one's beliefs and principles and, if necessary, resign when those conflicts or principles become so intense that he can't continue, and I think he's clearly indicated that he recognizes that.

Second, with regard to political activities, the most reassuring thing I heard was in his introductory statement, where he indicated that the targeting and timing—and the timing is important sometimes—of criminal prosecutions would be made without any consideration of the political implications involved, and this applies largely in corruption cases or in high profile cases.

Third, on priorities, obviously, the priorities of the Department of Justice are set by the President, but I think in Judge Mukasey, you clearly have someone who is willing to speak his mind and be an advocate for priorities that he thinks are proper and correct for the administration and his voice will be heard.

So on each of the matters that you raised, I'm reassured by his testimony and would expect that he would satisfy you as to his ability to meet those concerns.

Senator CARDIN. Admiral?

Admiral HUTSON. Senator, if I could take a small turn on one of your very nice lists of priorities, and that is independence.

I think it's not only the independence of the Attorney General, but that the Attorney General, as the chief law enforcement officer, sets the tone for independent legal advice down the chain of command, if you will, and all those government attorneys need to be able to give independent advice.

We have seen examples of where the advice of the attorneys within the Department of Defense, the judge advocates general, was ignored, not solicited, not respected, and we got ourselves in a lot of trouble and it wasn't until the U.S. Senate called hearings and the Senate Armed Services Committee called the JAGs, asked for their personal opinions about what constituted torture and whether the Geneva Conventions applied and so forth, that the American public really heard their independent views on that.

And I think that it's very important for—particularly in light of the recent past, it's very important for Judge Mukasey to ensure that everybody understands that the opinions of the subordinate lawyers doesn't always have to be followed, but they should be heard and respected.

Senator CARDIN. Thank you.

Ms. JOHNSEN. I'd like to second everything Admiral Hutson just said. It's very in line with what I'd like to say in my closing comment.

That is, an independent Attorney General is necessary, but not sufficient. We do need, as I mentioned earlier, aggressive oversight by this Committee and just this month you had Jack Goldsmith, former OLC head from the Bush administration, saying the same thing, that if there had been more oversight, the Bush administration would have made fewer mistakes and it was only when there was oversight that there actually was deliberation and debate within the administration.

And so I'm very encouraged by what I hear from others on this panel and some of what I've heard today about Judge Mukasey's independence, but that will not be enough, unless there is the pres-

sure from this Congress on the administration and, again, an insistence on greater openness so that we know what the executive branch is doing.

Senator CARDIN. I thank you for that comment. I am proud of the leadership of Senator Leahy and Senator Specter in this Committee, which I believe has been a model of the right role for the legislative branch, putting aside partisan differences to make sure that the oversight function, in fact, was effective.

As we have found out, there were very serious issues that needed the public attention and I think led to where we are today. So I think you're exactly right.

The framers had it right with the separation of the branches and let's make sure we carry out our responsibilities here in the U.S. Congress.

Mr. Shaw?

Mr. SHAW. Senator, I was sitting here thinking about my time in the Department many years ago and I think that every lawyer within the Department of Justice knows that the Attorney General is a member of the cabinet and, in a sense, that's a political position.

But there's political and there's political. I think, if I remember correctly, what we wanted was to know that the line would be drawn in the right place when it had to be drawn and that our superiors would listen to our suggestions and our analysis, even though they made the call, but they wouldn't make it purely on political grounds.

And, also, that the Attorney General and the Assistant Attorneys General, when need be, would be willing to go to bat for the line attorneys and for, effectively, the rule of law within the Department.

I think that's all one can want and ask for. I do know, because many of us stay in contact with or work with the line in the Department, that the esprit de corps is as low as it has been in any time that I can remember. The Department's attorneys are demoralized. And I think one of the most important challenges that the next Attorney General will face is to restore the sense of—well, of confidence on the part of the career attorneys that they're part of something that has integrity.

That's the sense in which I think the attorneys expect the Attorney General to be apolitical and a political appointee should be apolitical: that they, above all else, make their decisions based upon an interpretation of the law that has integrity.

Senator CARDIN. Well, I thank each of you for being here. I think you've added to the record in a way that I think is important in the confirmation process for an Attorney General of the United States and I found it extremely helpful, to me, to try to put the puzzle pieces together, because we are clearly all with the same objective and that is to see the Department of Justice move forward in its traditional respect from the American people and it is an important part of the administration.

And I think that these confirmation hearings have helped us in that regard and you all have been part of that and we thank you very much for your presence, your testimony, and, most impor-

tantly, for your patience as we've been trying to figure out when this panel would, in fact, be heard.

The hearing record will remain open for one week in order to be able to supplement the record, and the Judiciary Committee now stands adjourned. Thank you all.

[Whereupon, at 5:20 p.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

October 30, 2007

The Honorable Patrick J. Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Attached are my responses to written questions for the record posed to me after my confirmation hearings on October 17-18, 2007.

If I can be of further assistance on this matter, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael B. Mukasey". The signature is fluid and cursive, written in a professional style.

Michael B. Mukasey

cc: The Honorable Arlen Specter, Ranking Member  
w/ ENCLOSURES

**WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY,  
CHAIRMAN, SENATE JUDICIARY COMMITTEE,  
FOR MICHAEL B. MUKASEY,  
NOMINEE FOR ATTORNEY GENERAL OF THE UNITED STATES**

**Torture/Executive Power**

1. Our nation's top military lawyers, the Judge Advocates General of the Army, Navy, Air Force and Marines, have said that the use in interrogations of simulated drowning, dogs, forced nudity, and stress positions – in which prisoners are forced to stand, sit, or kneel in abnormal positions for extended periods of time – are not only bad policy because they yield unreliable information and could expose our own troops to such tactics, but also violate our law and the laws of war. The Army Field Manual published in September 2006 prohibited the military from using waterboarding or dogs in interrogations, as well as beatings and induced hypothermia. Yet in response to questioning at your Senate Judiciary Committee hearing, you declined to say that even the most extreme of these tactics, forced drowning or waterboarding, constitutes torture or cruel, inhuman, and degrading treatment and would therefore be illegal for the President to authorize.
  - A. With further time to reflect, do you agree with our top military lawyers that each of these interrogation techniques – simulated drowning, dogs, forced nudity, stress positions, beatings, and induced hypothermia – is unlawful?

**ANSWER:** I well understand your concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

Your question asks about the hypothetical use of certain coercive interrogation techniques, and as described at the hearing and in your question, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use. Third, I would not want any *uninformed* statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I do know, however, that “waterboarding” and certain other coercive interrogation techniques cannot be used by the United States military because their use by the military would be a clear violation of the Detainee Treatment Act (“DTA”). That is because those techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering, or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as “cruel, inhuman or degrading treatment” as set forth in the DTA and the MCA—enacted after the Department of Justice’s December 30, 2004 memorandum to Mr. Comey—which extended the Convention Against Torture’s prohibition on “cruel, inhuman or degrading treatment” to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase “cruel, inhuman or degrading treatment.”

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known “shocks the conscience” test to determine whether particular government conduct is consistent with the Fifth Amendment’s due process guarantees. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique’s past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that “our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.” 523 U.S. at 850 (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is “arbitrary in the constitutional sense,” a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

- B. Are these tactics, either individually or in combination, ever acceptable as a matter of law? Would it be acceptable for the President to authorize such tactics or immunize officials who carry them out?

**ANSWER:** Respectfully, please see my answer to question 1A. As I explained at the hearing, if these practices constituted torture or cruel, inhuman, or degrading treatment, they could not be authorized.

- C. The Army Field Manual asks soldiers evaluating whether or not to use a specific interrogation technique, "If the proposed approach technique were used by the enemy against one of your fellow soldiers, would you believe the soldier had been abused?" Do you believe that the techniques set out above would be abuse if applied to captured American soldiers?

**ANSWER:** The Army Field Manual is principally designed to prescribe standards of conduct governing prisoners of war ("POWs") who, like American soldiers, are entitled to the robust protections provided under the Third Geneva Convention. A fundamental tenet of the law of war is reciprocity, and that principle is embodied in the Army Field Manual. Members of al Qaeda, of course, operate in direct and purposeful violation of the law of war, and they focus their attacks on the killing of innocent civilians. Accordingly, as a general matter, different legal standards would apply to protect American soldiers than would be available to members of al Qaeda.

- D. If you are not willing to declare any of these tactics to be unlawful at this time, what type of further information and analysis will you need in order to make such a determination?

**ANSWER:** As I testified, and as noted above in the answer to question 1A, I do not have access to any of the classified details surrounding the CIA's interrogation program, nor have I had the opportunity to consider how the relevant legal standards would apply to those circumstances. Should I be confirmed as Attorney General, I will review the Department's analysis of the law governing the CIA program and ensure that no practices are authorized that are inconsistent with the laws of the United States.

- E. As Attorney General, will you consult with the JAGs before approving or issuing legal opinions on the subject of interrogation techniques?

**ANSWER:** Should I be confirmed as Attorney General, I will ensure that the Department of Justice consults with the appropriate officials at any agency whose practices might be affected by the Department's legal advice.

2. The memo dated August 1, 2002, signed by then-Assistant Attorney General Jay Bybee and known as the "Bybee memo" concluded that for an act to violate the torture statute, it "must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." That memorandum has since been withdrawn, but it is not entirely clear what standard currently governs. What is your understanding of what standard the Department of Justice currently has in place for determining what type of conduct constitutes torture or cruel, inhuman, or degrading treatment, and what do you believe the standard should be?

**ANSWER:** I am not aware of the views of the Department of Justice other than what has appeared in the public record. With respect to the definition of torture, the Office of Legal Counsel provided its interpretation of the anti-torture statute in a published December 30, 2004 opinion. That statute defines torture to mean, "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1). Whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering or (b) prolonged mental harm resulting from certain specified threats or acts.

"Cruel, inhuman, or degrading treatment" is also defined under federal law. In ratifying the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment ("UNCAT"), the United States undertook a reservation providing that "cruel, inhuman and degrading treatment or punishment" means the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States." Congress reiterated that definition in both the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. For a more complete discussion of this standard, please see my response to Question 1.A.

3. This administration appears to have engaged in a policy of extraordinary rendition – sending detainees to be interrogated in other countries where they could be, and in some cases apparently have been, tortured. I asked Attorney General Gonzales on several occasions about the case of Maher Arar, a Canadian citizen who when returning home from a vacation in 2002, was detained by federal agents at JFK Airport in New York City on suspicion of ties to terrorism. He was sent, not to Canada, but to Syria, where he was held for 10 months. A Canadian commission found no evidence that he had any terrorist connection or posed any threat, but concluded that he was tortured and held in abhorrent conditions in Syria. The Canadian government has apologized to Mr. Arar for its part in this debacle. The head of the Royal Canadian Mounted Police resigned, and the country has agreed

to compensate Mr. Arar almost \$10 million. This country has not apologized or admitted any wrongdoing.

- A. Will you commit that you will not approve the transfer of any detainee to another country where there is a realistic possibility that he or she may be tortured, regardless of any assurances you receive from that country?

**ANSWER:** It my understanding that both United States law and policy prohibits the transfer of anyone in the custody of the United States to another country where it is “more likely than not” that the person would be tortured. Should I be confirmed as Attorney General, I would ensure that the Department of Justice adheres to this standard.

- B. If you are confirmed, will you commit to look into issuing some form of apology or compensation to Mr. Arar and to anyone else who may have been transferred from the United States to another country and tortured?

**ANSWER:** Without an awareness of the details of this particular case, I would be reluctant to commit to revisiting the Department’s position on this issue.

**Executive Privilege**

4. You testified that executive privilege was related to the President’s need to gather facts. You did not categorically rule out that it could apply to third parties.

- A. Do you view executive privilege as a communications privilege?

**ANSWER:** The Supreme Court stated in *United States v. Nixon*, 418 U.S. 683 (1974), that executive privilege derives from “the valid need for protection of communications between high Government officials and those who advise and assist them,” as well as “from the supremacy of each branch within its own assigned area of constitutional duties.” *Id.* at 705. Thus, executive privilege is primarily a communications privilege, although it also reflects broader concerns for the separation of powers.

- B. Do you think executive privilege extends to matters in which the President was not personally involved?

**ANSWER:** Yes. It has been recognized in the courts that executive privilege extends to matters in which the President is not personally involved. *United States v. Nixon*, 418 U.S. 683, 705 (1974) (explaining that the privilege applies to “communications between high Government officials and those who advise and assist them in the performance of their manifold duties”); *In re Sealed Case*, 121 F.3d 729, 751 (D.C. Cir. 1997) (“communications made by presidential advisers ... in the course of preparing advice for the President come under the presidential communications privilege, even when these communications are not made directly to the President.”).

- C. What are the limits of executive privilege in your view?

**ANSWER:** Executive privilege is generally a qualified privilege, rather than an absolute privilege. For instance, the Supreme Court in *Nixon* held that the assertion of the presidential communications component of executive privilege “must yield to the demonstrated, specific need for evidence in a pending criminal trial.” *Nixon*, 418 U.S. at 713.

5. No prosecutor should take a matter to a grand jury, or to trial, if he or she believes there is not probable cause. But prosecutors need to be able to test the validity of a claim of privilege. Under our current statutes, the way to test the validity of the executive privilege claim is through a contempt citation. That is a mechanism that brings the executive’s claim of privilege to withhold information and the legislature’s claim to the information to a head. You suggested in your testimony, though, that where an official relied on Justice Department advice in asserting executive privilege, then no Justice Department prosecutor could move forward on a contempt citation.
  - A. If the other two branches have not been able to work out an accommodation, then the courts as the third branch can referee the dispute and apply what is actually a judicially-created privilege. Isn’t that the logical place in our constitutional system of checks and balances to resolve a dispute between the executive and Congress about an assertion of executive privilege?

**ANSWER:** A prosecution for contempt of Congress may be one way of testing an assertion of privilege, but historically that is not how disputes between Congress and the Executive Branch have been resolved. A criminal case under the contempt statute should not be brought unless and until the prosecutor is convinced that the defendant intended to commit a crime. The prosecutor’s decision, as to this as well as to other elements of a charged crime, should be based on his assessment that he possesses facts which allow him to prove the case beyond a reasonable doubt. I understand also that it is the long-standing Department of Justice position that the criminal contempt of Congress statute does not apply to an executive branch official who declines to comply with a congressional subpoena based on the President’s assertion of executive privilege. That rationale has been discussed in OLC opinions written by former Assistant Attorney General Walter Dellinger and by former Assistant Attorney General Ted Olson. Disagreements between Congress and the President over privilege matters historically have been resolved through an accommodation process that respects the prerogatives of both branches of government.

- B. The language of the governing statute, a statute that was passed by the Congress and signed by the President, says that in connection with a contempt of Congress citation, the U.S. Attorney “shall” refer the citation to a grand jury. If the U.S. Attorney does not proceed as the statute provides, how does the claim of executive privilege get evaluated and how does the conflict with the Congress get resolved?

**ANSWER:** As I mentioned in my previous response, Congress and the President have other ways to resolve their disputes, and these disputes historically have been resolved by an accommodation process, rather than by a contempt of Congress prosecution.

**Civil Rights**

6. On the first day of your hearing before the Senate Judiciary Committee, you were asked questions about your plans for restoring the morale and the historical priorities of the Civil Rights Division. In the last seven years, arguably as a result of blatant politicization, we have seen the Justice Department abandon its historic positions in civil rights cases ranging from employment discrimination to racial integration in schools. During the hearing, you testified that the Civil Rights Division is "important" and that you had met with a few Civil Rights Division attorneys who were "energized," but what is your vision for the role of the Justice Department with regard to civil rights enforcement? How do you plan to address the well-documented problems with low morale in the Division?

**ANSWER:** As I testified, the civil rights movement in general has been one of the finest expressions in our Nation's history of the genius of American politics. The movement helped to begin to remove a significant stain on our Nation's history through the rule of law rather than through the kind of violent confrontation we have seen in other countries. The Department protects the rights of its citizens through vigorous enforcement of statutes such as the Civil Rights Act. As I mentioned during my testimony, the Civil Rights Division occupies a crucial place in the Department precisely because it continues to carry out the work of the civil rights movement by enforcing the Nation's civil rights laws. I strongly support the mission of the Civil Rights Division and will ensure that it has the tools and resources it needs to fulfill its mandate. With respect to the morale of the Department, if confirmed, I hope to lead by example and to show, through my words and my deeds, that the Civil Rights Division will play an essential role in the Department's efforts to enforce the rule of law.

**Senator Edward M. Kennedy**  
**Questions for the Record**  
**Senate Judiciary Committee Hearing on the Nomination of Michael B. Mukasey to be**  
**Attorney General**

1. As you know, the nation was disgraced in the eyes of the world by the Bybee “torture memorandum” of August 2002, a legal opinion by the Office of Legal Counsel that redefined torture in such a narrow way that it justified interrogation techniques widely recognized as cruel, inhuman, and degrading.

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, the memo said. CIA interrogators called this memo their “golden shield,” because it allowed them to use virtually any interrogation method they wanted.

The memo also created a commander-in-chief exception, which no legal authority had ever recognized, stating that the President and the people he directs are not bound by laws passed by Congress that prohibit torture.

The memo further stated that government officials can avoid prosecution for their acts of torture by invoking the defenses of “necessity” or “self-defense”—even though the Convention Against Torture, an international treaty ratified by Congress in 1994, states very clearly that “no exceptional circumstances whatsoever” may be invoked as a justification for torture.

All of these arguments in the memo were morally repugnant, and they were also legally repugnant. The Office of Legal Counsel eventually took the extraordinary step of withdrawing the memo because it was so flawed. This was apparently the first time that an opinion from the Office had ever been overturned within a single Administration.

The torture memo did not come to light until 2004, and along with the photos from Abu Ghraib prison, it created worldwide outrage and condemnation. America lost its moral high ground in the fight against terrorism, possibly for years to come.

We’ve been told that the Bybee memo was withdrawn at the end of 2004, but it has never been repudiated by the Administration. In the October 17 hearing, you stated that “the Bybee memo, to paraphrase a French diplomat, was worse than a sin, it was a mistake. It was unnecessary.” I agree wholeheartedly that the memo was a mistake, but I was troubled that you did not repudiate its contents explicitly. Your statement that it was “unnecessary” leaves the alarming impression that you may agree with its legal reasoning.

**Questions:**

- **Dean Harold Koh of the 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?**

**ANSWER:** As I stated in my testimony, I believe that the opinion was worse than a sin; it was a mistake.

- **In the words of Jack Goldsmith, the former head of the Office of Legal Counsel, “The message of the [Bybee memo] was indeed clear: violent acts aren’t necessarily torture; if you do torture, you probably have a defense; and even if you don’t have a defense, the torture law doesn’t apply if you act under color of presidential authority.”**
  - **Do you believe that Mr. Goldsmith has accurately characterized the legal analysis of the memo?**
  - **If so, what, if anything, do you find wrong with this legal analysis?**

**ANSWER:** I am not in a position to comment on the message of the opinion, but Professor Goldsmith’s shorthand description of the analysis in the opinion seems reasonable.

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

**ANSWER:** I disagree.

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

**ANSWER:** I disagree.

- **Do you agree or disagree with the theory—still not repudiated by the Administration—that laws banning torture do not always bind the Executive Branch, because of the President’s inherent powers as commander-in-chief?**

**ANSWER:** As I stated at my hearing, I do not believe that the President has the constitutional authority to direct acts of torture, and I believe that laws prohibiting torture are binding on the President.

- **As Attorney General, will you completely rescind and repudiate this memo?**
  - **Will you make it clear that the Department is empowered to enforce the federal criminal laws against torture?**

**ANSWER:** As I understand it, the Department of Justice rescinded that memo in 2004. To the extent that it is unclear as to whether the Department is empowered to enforce federal criminal laws against torture, I will make clear that it is.

2. At the end of 2004, when the Office of Legal Counsel withdrew the Bybee memo, it replaced it with a less extreme opinion that did not address the most controversial parts of the earlier opinion. The Department made this new opinion public.

But on October 4, 2007, we learned from the *New York Times* that the Office of Legal Counsel had issued two more secret "torture memos" in 2005—only a few months after publicly releasing the memo that replaced the Bybee memo.

The first secret memo reportedly authorized interrogators to use harsh techniques in combination, to create a more extreme overall effect. They could deprive detainees of sleep and food, bombard them with loud music, and subject them to freezing temperatures, all at the same time. These are techniques that our Judge Advocates General have said are illegal under U.S. law and the Geneva Conventions.

The second memo declared that none of the CIA's interrogation methods violated the ban on cruel, inhuman, and degrading treatment that Congress was preparing to pass. At the time, the CIA was using "waterboarding" and other abhorrent techniques copied from the Soviet Union and other brutal regimes.

Before he was sidelined by the White House, Deputy Attorney General James Comey told his colleagues at the Justice Department that they would all be "ashamed" when the world eventually learned of these opinions. The world has now learned of them, and once again there's a scandal involving opinions of the Office of Legal Counsel, issued in secret, authorizing interrogation techniques widely believed to violate laws against torture.

**Questions:**

- **Despite our repeated requests for the opinions relating to interrogation, Congress has not been given these documents. We had to learn about them from the *New York Times*.**
  - **If you are confirmed, will you produce these opinions for this Committee?**

**ANSWER:** My understanding is that these opinions are classified and reflect internal legal advice. If confirmed as Attorney General, I will make sure that the Department appropriately shares its legal views on matters of interest to the Committee while at the same time respecting the Executive Branch's interest in preserving the confidentiality of attorney-client communications.

- **Do you think it was appropriate that these opinions were issued in secret, at a time when the Department was publicly claiming it had rejected the Bybee torture memo?**

**ANSWER:** I have not reviewed any non-public OLC opinions. Based on the press reports, the opinions in question appear to have addressed a classified CIA program, and therefore, it is not surprising that such opinions would not be publicly disclosed. Because I have not reviewed these opinions, I am not in a position to determine whether they were consistent with the Department's public statements, and the December 30, 2004 opinion made public, concerning the application of the anti-torture statute.

- **If these memos really do say what the press accounts report, will you rescind them immediately?**

**ANSWER:** As I stated at the hearing, if confirmed as Attorney General, I will review the legal analysis in these memos, and I will not hesitate to rescind any opinion that is unsustainable as a matter of law.

- **The second memo was apparently written while Congress was considering the Detainee Treatment Act, which prohibits the use of cruel, inhuman, and degrading practices. The Administration seems to have concluded that the Act would have no effect, even before it was enacted. That information certainly would have been helpful during the legislative debate.**
  - **Do you think the Administration had an obligation to inform Congress of its view during our consideration of the Detainee Treatment Act?**
  - **If confirmed, will you be more forthcoming in sharing with Congress the information we need to perform our legislative and oversight functions?**

**ANSWER:** I have no reason to believe that the Administration took the view that the Detainee Treatment Act would have no effect. To the contrary, my understanding is that senior Administration officials had stated publicly that the United States complied with the cruel, inhuman and degrading treatment standard as a matter of policy, and that the Detainee Treatment Act would make that standard effective as a matter of law.

- **Professor David Luban of the Georgetown Law School has written that the second memo most likely stated that treatment of detainees will only be considered cruel, inhuman, or degrading if it is "unjustifiable by any government interest." Such a position completely distorts Supreme Court precedent and leads to the absurd result that *nothing* the government does in an interrogation will ever qualify as torture.**
  - **If Professor Luban is correct about the content of the memo, do you agree that this is an outrageous argument, both legally and morally?**

**ANSWER:** I am not aware of the contents of these memos and thus cannot evaluate the accuracy of Professor Luban's analysis. My understanding is that with respect to the treatment of captured terrorists, the appropriate standard is the substantive component of the Fifth Amendment's Due Process Clause, which the Supreme Court has referred to as the "shock[] the conscience" test. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003); *see also id.* at 773

(plurality op.); *id.* at 787 (Stevens, J., concurring in part and dissenting in part). This test requires “an exact analysis of circumstances” in determining what “shocks the conscience.” *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). As the Supreme Court has explained, a court first considers whether the conduct is “arbitrary in the constitutional sense,” a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the circumstances or justification.

3. Congress attempted to take a strong stand against torture in 2005 in the Detainee Treatment Act by prohibiting “cruel, inhuman, and degrading treatment” in interrogations. It required all Department of Defense interrogations to comply with the Army Field Manual, which recognizes that such techniques are both immoral and ineffective, because they produce unreliable information and put our own troops at greater risk.

The Senate passed the Detainee Treatment Act by the overwhelming vote of 90 to 9. President Bush issued public statements suggesting he would comply with the Act and signed it into law. But immediately after signing it, the President issued a signing statement saying he would construe the law in a manner consistent with the constitutional authority of the President to supervise the executive branch and protect the American people. In other words, the President said he would follow that law only as long as it did not interfere with his commander-in-chief powers. If he thought it did, he would ignore it. And as we now know, a secret opinion of the Office of Legal Counsel had told him the CIA could continue to use torture.

That signing statement was a particularly outrageous example of a larger pattern. President Bush has been more aggressive than any previous president in claiming the right to ignore congressional enactments. Until recently, he’s rarely used his veto power, but he’s issued signing statements affecting nearly 800 provisions of laws passed by Congress.

**Questions:**

- **Do you believe the President is free to disregard a direct congressional enactment? If so, under what circumstances?**

**ANSWER:** The President must comply with a constitutional law passed by Congress. If a law falls outside the Constitution, however, the President of course must follow the Constitution, which is our Nation’s highest law.

- **Do you agree or disagree with the President’s unprecedented use of hundreds of signing statements asserting a right to ignore provisions in laws that Congress has passed? Doesn’t this undermine our system of checks and balances if the President can simply decide which parts of which laws he will comply with?**

**ANSWER:** Our system of government works best when Congress and the Executive Branch act in a spirit of mutual accommodation and cooperation. The practice of presidential signing statements is not new, and I do not believe that it has to be controversial. The President may express his views about the laws that he signs, and if he believes that a particular provision of the bill is constitutionally problematic, the President may appropriately identify the problem. That said, I agree that presidential signing statements should not be a vehicle for creating unnecessary confrontation between the branches. If confirmed, I will ensure that the Department of Justice provides advice on the issue of signing statements with this spirit in mind.

4. When Congress was considering the Military Commissions Act last year, I offered an amendment to direct the Secretary of State to notify other parties to the Geneva Conventions that we would consider it a war crime to subject an American to any of the techniques prohibited by the Army Field Manual. Those practices include waterboarding, use of dogs, extreme temperatures, beatings, electric shocks, and forcing detainees to be naked.

During the debate, Senator Warner, then-Chairman of the Armed Services Committee and manager of the bill, stated that all of those practices constitute “grave breaches” of the Geneva Conventions and would be “clearly prohibited” by the Military Commissions Act.

**Question:**

- **Senator Warner, the manager and a primary author of the Military Commissions Act, stated clearly that the Military Commissions Act prohibits these practices. Will you follow Senator Warner’s interpretation of the law? If not, what weight will you give to his statement?**

**ANSWER:** In enacting the Military Commissions Act of 2006, Congress prohibited the “grave breaches” of Common Article 3, such as torture, cruel or inhuman treatment, murder, and mutilation and maiming. In determining whether a particular practice is prohibited under those standards, the primary question would be to consider the text of the prohibitions themselves.

5. In the October 17 hearing, you stated that Congress has the constitutional authority to prohibit torture, no matter where it occurs or under what circumstances, and you acknowledged that we have in fact done so. You acknowledged that following the McCain Amendment and other laws, U.S. personnel may never subject anyone to “cruel, inhuman, or degrading treatment.” No exceptions. I was gratified that you were so clear on this point.

But there is disagreement on what constitutes “cruel, inhuman, or degrading treatment.” As the recently-revealed secret OLC memos and other sources indicate, the President believes that numerous interrogation techniques—such as sleep deprivation, freezing temperatures, and even waterboarding—do not constitute “cruel, inhuman, and degrading treatment,” even though most legal experts and the great body of observers worldwide believe they do. The Administration appears to take such a narrow view of what counts as torture that it makes a mockery of our laws against it. And the CIA appears to be implementing this alarming view.

In the October 18 hearing, your comments on these matters were deeply troubling. You refused to take a position on whether waterboarding is unlawful, or to say anything whatsoever on the crucial questions of what constitutes torture and who gets to decide the issue. The implication of your comments is that while you are committed to the position that “torture” is immoral and illegal, you take such a narrow view of what counts as torture that this commitment is meaningless in practice. Your opposition to torture appears to be “purely semantic,” as Senator Whitehouse observed.

You also suggested that government interrogations are not necessarily governed by Common Article 3 of the Geneva Conventions, notwithstanding the Supreme Court’s clear ruling to the contrary in *Hamdan v. Rumsfeld*. You seemed to say that in *Hamdan* the Court applied only the fair trial requirements of Common Article 3 to “enemy combatants,” and not its humane treatment requirements. This is an astonishing interpretation of *Hamdan* that has never received any support from legal experts or even from the Bush Administration.

**Questions:**

- **Do you stand by everything you said in your testimony on torture, interrogation, and *Hamdan*?**
  - **Do you acknowledge that the humane treatment requirements of Common Article 3 apply to the interrogation of “enemy combatants” in U.S. custody?**
  - **Since Common Article 3 is a universal standard that protects both prisoners in U.S. custody as well as American servicemen and women in foreign custody, do you agree that the opinions of the Judge Advocates General—the nation’s top military lawyers—are highly relevant for the determination of what techniques may be authorized under Common Article 3?**
  - **Will you consult with the Judge Advocates General in deciding whether to authorize interrogation techniques as consistent with Common Article 3?**

**ANSWER:** Although my testimony accurately described the holding in *Hamdan*, I agree that the Supreme Court’s decision means that Common Article 3 applies to the conflict against al Qaeda. Accordingly, the standards of Common Article 3 apply to the treatment and interrogation of enemy combatants detained in that conflict, including those at Guantanamo Bay. I would think that the Department of Justice, in providing legal advice, should consult with appropriate officials at the agencies whose interests are implicated. If confirmed, I will review the Department’s legal analysis with respect to Common Article 3 and ensure that no interrogation techniques are authorized in violation of our Nation’s treaty obligations.

- **If you’re confirmed and the Torture Prevention and Effective Interrogation Act is passed, will you do everything in your power as Attorney General to ensure that every interrogation conducted by the U.S. government complies with the law?**

**ANSWER:** Yes.

- **As Attorney General, would you advise the President that he is bound by this law?**

**ANSWER:** Yes.

- **The brutal interrogation techniques being debated today are not new. After World War II, we tried and convicted Japanese soldiers of using these same techniques against American prisoners. Our soldiers were forced to endure stress positions for hours. They were exposed naked to severe temperatures. They were denied food, water, and medical treatment. Water was poured down their mouths and noses to simulate drowning—the very technique of waterboarding that the Bush administration now refuses to ban.**
  - **If we don't categorically reject the use of such techniques today, what purpose did those trials serve half a century ago? Were we wrong to prosecute those soldiers after World War II?**

**ANSWER:** I believe that the United States should prosecute all cases involving the unlawful treatment of prisoners during wartime. I am not, however, aware of the particular facts and circumstances surrounding those prosecutions, including what other acts the defendants were charged with doing.

- **Last May, General Petraeus wrote to all U.S. service members serving in Iraq that “adherence to our values distinguishes us from our enemy.” He said “this fight depends upon” occupying “the moral high ground,” and “torture and other expedient methods to obtain information” are not only illegal and immoral but also “neither useful nor necessary.”**
  - **Do you agree with General Petraeus?**

**ANSWER:** Yes.

- **In September 2006, the Army's top intelligence officer, Deputy Chief of Staff for Intelligence Lt. Gen. John Kimmons, said: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”**
  - **Do you agree with General Kimmons?**

**ANSWER:** Torture should be prohibited without regard to whether it might lead to good intelligence.

- **The minimum standards we apply to detainees set the standard for other nations' treatment of Americans they take into custody, such as CIA agents and members of our Special Forces who do not wear uniforms. If we decide it is lawful for us to**

**engage in sleep deprivation, waterboarding, and the use of stress positions, then we increase the likelihood that other countries will subject Americans to those practices.**

- **Do you agree that we shouldn't subject anyone to interrogation practices that we'd consider unlawful if used against an American?**

**ANSWER:** As you note, as a general matter, American soldiers are entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could apply to American citizens, and that presents an additional reason why it is important for the United States to enforce fully its treaty obligations, including those under Common Article 3.

- **Do you think it would be lawful for another country to subject an American to:**
  - **Waterboarding?**
  - **Induced hypothermia or heat stress?**
  - **Standing naked?**
  - **The use of dogs?**
  - **Beatings, including head slaps?**
  - **Electric shocks?**

**ANSWER:** I well understand your concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

Your question asks about the hypothetical use of certain coercive interrogation techniques, and as described at the hearing and in your question, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use. Third, I would not want any *uninformed* statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I do know, however, that “waterboarding” and certain other coercive interrogation techniques cannot be used by the United States military because their use by the military would be a clear violation of the Detainee Treatment Act (“DTA”). That is because those techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering, or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as “cruel, inhuman or degrading treatment” as set forth in the DTA and the MCA—enacted after the Department of Justice’s December 30, 2004 memorandum to Mr. Comey—which extended the Convention Against Torture’s prohibition on “cruel, inhuman or degrading treatment” to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the

Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase “cruel, inhuman or degrading treatment.”

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known “shocks the conscience” test to determine whether particular government conduct is consistent with the Fifth Amendment’s due process guarantees. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique’s past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that “our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.” 523 U.S. at 850 (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is “arbitrary in the constitutional sense,” a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

6. In enacting the Detainee Treatment Act, Congress sought to ensure that the government honors its commitment to the basic rights enshrined in the Geneva Conventions.

But we didn’t go far enough. We required compliance with the Army Field Manual by the Department of Defense, but we said nothing about the CIA. As this latest scandal shows, it is the CIA, acting with the approval of the Justice Department, that we need to worry about now.

The Army Field Manual represents our best effort to develop an effective and responsible interrogation policy. It acknowledges that torture does not yield reliable information, and often hinders the effort to acquire it. As the Manual clearly states, “use of torture is not only illegal but also it is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the [interrogator] wants to hear.”

The Manual ensures that we collect only credible information in pursuing terrorists. It prevents the secret abuse of detainees. It protects our own interrogators from the risk of prosecution. And it protects our own servicemen and women from being tortured.

I’m sponsoring a bill now—the “Torture Prevention and Effective Interrogation Act”—to close the loophole left open by the Detainee Treatment Act. It would apply the Army Field Manual to *all* government interrogations. It makes clear that brutal interrogation methods such as waterboarding, using dogs, or inducing hypothermia are *never* permissible.

The issue is whether the CIA and all other agencies of the government should, like the Department of Defense, be bound by the interrogation standards set out in the Army Field Manual. The Manual is highly flexible and allows interrogators to do a lot of things. But it does not allow them to use techniques such as waterboarding, use of dogs, sleep deprivation, forced nudity, or beatings—the most brutal techniques that experts believe are not only immoral but also ineffective in obtaining good information and illegal under both domestic and international law.

**Questions:**

- **Shouldn’t we require *all* interrogations to comply with the standards of the Army Field Manual?**
  - **If not, which specific techniques do you believe the CIA should be allowed to use, even though the Department of Defense has rejected them as immoral, illegal, ineffective, and damaging to America’s global standing and the safety of our own servicemen and women overseas?**
  - **Specifically, which of the following interrogation techniques that are prohibited by the Army Field Manual would you consider lawful and which would you consider appropriate for use by CIA interrogators?**
    1. **Forcing detainees to be naked, perform sexual acts, or pose in a sexual manner.**
    2. **Placing hoods or sacks over the heads of detainees, or duct tape over their eyes.**
    3. **Using beatings, electric shock, burns, waterboarding, military dogs, or other types of physical abuse.**
    4. **Inducing hypothermia or heat injury, or conducting mock executions.**
    5. **Depriving detainees of food, water, or medical care.**

**ANSWER:** As you note, the Detainee Treatment Act of 2005 provides that the United States military may not employ any interrogation technique that is not specifically authorized by the Army Field Manual. In passing that act, Congress made the judgment that other agencies, particularly the CIA, should be able to employ interrogation techniques not specifically authorized in the Army Field Manual. Congress made a similar judgment in passing the Military Commissions Act of 2006, in part, to allow the CIA interrogation program to go forward following the Supreme Court's decision in *Hamdan*.

As I explained in my previous response, I well understand your concern that this Country remain true to its ideals, and that the United States set a high standard of respect for human rights. At the same time, I believe that it is important that the United States take all lawful measures available to protect its citizens. I am not aware of any of the classified details of the CIA interrogation program, nor do I consider myself an expert in the effectiveness of particular interrogation methods. Accordingly, I do not have a view as to what, if any, techniques the CIA should be able to employ that are not authorized by the Army Field Manual. With respect to your question about the lawfulness of specific techniques, please see my answer to question 5.

- **If you're confirmed and the Torture Prevention and Effective Interrogation Act is passed, will you do everything in your power as Attorney General to ensure that every interrogation conducted by the U.S. government complies with the law?**

**ANSWER:** Yes.

- **As Attorney General, would you advise the President that he is bound by this law?**

**ANSWER:** Yes.

- **The brutal interrogation techniques being debated today are not new. After World War II, we tried and convicted Japanese soldiers of using these same techniques against American prisoners. Our soldiers were forced to endure stress positions for hours. They were exposed naked to severe temperatures. They were denied food, water, and medical treatment. Water was poured down their mouths and noses to simulate drowning—the very technique of waterboarding that the Bush administration now refuses to ban.**
  - **If we don't categorically reject the use of such techniques today, what purpose did those trials serve half a century ago? Were we wrong to prosecute those soldiers after World War II?**

**ANSWER:** I believe that the United States should prosecute any illegal treatment of prisoners during wartime. I am not, however, aware of the particular facts and circumstances surrounding these prosecutions, including what other acts the defendants were charged with doing.

- **Last May, General Petraeus wrote to all U.S. service members serving in Iraq that “adherence to our values distinguishes us from our enemy.” He said “this fight depends upon” occupying “the moral high ground,” and “torture and other expedient methods to obtain information” are not only illegal and immoral but also “neither useful nor necessary.”**

- **Do you agree with General Petraeus?**

**ANSWER:** Yes.

- **In September 2006, the Army’s top intelligence officer, Deputy Chief of Staff for Intelligence Lt. Gen. John Kimmons, said: “No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that.”**

- **Do you agree with General Kimmons?**

**ANSWER:** Torture should be prohibited without regard to whether it might lead to good intelligence.

- **The minimum standards we apply to detainees set the standard for other nations’ treatment of Americans they take into custody, such as CIA agents and members of our Special Forces who do not wear uniforms. If we decide it is lawful for us to engage in sleep deprivation, waterboarding, and the use of stress positions, then we increase the likelihood that other countries will subject Americans to those practices.**

- **Do you agree that we shouldn’t subject anyone to interrogation practices that we’d consider unlawful if used against an American?**

**ANSWER:** As you note, as a general matter, American soldiers are entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could apply to American citizens, and that presents an additional reason why it is important for the United States to enforce fully its treaty obligations, including those under Common Article 3.

- **Do you think it would be lawful for another country to subject an American to:**

- **Waterboarding?**
- **Induced hypothermia or heat stress?**
- **Standing naked?**
- **The use of dogs?**
- **Beatings, including head slaps?**
- **Electric shocks?**

ANSWER: Please see my answer to question 5.

7. In a May 2004 op-ed in the *Wall Street Journal*, you wrote 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.”

I am not sure exactly what you meant by this statement, but I am concerned that you believe the government has a right to say, “Trust us,” and the American people should fall in line. Too often, the Bush Administration has said “trust us,” but there is absolutely no reason to trust the Administration after all it has done.

**Questions:**

- **Do you believe that this Administration deserves the trust of the American people after taking us to war in Iraq on false pretenses, denying that it engaged in torture when we know that it did, and listening to the conversations of Americans without warrants?**

ANSWER: Yes, I believe that the Administration deserves the trust of the American people.

- **Do you believe that this Department of Justice deserves the trust of the American people, when we know that political considerations have infected its hiring and its law enforcement decisions and that it has given severely flawed legal advice?**

ANSWER: Yes, I believe that the Department of Justice deserves the trust of the American people.

- **When you say that “the government . . . is entitled . . . to receive from its citizens the benefit of the doubt,” what is the role of Congress in your theory? Too often, the Administration has asked Congress to trust it. Do you agree that Congress has a constitutional duty to conduct oversight of the Executive Branch and the laws it passes and cannot simply trust the Executive?**

ANSWER: When I said that “the government . . . is entitled . . . to receive from its citizens the benefit of the doubt,” I meant all three branches of Government, including Congress. I agree that Congress has a constitutional duty to conduct oversight of the Executive Branch and the laws that Congress passes.

- **In your testimony on October 17, you cited the Hamdi case for “the authority of the president to seize U.S. citizens [on the battlefield] and detain them without charge,” but you said you “can’t say now” whether the “battlefield” applies to the United States. You never clearly answered the question of whether the President may indefinitely imprison without charges a U.S. citizen, seized on U.S. soil, solely on the President’s determination that the person is an “enemy combatant.” Nor did you make any reference to the due process requirements that Hamdi established or to its**

reminder that “a state of war is not a blank check for the President when it comes to rights of the Nation’s citizens.”

- **May the President indefinitely imprison without charges a U.S. citizen, seized on U.S. soil, solely on the President’s determination that the person is an “enemy combatant”?**

**ANSWER:** I believe that the Supreme Court in *Hamdi* left this as an open question. I note, however, that in *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court did hold that an American working as a German saboteur who was captured in the United States could be detained and prosecuted by military commission as an unlawful enemy combatant.

- **Are there any constitutional limits on the President’s power to detain U.S. citizens or non-citizens in its war on terrorism?**

**ANSWER:** Yes. Indeed, the Supreme Court recognized as much in *Hamdi*.

- **As Attorney General, how would you enforce the Supreme Court’s instruction that “a state of war is not a blank check for the President when it comes to rights of the Nation’s citizens”? With respect to the detention of “enemy combatants,” what specifically would you do to ensure that all legal requirements are complied with?**

**ANSWER:** If I am confirmed as Attorney General, I will ensure that the U.S. Government complies with the law. As I testified at the hearing, if I did not believe that an Administration policy concerning the treatment of enemy combatants was lawful, I would insist that the policy change, and failing that, would resign.

8. It is obvious that this Administration does not respect the Foreign Intelligence Surveillance Act. Instead of working with Congress to amend FISA—as other Administrations have done about 30 different times since it was enacted in 1978—this Administration chose to eavesdrop on Americans in secret, without warrants, in violation of the law.

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 over them. Jack Goldsmith, the conservative legal scholar and former head of the Office of Legal Counsel, testified that, like John Ashcroft and James Comey, 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, in his just-published book which you praised during your testimony, describes 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 says 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 permanent the Protect America Act, enacted last August, and amend FISA in several other ways as well. Yet at the same time that it makes these requests, the Administration refuses to acknowledge that it is bound by FISA. So we have a strange situation: the Administration is demanding that Congress pass a new law, but is simultaneously insisting that no such law is necessary.

The language of FISA is clear: it provides the “exclusive” means by which the Executive may conduct foreign intelligence surveillance. As we know from Justice Jackson’s opinion in the Steel Seizure Cases, the President’s authority is at its weakest when he acts contrary to a congressional enactment. Yet President Bush wants to defy clear statutory language.

**Questions:**

- **I am concerned that in your confirmations hearings, you 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 may conduct foreign intelligence surveillance.**
  - **Do you agree that the Executive Branch is bound to conduct all foreign intelligence surveillance according to FISA?**

**ANSWER:** As I testified, FISA has been and continues to serve as the foundation for conducting foreign intelligence surveillance of persons in the United States. That said, it is well established that the President has the constitutional authority to conduct foreign intelligence surveillance. See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); see also *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002). A difficult separation of powers question may arise to the extent that the President’s authority comes into conflict with FISA’s limitations. Such a conflict would be governed by the *Youngstown* analysis, and in light of the statutory limitation the President’s authority would be at its “lowest ebb”—but that is not to say such inherent authority to act does not exist. I believe it is a well-established principle of constitutional law that each branch of government has authorities that another branch cannot take away. (For instance, as I noted at the hearing, the Senate has the power to consent to the confirmation of the President’s nominees, and a nominee who was not confirmed would not have a valid legal claim to challenge the Senate’s decision not to confirm him or her.)

With that said, as I emphasized at the hearing, if such a case were to arise, I believe that the best thing for the country would be for Congress and the Executive Branch to work together so as to ensure that we have the laws necessary to protect the country.

- **When, in your view, would the President ever be authorized to disregard or violate FISA?**

**ANSWER:** The President has an obligation to faithfully execute all constitutional laws of the United States, and FISA is a constitutional law. As a general matter, therefore, the President is not free to disregard or violate FISA. That said, as I noted in my previous response, a difficult separation of powers question would arise if FISA's limitations were to conflict with the President's inherent authority under the Constitution.

- **Many legal experts, such as Judge James E. Baker of the U.S. Court of Appeals for the Armed Forces, have argued that the President may *never* validly disregard or contravene FISA. As Judge Baker states, "in light of the specificity of the [FISA] statute, and the longstanding acquiescence of the executive in the Act's constitutionality, . . . FISA did not leave the president at a low ebb exercising residual inherent authority, but extinguished that authority."**
  - **If you disagree with this statement, in what way and why?**

**ANSWER:** I would disagree with this statement for the reasons expressed in my previous answers.

- **If Congress does not extend the Protect America Act and does not pass any other new laws, will you insist that the Administration must comply with FISA?**

**ANSWER:** I understand that Congress is currently considering whether to extend or revise the Protect America Act. I believe that our Nation is best served by the two branches working together to create the framework necessary to protect the country. If confirmed as Attorney General, I will advise the President to comply with all constitutional laws.

- **Do you agree that any new FISA legislation should reaffirm that FISA is the "exclusive" means by which the executive can conduct foreign intelligence surveillance?**

**ANSWER:** I have not considered that matter, but if confirmed, I expect that I will look at that question in the context of the current Congressional deliberations about whether to extend or revise the Protect America Act.

- **In an Administration that has shown no respect for FISA, it will obviously take courage to insist that the law must be followed. Your predecessor did not show this courage. No matter what pressures you face, will you insist that government surveillance must comply with FISA?**
- **Will you take the necessary steps to ensure that all Justice Department employees are also committed to obeying FISA?**

**ANSWER:** If confirmed, I will insist that foreign intelligence surveillance must be conducted in accordance with the Constitution and laws of the United States. As I stated in my previous

answers, I believe that FISA has been and continues to serve as the foundation for conducting foreign intelligence surveillance of persons in the United States.

- **In a speech you gave in April, on “Terrorists and Unlawful Combatants,” you recommended that Congress abolish the FISA court and instead create a single “national security court” to oversee surveillance, detention, and prosecution of suspected terrorists.**
  - **Why did you make this recommendation—do you think the FISA court is flawed?**
  - **Isn’t the FISA court precisely the kind of specialized “national security court” you say we need—with unique procedures, almost total secrecy, and judges appointed specially by the Chief Justice?**
  - **If you do not support the FISA court, what would you prefer to see in its place?**

**ANSWER:** In that speech, I did not recommend abolishing the FISA court, but merely suggested that creating a single national security court is one option that Congress might consider. The question of what court should be created is a question within the discretion of Congress, and my speech did not signal a preference among the options that I discussed.

9. It’s also no secret that the Administration does not like to cooperate with Congress. Time after time, it’s refused to work with Congress, even though doing so could have made its counterterrorism policies more effective and given them a sounder legal basis. When Attorney General Ashcroft wouldn’t rubber-stamp some of its activities, the Administration even sidelined its own Department of Justice. This “go-it-alone” approach has not only inspired anger and mistrust, but also made us less safe.

When Attorney General Gonzales came before this Committee last year, I questioned him about FISA and the recently revealed warrantless eavesdropping program. I offered to work with him, and I asked him why he had not approached Congress sooner. He answered bluntly, “We did not think we needed to, quite frankly.”

We’re now paying a high price for that arrogance. Warrantless wiretapping has apparently been used to spy on Americans illegally for years. As a result, prosecutions have been jeopardized, intelligence professionals are in fear of criminal penalties, government lawyers threatened to resign, public trust was undermined, and resources were misallocated. The Administration’s reckless disregard for FISA has made us more vulnerable. It has also made many Americans afraid for their rights.

When the Administration finally came to Congress on FISA a few months ago, it did so not in the spirit of cooperation, but to demand that we pass certain reforms. The reforms were negotiated in secret and at the last minute, while the Administration issued dire threats that failure to enact a bill before the August recess could lead to disaster. The resulting legislation,

the Protect America Act, is badly drafted and severely flawed, and has caused even more uncertainty and public outrage.

The history of FISA teaches us that there is a better way. I was present at the creation of FISA, when a Democratic Congress worked closely with Republican Attorney General Edward Levi to draft it. Four different times, Mr. Levi invited members of Congress to the Justice Department to work on the legislation. Together, we found a way to give our intelligence agencies the authority they needed, and to build in checks and balances to prevent abuses. The final bill passed the Senate by an overwhelming vote of 95 to 1, and it served this country well for three decades.

Congress is now considering legislation to revise the Protect America Act. The Administration has demanded that we include retroactive immunity for the telecommunications companies that participated in the warrantless eavesdropping program. The Administration has gone so far as to refuse to produce documents related to the program unless the Judiciary Committee commits in advance to granting immunity. Obviously, that is backwards. The Committee should not be considering retroactive immunity in the dark.

**Questions:**

- **If you are confirmed as Attorney General, which tradition will you follow—the Edward Levi model or the Alberto Gonzales model—when it comes to working with Congress?**

**ANSWER:** As I indicated during my testimony at the hearing, I believe that we are stronger as a nation when the Congress and the Executive Branch work together. It is my understanding that there was extensive cooperation and coordination when FISA was enacted in 1978, and if confirmed I would work closely with the Congress as it considers legislation to modernize FISA.

- **Do you agree with Jack Goldsmith and others that it was a mistake for the Administration not to come to Congress with its so-called “Terrorist Surveillance Program” and other warrantless wiretapping programs?**

**ANSWER:** As I have not been provided access to information concerning the Terrorist Surveillance Program or any other classified activity, I am not in a good position to judge the Administration’s decision not to seek legislation from the Congress. However, as noted above, I do believe as a general matter that it is best for the Congress and the Executive Branch to work together to address national security matters.

- **Will you commit to producing for all members of the Judiciary Committee, prior to our consideration of FISA legislation, all documents related to the legal justifications for and authorizations of the warrantless wiretapping program that the Administration conducted between September 11, 2001 and this year?**

**ANSWER:** As I have not had access to the documents at issue, I am reluctant to commit to provide them to the Congress. I do appreciate the importance of Congress’s oversight

responsibilities, and, if confirmed, I will work with this Committee to ensure it has the information it needs to perform its oversight functions.

- **Do you agree that Congress cannot responsibly grant retroactive immunity to telecommunications companies, when it has no idea what the companies may have done, who may have directed their conduct, and what the legal justification for their conduct may have been?**

**ANSWER:** I understand from public reports that such information has been provided to the Senate Select Committee on Intelligence, and that discussions are taking place concerning the provision of information to this Committee as well. While it is of course important for Congress to have relevant information available when legislating, I can also conceive of circumstances where national security considerations would counsel in favor of informing Congress through the intelligence committees.

- **Do you believe that telecommunications companies that broke the law should be given full retroactive immunity by Congress?**

**ANSWER:** It is my understanding from the Senate Intelligence Committee's publicly released committee report that those companies that assisted the government did so in the wake of the September 11 attacks, and did so at the government's request and in reliance upon the government's representation that their assistance was lawful. Under these circumstances, retroactive immunity in my judgment would appear appropriate.

- **Do you believe that FISA imposed liability on telecommunications companies to ensure that they would act as a check on unlawful surveillance requests by the Executive?**

**ANSWER:** It is my understanding that FISA's liability provisions apply only to actions taken under color of law, so it is not clear to me that this was Congress's intent when it enacted FISA.

- **What does it do to the structure of FISA to eliminate their liability for breaking the law?**

**ANSWER:** As noted above, it is my understanding that those companies that assisted were doing so in good faith reliance on government representations of legality, so I do not see how it would adversely impact FISA's structure.

- **What do you think was the role of the lawyers who advised the telecommunications companies on the lawfulness of their warrantless surveillance?**

**ANSWER:** I do not know and am reluctant to speculate.

- **What does it say about the Administration's commitment to the rule of law to insist on retroactive immunity as a precondition for any FISA reform?**

**ANSWER:** I would respectfully refer you to my answers to other questions above on this subject, where I express my view that there is a sound policy case to be made for immunity under the appropriate circumstances.

- **Do you believe that it is wise for Congress to step into ongoing litigation to dictate victory for one side?**

**ANSWER:** It would depend upon the facts and circumstances of the controversy.

- **The Administration has been asserting an extremely broad version of the state secrets privilege in an attempt to derail the litigation against the telecommunications companies, even though it is no longer a secret that the Administration conducted widespread warrantless surveillance.**
  - **Do you share the Administration's view on the application of the state secrets privilege to these lawsuits, even though a number of federal courts have expressly rejected it?**

**ANSWER:** As I have not been provided information about classified activities, I am not in a good position to evaluate the Administration's assertions of the state secrets privilege in any particular case.

- **Do you agree or disagree with the many critics who claim that the Justice Department has abused the state secrets privilege in post-9/11 litigation to conceal the Executive's activities from public scrutiny, when there is no legitimate security reason for doing so?**

**ANSWER:** I have no reason to believe that the state secrets privilege has been asserted in bad faith. If confirmed, I would ensure that any assertion of the state secrets privilege was based upon national security considerations.

- **Even if the state secrets privilege were to apply to some portion of the warrantless wiretapping lawsuits, could Congress adopt special procedures to permit the litigation to continue in a protected setting?**

**ANSWER:** While the answer may depend upon the particulars of the procedures proposed, I believe that Congress would have the authority to enact legislation in this area if it believed that was the appropriate policy.

10. There is still a great deal we don't know about the warrantless wiretapping used by the Administration after 9/11. The Administration has refused to comply with subpoenas for documents that would explain the programs and their legal justifications. We do know that Americans were spied on without warrants, that the FISA court declared at least some of the program illegal, and that many Justice Department employees believed the programs were so flagrantly illegal that they threatened to resign if changes were not made.

Early last year, the Justice Department's Office of Professional Responsibility began to investigate whether the Administration's domestic eavesdropping programs were legal, and whether department officials, including Attorney General Gonzales and Attorney General Ashcroft, had acted properly in overseeing them.

But the Office of Professional Responsibility's investigation never got off the ground. The investigators were denied security clearances to do their work. The Office was asking only for internal Justice Department communications and legal opinions, and it has detailed procedures in place to ensure that no sensitive information leaks out. When the Office of the Inspector General launched a more limited investigation, its investigators received necessary clearances.

As a result of the obstruction of the Office of Professional Responsibility investigation, the American people and their representatives in Congress still don't know what happened. No one has been held accountable, and no lessons have been learned.

**Questions:**

- **If confirmed, will you commit to reauthorizing an investigation into the government's secret spying programs, and to doing everything in your power to see that this investigation is as thorough and effective as possible?**

**ANSWER:** As I understand it, there is an investigation ongoing into the Terrorist Surveillance Program described by the President. I will review the results of that investigation, which may include an argument by the investigators that they were unable to access all relevant information. To the extent that argument is included in the report, that would inform my determination of what the appropriate next steps might be.

- **Will you commit to reporting all the findings of this investigation to Congress?**

**ANSWER:** I will review the findings of any ongoing investigation with a view to sharing as much of the findings with Congress as possible. As I have testified, I believe that this Committee has a critical oversight role to play with respect to the Department of Justice. That said, there may be some portions that I may not be able to release because of national security or privilege concerns, or because to do so would implicate privacy rights.

**11.** The material witness law allows the government, in narrow circumstances, to detain witnesses to prevent them from fleeing to avoid testifying in a criminal proceeding. The court can order them to be incarcerated if it finds that they have information that's "material" to the proceeding and will likely flee if subpoenaed. But they have not been accused of any crime, and can only be held for as long as necessary to testify.

After 9/11, the Justice Department began to use the material witness statute in a new way, to detain an unknown number of Muslim men. We still don't really know what happened to them, because the court records are sealed. But we know that at least 70 of them, and possibly many hundreds, were detained in New York City as "material witnesses" because the

government believed they might have some knowledge of the attacks or pose some danger to society. These men had lawyers, but for months they were held in harsh conditions, without criminal charges or bail, and nearly half of them were never brought before a court or a grand jury to testify. Some of them were abused while held in a Brooklyn jail.

As chief judge of the federal court in the Southern District of New York, you played a major role in overseeing this process. We don't know how you handled these cases or how many material witness warrants you signed, but it has been said that you signed more than any other judge.

Commentators have criticized your court's handling of these detentions, in particular the secrecy you imposed and the way you appear to have allowed innocent people to be arrested and incarcerated for months in degrading conditions on the skimpiest of evidence. A report by Human Rights Watch and the ACLU states that many of these material witness detainees were held on "baseless accusations of terrorist links."

**Questions:**

- **How do you respond to these allegations?**

**ANSWER:** Congress has provided in the material witness statute that an individual may not be held pursuant to a material witness warrant absent a showing by the government (and a finding by a court) that there is probable cause to believe that the individual has information material to an ongoing investigation and probable cause to believe that the individual would not be available absent detention pursuant to a material witness warrant. To my knowledge, the criteria of the material witness statute were met in each of the cases.

- **How do you respond to the lawyer who claims you were insensitive to his clients?**

**ANSWER:** I believe that I acted appropriately and lawfully at all times with regard to those held pursuant to material witness warrants. Each of these individuals was afforded counsel and at least one hearing before the court.

- **One client was a 21-year-old college student with no criminal record who claimed he was beaten in his cell. After he showed you the bruises hidden beneath his orange jumpsuit, the transcript shows that you didn't seem very concerned. You said: "As far as the claim that he was beaten, I will tell you that he looks fine to me. You want to have him examined, you can make an application. If you want to file a lawsuit, you can file a civil lawsuit."**
- **Do you think that you handled this complaint appropriately? We know that some of these detainees—who may have been completely innocent of any wrongdoing whatever—were in fact beaten by their guards.**

**ANSWER:** I believe that I did handle this complaint appropriately. At all times, I followed the legal process that Congress put into place through the material witness statute.

- **In your May 2004 op-ed in the *Wall Street Journal*, you wrote the following: “No doubt there were people taken into custody [after 9/11], whether on immigration warrants or material witness warrants, who in retrospect should not have been. If those people have grievances redressable under the law, those grievances can be redressed. But we should keep in mind that any investigation conducted by fallible human beings in the aftermath of an attack is bound to be either overinclusive or underinclusive. There are consequences both ways. The consequences of overinclusiveness include condemnations. The consequences of underinclusiveness include condolences.”**
  - **I appreciate your concern that the government do everything it can to prevent the next attack, but I am concerned by the way you make this point. It sounds as if you think anything goes in such a situation. You were the chief judge of the Southern District, and you were publicly dismissing a serious question of law and policy that might still be litigated in your court. Can you elaborate on your thinking when you wrote those words?**

**ANSWER:** I do not believe that my remarks could reasonably be interpreted as supporting an “anything goes” standard, nor do I believe in such a standard.

**12.** Many legal scholars say the Administration abused the material witness statute during this episode. The Administration relied on it and indefinitely detained people accused of no crime. Some scholars emphasize that this violates the Fourth Amendment. Others say the material witness law allows the government detain witnesses only to testify at a criminal trial, not to testify before a grand jury.

You faced these questions in a 2002 case. You ruled that the material witness statute authorizes the government to imprison a witness for grand jury investigation. You dismissed the argument that there might be a constitutional problem in doing so. In *United States v. Awadallah*, however, Judge Scheindlin on your court reached the opposite conclusion. On appeal, the Second Circuit appears to have adopted your reasoning. But a number of legal scholars have written articles criticizing your Fourth Amendment analysis.

**Questions:**

- **As Attorney General, would you use the material witness statute in the same way it was used in the aftermath of 9/11? What, if anything, would you do differently?**

**ANSWER:** I believe, as the Second Circuit agreed, that the material witness statute was used lawfully in the aftermath of the attacks of September 11, 2001. As Attorney General, I would use the material witness statute in the same way: lawfully.

- **Do you think that holding someone in jail, solely on the grounds that they might be called to testify before a grand jury, ever raises constitutional concerns?**

**ANSWER:** Congress has provided that an individual may not be held pursuant to a material witness warrant absent a showing by the government (and a determination by a court) that there is probable cause to believe that the individual has information material to an ongoing investigation and that the individual would be unavailable absent issuance of the warrant. I believe that the statute is constitutional.

- **Does it raise any moral or policy concerns?**

**ANSWER:** I believe that Congress is in the best position to address moral or policy concerns that may arise when an individual is lawfully detained pursuant to the material witness statute.

13. From what we know, it appears that many of those detained without charges after 9/11 were immigrants. The press reported the FBI was rounding up hundreds of Muslim men and imprisoning them on very little evidence.

According to Human Rights Watch and the ACLU, the “evidence often consisted of little more than the fact that the person was a Muslim of Middle Eastern or South Asian descent, in combination with having worked in the same place or attended the same mosque as a September 11 hijacker, gone to college parties with an accused terrorism suspect, possessed a copy of *Time* magazine with Osama bin Laden on the cover, or had the same common last name of a September 11 hijacker.”

The government apparently used the material witness statute as a pretext to arrest and hold individuals who could not be charged with a crime or an immigration violation, because there was no probable cause. What the government actually wanted in some of these cases, it seems, was to detain these persons preventively, or investigate them for possible wrongdoing.

I’m particularly concerned that so many of these persons were immigrants. This kind of mass detention of Muslims raises serious civil rights concerns.

Along with other Justice Department programs used after 9/11 to fingerprint, photograph, and interrogate immigrant men from Muslim countries, this kind of activity created massive fear in our Muslim communities. At a time when we needed critical intelligence, members of these communities were unfairly stigmatized and discouraged from coming forward to assist in our counterterrorism efforts.

**Questions:**

- **Do you believe that the material witness statute may have been used as a pretext to detain individuals preventively or to investigate them? Does this trouble you?**

**ANSWER:** I have no reason to believe that the material witness statute was used as a pretext in the aftermath of the attacks of September 11, 2001; indeed, to my knowledge, each individual

was detained only after the requisite government showing and court findings, and was provided with counsel and access to the court.

- **Does the disproportionate number of immigrants targeted in material witness warrants raise any concerns for you?**

**ANSWER:** The material witness warrants were issued in the aftermath of a foreign attack on our soil. Each and every one of the 19 hijackers was a foreign national. It therefore would not be surprising to me if a large proportion of the individuals detained in connection with the investigation of that foreign attack were also immigrants.

14. In June 2003, the Inspector General for the Justice Department issued a report evaluating the treatment of 762 detainees who were held on immigration charges and designated as of "special interest" to the investigation of the 9/11 attacks. The report noted "significant problems in the way detainees were handled" following 9/11. These problems included:

- a failure by the FBI to distinguish between detainees whom it suspected of having a connection to terrorism and detainees with no connection to terrorism;
- the inhumane treatment of the detainees at a federal detention center in Brooklyn;
- unnecessarily prolonged detention, both from delays in charging and holding people in detention well after they had been ordered deported;
- interference with access to counsel; and
- closed hearings.

A subsequent report published by the Inspector General in December 2003 elaborated on the severe physical and verbal abuses that special immigrant detainees were subjected to during this time.

**Questions:**

- **When the report was issued, the Department of Justice announced that it made "no apologies" for any of its conduct or policies. If you had been Attorney General at the time, what response would you have recommended?**

**ANSWER:** I am not familiar either with the report the Inspector General issued in December 2003 or with its recommendations. I therefore am not in a position to say what response I might have recommended.

- **What steps should the Justice Department and the Department of Homeland Security take to prevent such abuses in the future?**

**ANSWER:** As stated above, I am not familiar with the report, or with any abuses described therein. I am therefore unable to opine on what steps the Department of Justice and the Department of Homeland Security might take.

15. The death penalty is the most extreme form of punishment we have. Once administered, it cannot be undone, so we must be absolutely certain that it is applied in a fair and consistent manner. We know that since 1993, 120 people convicted and sentenced to death have been exonerated from state death rows prior to execution. We also know that minority defendants are disproportionately sentenced to death; the reason for this discrepancy is not clear, and a recent study by the National Institute of Justice has not provided adequate answers.

The possibility that innocent people are being executed or that the death penalty is being applied in a discriminatory manner makes it essential that the decision to execute a defendant be open and transparent. Since 2001, however, the Department has changed its death penalty protocols in a way that makes the Attorney General's decision-making process confidential. In addition, the line prosecutors, who are most familiar with their cases, are being given little input into the decision whether to pursue the death penalty in a particular case.

**Questions:**

- **Do you believe that the government's decisions to apply the death penalty should be more transparent? As Attorney General, what steps would you take to make deliberations on the application of the death penalty more transparent?**

**ANSWER:** As I understand it, there are extensive procedures in place by which the Department of Justice, and ultimately the Attorney General, determines whether the death penalty should be sought in a particular case. I believe those procedures are public, giving great transparency into the process. That said, advice that may be given within the Department as to a particular case is not public. It would risk distorting the process to publicize the content of that advice.

- **A National Institute of Justice study on racial bias and the death penalty examined data from 1995-2000 and concluded that there was no racial bias at the federal level. Yet, the next 6 individuals facing the death penalty at the federal level are all African American males. As Attorney General, will you commit to make recent data available for analysis of the impact of race on the death penalty?**

**ANSWER:** I do not understand what data, beyond that which is apparently already public, you are requesting be disclosed. I therefore cannot make a commitment to make that data public.

- **In your testimony, you refused to agree to speak personally with U.S. Attorneys who disagree with your decision to pursue the death penalty and want to discuss the matter with you. I am not satisfied by the answer you gave, and I want to give you an opportunity to explain your position in more depth. Why, if you are committed to "review[ing] every [death penalty] case in excruciating detail" and to adopting an open and collaborative management style, as you said, would you refuse to speak with these U.S. Attorneys, who may have personal knowledge and expertise relevant to the case?**

**ANSWER:** The Department of Justice has extensive policies in place that govern consideration of whether the Attorney General should seek the death penalty in a particular case. These policies serve to promote uniformity in decisions on whether to seek the death penalty, as well uniformity in the application of the standards themselves. The policies clearly allow for a United States Attorney to convey any personal knowledge or expertise relevant to the case, and I would expect each United States Attorney to avail him or herself of that opportunity. I would be reluctant, however, to depart from the established policies and procedures in a given case, as that would risk undermining the uniform and consistent application of the death penalty.

16. As you may know, the Department of Justice recently issued extremely controversial regulations on death penalty appeals in federal courts. They give the Attorney General the power to certify states for special, "fast-track" procedures. If the Attorney General certifies a state, federal courts are required to review that state's capital cases on a faster and more limited basis.

In the Patriot Act reauthorization, Congress authorized the Department of Justice to issue regulations on this subject. The intention was that if states develop systems to guarantee adequate representation of their death row prisoners, they can receive the benefits of abridged federal court review. Such a provision would encourage states to provide quality counsel to their prisoners and help make sure that innocent persons are not sentenced to death.

The proposed regulations make a mockery of this goal. They fail to provide any meaningful definitions, standards, or requirements to ensure that states have in fact established counsel systems that comply with Congress's intent. They fail to provide any safeguards to shield the certification process from conflicts of interest or political influence. As a result, federal court review of death sentences will be dramatically curtailed, even in cases where the defendant may not have received a full and fair trial.

These regulations have produced intense controversy. Comments from the Judicial Conference, the American Bar Association, capital defense organizations, federal public defenders of all 50 states, and many others explain how these regulations are badly drafted and dangerous. They're vague; they flout well-settled case law; they place significant burdens on the federal courts; and they create an unacceptable risk that innocent prisoners will be denied justice. In short, as Chairman Leahy, Senator Feingold, and I explained in our comments to the Department, these regulations are "unclear, unjust, and unwise." (Document ID: DOJ-2007-0110-0166, regarding OJP Docket No. 1464, available at <http://www.regulations.gov>)

If these regulations are implemented, they will cause protracted litigation and public outrage, and deal a serious blow to the nation's commitment to due process and equal justice for all.

In July 2001, Justice O'Connor stated, "After 20 years on [the] high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country." The proposed regulations would raise even more questions and take this nation a giant step backwards.

**Questions:**

- **These regulations concern an extremely complicated and sensitive area of law. Thousands of pages of comments have explained the many problems they create. As Attorney General, will you give careful review to the entire comment record before making any decision on whether to implement the regulations?**

**ANSWER:** I agree that these regulations are being promulgated with respect to an extremely complicated and sensitive area of law. There is no greater sanction than the imposition of the death penalty, and the complexity of the law reflects the gravity of that decision. I would, as Attorney General, ensure that any regulations relating to the death penalty reflect the nature of the law in this area.

- **If your review shows that the proposed regulations are deficient, will you make the fundamental revisions necessary for such regulations to be consistent with Congress's intent?**

**ANSWER:** As stated above, I would ensure that the regulations reflect the complicated and sensitive nature of the law in this area.

17. We know you've been close friends with Rudy Giuliani ever since your years together in the U.S. Attorney's office and in private practice in New York City. When Mr. Giuliani was elected mayor, he asked you to swear him in. When he decided to run for President, he asked you and your son to serve on his "Justice Advisory Committee." You once wrote him a letter saying, "Your achievements have been such that neither I nor anyone else I know could match them. . . . Please also know that my admiration and love [for] you and your family is without limit." I understand that as a judge you recused yourself from litigation involving Mr. Giuliani, and your close association with him suggests it may be difficult for you to act impartially as Attorney General on issues that affect him.

**Questions:**

- **In your October 17 testimony, you answered in the affirmative to Senator Leahy's question, "would it be safe to say that you will totally recuse yourself from any involvement, either with Mr. Giuliani or any candidate for president?" It is good to have on record that you will not involve yourself with Mr. Giuliani or any of his competitors in the presidential race, but what further assurances can you give Congress and the American people that your association with Mr. Giuliani will not affect your decision-making?**

**ANSWER:** I would urge any American with a concern about my ability to be fair to look at my record as a judge. While on the bench I approached each case and made each decision with a full commitment to the rule of law. As I testified, each and every case or investigation the Department of Justice pursues—indeed, any decision the Attorney General makes—must be guided by the law and the facts, not partisan or political considerations. I would add to that admonition here, that personal considerations are no more appropriate guides.

- **Will you recuse yourself from all decisions that might affect him personally or politically?**

**ANSWER:** I would seek and follow the guidance of the Professional Responsibility Advisory Office with respect to any decisions that could raise an ethical concern.

- **What safeguards will you put in place to ensure that you do not inadvertently make a decision that affects him?**

**ANSWER:** I have publicly disclosed my long friendship with Mr. Giuliani, and would remind my staff should I be confirmed to keep in mind my commitment to recuse myself where appropriate.

- **Has the Administration assured you that you will have the ability to make personnel decisions free from White House interference?**

**ANSWER:** The Administration has assured me that I will have the ability to make personnel decisions within the Attorney General's authority free from White House interference. Of course, some positions in the Department of Justice are PAS positions—individuals for those positions are nominated by the President and confirmed by the Senate. With respect to those positions (which comprise a very small percentage of Department employees), I have been assured that I will have a voice in considering nominations and that anyone nominated would be someone with whom I could work.

18. As Attorney General, one of your duties will be to oversee the Department's role in enforcing the federal election laws. The details are still coming out about how this responsibility was improperly politicized under Attorney General Gonzales. The Department abused its authority and its influence to help Republicans win elections, and U.S. Attorneys were fired if they refused to go along.

The Department of Justice should never make a decision—or appear to make a decision—based on the desire to affect an election. In fact, the Department has long been aware of this problem. Launching investigations, interviewing witnesses, or issuing indictments shortly before an election can obviously affect its outcome. For that reason, the Department had developed written guidelines to prevent such interference.

In May, the Department issued a new guidebook on "The Federal Prosecution of Election Offenses," replacing the 1995 manual and reversing the Department's longstanding policy of not taking any action before an election that could affect the election outcome.

As the previous guidelines had stated: "In investigating election fraud matters, the Justice Department must refrain from any conduct which has the possibility of affecting the election itself." That language was severely weakened by the revision.

The previous guidelines had also stated that “most, if not all, investigation of an alleged election crime must await the end of the election to which the allegation relates.” That provision was removed.

The previous guidelines had further stated that: “Federal prosecutors and investigators should be extremely careful to not conduct overt investigations during the pre-election period or while the election is underway.” That provision was removed as well.

When Senator Feinstein asked Attorney General Gonzales in July why these changes were made, Mr. Gonzales said, “I don’t know the answer to that question. I would like to find out . . .” We have not received an answer, but the clear impression is that the Department wanted to give itself greater leeway to take actions that might interfere with upcoming elections.

**Questions:**

- **What assurances can you give Congress and the American people that you will restore the Department of Justice to its rightful role as the nonpartisan guardian of fair and open elections?**

**ANSWER:** The right to vote is an extremely valuable one in our society, and the Department of Justice must make every effort to ensure fair and open elections. As I testified, one of the joyful duties that I had as a judge was swearing in new citizens. A significant part of what I said to them after they had been sworn in involved their obligation to inform themselves and to vote. As I also testified, it is imperative that we ensure that people who want to vote, and who are authorized to vote, have access to the ballot box.

- **In your testimony, you were clear that “partisan politics plays no part in either the bringing of charges or the timing of charges,” but you never specifically addressed the changes made to this manual. Restoring the 1995 guidelines is an obvious reform that would go a long way toward restoring public trust in the Department. Will you commit to restoring the 1995 version of the “The Federal Prosecution of Election Offenses” manual?**
  - **If you will not commit to do this, do you agree that the changes recently made to the manual were dangerous and inappropriate?**
  - **Do you think it’s appropriate that under the new guidelines, prosecutors and investigators are given so much freedom to influence election outcomes?**

**ANSWER:** As I testified partisan politics can play no part in either the bringing or timing of charges. Although I have not reviewed either the 1995 or current versions of “The Federal Prosecution of Election Offenses” manual specifically, I fully appreciate that the closer to an election, the higher the standard that must be met for charges to be brought.

19. Violent crime continues to increase across the country, and hate crimes are a particular concern. Many states have recognized the significant impact of hate crimes and have enacted

laws to combat them. The annual hate crime reports that you authorized the FBI to publish reflect such crimes in every state except Alabama and Mississippi in 2005.

It is obvious that hate crimes are a national problem, and should be a priority of the Department. I was encouraged that at the October 18 hearing, you said that "prosecution of hate crimes has become, sadly, much a priority," and that the Department must "be actively involved in" this effort. In your hearing testimony, however, you did not go into any specifics.

There are concerns that the Department is not doing enough to combat hate crimes, and that the FBI's annual report fails to represent an accurate number of hate crimes. In 2005, as national crime rates increased, the hate crimes reported and the number of reporting agencies declined. The guidelines implemented by the FBI in collecting and classifying data on hate crimes seem overly restrictive.

The FBI has the authority to create additional categories of bias based on ethnic background and national origin, and to establish reasonable criteria to determine whether prejudice is involved in a crime. If the guidelines are enhanced to include more expansive categories of race, ethnic background and national origin, the data would be more accurate and would advance the purpose of the Act. In light of this:

**Questions:**

- **How should the Department go about making hate crimes investigations and prosecutions a higher priority?**

**ANSWER:** As I testified, the priorities of the Civil Rights Division are both the historic (such as equal protection) and the current (hate crimes). As I understand it, prosecution of hate crimes is something that the Civil Rights Division is very actively involved in and must continue to be actively involved in.

- **Will you ask the FBI to enhance its guidelines to produce accurate data that will advance the purpose of the Act?**

**ANSWER:** I am not currently familiar with the FBI's guidelines in this regard. I can assure you, however, that if confirmed I will work with Director Mueller to ensure that the FBI meets its responsibilities in the most efficient manner possible.

Civil Rights

20. I was encouraged by your statements during the hearing that you appreciate the importance of the Department's role in enforcing civil rights. However, to fulfill the Department's leadership responsibilities in this area will require immediate, sustained, and concrete action. When asked about your plans for correcting the problems in the Civil Rights Division, you offered no specifics. It is important for the Committee to know in greater detail how you propose to approach this problem.

In recent months, there have been troubling reports that personnel decisions in the Civil Rights Division have been based on improper partisan considerations. There has been a concerted effort by the Administration to replace long-serving career attorneys with attorneys chosen at least in part because of their politics and ideology. This practice has been widespread and was very damaging to the morale of the attorneys who have the important job of enforcing our civil rights laws.

-- Bradley Schlozman, a former official in the Division, sought to transfer three minority women -- all of whom had served successfully for years -- out of the Appellate Section of the Division. Mr. Schlozman, the acting head of the Division at the time, admitted seeking to transfer them so they could be replaced by "good Americans." They were replaced by men with conservative credentials. Mr. Schlozman also told the Committee that he had bragged about hiring Republicans in the Division.

-- A Deputy Chief of the Voting Section, who had served in the Department for over 25 years with distinction, was transferred involuntarily to a dead-end training job after he and other career attorneys recommended raising a Voting Rights Act objection to a Georgia photo ID law that had been pushed through by Georgia Republicans. That law was later blocked by the courts, which compared it to a poll tax of the Jim Crow era.

-- Beginning in 2003, according to press reports, an increasing proportion of attorneys hired in three key Sections of the Division were members of the Republican National

Lawyers Association and other conservative groups, and fewer of these new hires had experience in civil rights.

-- There are many examples of career Section Chiefs who were removed, and attorneys who were transferred were denied assignments, or left because they found working in the Division so difficult. Similar concerns have been raised by other career employees with the Division, including some of the civil rights analysts who help review voting changes in states covered by the Voting Rights Act.

Federal law clearly prohibits this sort of political litmus test for career civil service employees. These changes in hiring practices have been demoralizing to the Division's personnel, and have undermined the Division's mission of enforcing civil rights. The Department's Inspector General and Office of Professional Responsibility are investigating these abuses, but their investigation is likely to take many months.

a. Correcting these problems will require immediate action by the next Attorney General. Can you tell the Committee specifically how you plan to do that?

**ANSWER:** As I have repeatedly stated, there can be no political litmus test for the hiring of career civil service employees. This is, and must be, a bedrock principle. Instead, hiring should be done on the basis of competence and dedication to the mission of the Department of Justice. I believe the best way to ensure that no political litmus test is imposed is through a zero tolerance policy. I have indicated my position in the past and reaffirm it here.

b. Is it your understanding that the White House will give you free reign to investigate and correct the problems in the Civil Rights Division?

**ANSWER:** Yes.

c. As you know, many key positions in the Justice Department are currently unfilled. Will you have substantial input in filling those positions, including the head of the Civil Rights Division?

**ANSWER:** Yes.

d. Will you issue a statement to the attorneys in the Civil Rights Division that all personnel and litigation decisions will be based on merit, not partisan considerations?

**ANSWER:** I have stated, and will continue to make clear, that regardless of component, career personnel decisions must be made on the basis of merit and dedication to the Department's mission, not partisan consideration. Litigation decisions similarly must be guided only by the law and the facts, not partisan or political considerations.

e. Will you review the management of the Division – both by political appointees and by career employees – to ensure that the Division is capable of carrying out needed reforms and fulfilling its vital mission? Will you agree to remove managers who have improperly considered political factors in hiring, promotions and performance evaluations?

**ANSWER:** I will, if confirmed, review the management of the Civil Rights Division to ensure that the Division is capable of carrying out any needed reforms and fulfilling its vital mission. I know of no manager currently in place who has made improper personnel decisions; should information to that effect come to my attention, I will certainly act appropriately.

f. Will you review the serious allegations of politically motivated decision-making in recent years and take corrective action?

**ANSWER:** As I understand that, those allegations are currently under investigation. I will review the results of those investigations and act accordingly.

g. Will you identify victims of improper personnel practices and provide remedies for them?

**ANSWER:** As I understand that, those allegations are currently under investigation. I will review the results of those investigations and act accordingly.

h. Will you adopt a plan to recruit and hire career attorneys of the highest caliber? If so, please describe that plan.

**ANSWER:** I firmly believe that career attorneys must be hired on the basis of merit and dedication to the mission of the Department of Justice. Of course the Department and the American people are best served if the Department can recruit career attorneys of the highest caliber. It is my understanding that the current policies in place reflect those considerations. My plan, if confirmed, would be to lead by example through my dedication to the Department's mission.

i. If you are confirmed, I would be interested to hear in more detail about your progress in addressing the problems in the Civil Rights Division once you're on the job. If confirmed, will you be willing to inform the Committee within a month or so to discuss progress on civil rights issues?

**ANSWER:** I commit, if confirmed, to keeping this Committee informed on an ongoing basis of the Department's progress on fulfilling its historical mandate of enforcing the civil rights laws.

21. Many of us on the Committee have repeatedly tried without success to get information from the Administration on its civil rights enforcement.

-- We were troubled when the Civil Rights Division overruled its career professionals and rubber stamped the Republican-backed 2005 photo ID requirement for voting in Georgia that disproportionately disadvantaged minorities. That decision was widely condemned as based on partisan considerations. A court later blocked the Georgia law, comparing it to a modern-day poll tax, and the state abandoned it. I asked repeatedly about the justification for the Division's decision to approve it, but never got a full explanation.

-- I also asked former Assistant Attorney General Wan Kim why the Division had filed so few cases of racial discrimination in voting. He testified that the Division had filed as many as 15 such cases, but later sent a letter to the Committee that showed the Division actually has filed only two.

-- We also never received a full explanation of the reasons for the involuntary transfer of Robert Berman, the long-time Deputy Chief of the Voting Section,

after he agreed with the career professionals' recommendation to object to the 2005 Georgia photo ID law on voting.

If confirmed, will you work cooperatively with the members of the Committee to review these issues and provide specific responses on each of the issues listed above?

**ANSWER:** As I have previously stated, I believe that this Committee performs an important oversight role. I am committed to working with this Committee to provide it the information it needs to fulfill its oversight responsibilities.

22. At your nomination hearing, Senator Cardin asked you about the Department of Justice's Voting Access and Integrity initiative, adopted in the early years of the Bush Administration. In practice, the initiative 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. Senator Cardin asked whether "your priority and your instructions to the Civil Rights Division" would focus on the traditional role of seeking to remove obstacles to voting, or whether you would focus on discouraging voter fraud. You responded that you "don't think it's an either/or proposition," and that "opening up access to the vote and preventing people who shouldn't vote from voting are essentially two sides of the same coin."

I was troubled by your answer. 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. Even states that have enacted photo ID laws to combat voter fraud admit they have no concrete evidence that voter fraud is occurring. Georgia's Secretary of State said she knew of no example of anyone impersonating a voter to cast a fraudulent ballot. Indiana couldn't cite a single example of voter fraud. 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 Department's priorities should focus on the most prevalent and significant voting problems? Do you also agree that the lack of evidence of fraudulent voting by persons impersonating other voters does not warrant a large commitment of resources by the Department?

**ANSWER:** I completely agree that the Department's priorities should focus on the most prevalent and significant voting problems. At this time, however, I do not have sufficient information to determine whether the Department's priorities comport with that approach, although I assume that they do.

b. If a photo ID requirement for voting is found to have a disproportionately negative impact on minority voters, and, at the same time, little evidence exists of voter impersonation to justify the need for such a requirement, doesn't that potentially constitute unlawful discrimination in violation of the Constitution and Section 2 of the Voting Rights Act?"

**ANSWER:** This is not a question that I have had occasion to consider as a judge or in private practice. I would be reluctant to opine on this issue absent more careful study.

c. 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 sometimes brings criminal prosecutions to punish those who sought to 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?

**ANSWER:** I believe that the Civil Rights Division must follow its tradition of focusing on the most prevalent and significant voting problems.

d. 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. 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?

**ANSWER:** As I mentioned above, I agree that the Division's priorities must reflect the most prevalent and significant voting problems.

e. As noted above, in this Administration, the Division has 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) -- a fraction of the number of such cases filed in the Clinton Administration. 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?

**ANSWER:** The Civil Rights Division is charged with enforcing all of the Voting Rights Act. I can assure this Committee that, if confirmed, the Division will enforce each and every provision of that Act. As I mentioned above, the right to vote is one the most valuable rights that we have.

23. There have been several 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, mentioned above, I am 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 current Chief of the Voting Section, John Tanner, and the new 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 had spent decades in the Department under both Republican and Democratic administrations. Do you agree that these allegations of race discrimination and poor morale in the Voting Section raise serious concerns that should be addressed?

**ANSWER:** Although I am not familiar with these particular allegations, I can assure this Committee that I believe that allegations of racial discrimination or poor morale always raise serious concerns.

24. During your hearing, Senator Cardin asked you about the Civil Rights Division's approval of a 2005 Georgia photo ID law over strong objections by career professionals that the law would have a discriminatory impact on minority voters. That 2005 law was enjoined by a federal court as having the effect of a Jim-Crow era poll tax, and the injunction was upheld by the Eleventh Circuit. The Georgia legislature abandoned the 2005 law, and passed a new version the following year. The Washington Post reported that Mr. Tanner dismissed concerns over the racially discriminatory impact of photo ID laws in recent public remarks to the National Latino Congress, suggesting that such laws affect the elderly, but not minorities because "minorities don't become elderly the way white people do. They die first." These remarks display a shameful lack of understanding and sensitivity that is unacceptable in the person charged with

enforcing the nation's laws against voting discrimination. These comments only underscore the Voting Section's troubling record under Mr. Tanner. If you are confirmed, will you review Mr. Tanner's record and consider whether he should be replaced as head of the Voting Section?

**ANSWER:** I am not familiar with Mr. Tanner's record. I can assure this Committee, however, that I am committed to ensure that the Civil Rights Division is in the best position possible to fulfill its critical historical mandate.

25. Allegations recently became public that Susana Lorenzo-Guiguere, a Special Litigation Counsel in the Civil Rights Division's Voting Section, under the supervision of Mr. Tanner, may have reopened the case of United States v. City of Boston, which was settled in 2005, for the purpose of obtaining taxpayer reimbursement for travel to and from Massachusetts, where her family reportedly maintains a summer home. Reports suggest that she collected per diem expense payments while spending the summer at her Cape Cod home. Although it appears that this particular incident is under investigation by the Inspector General and the Office of Professional Responsibility, if you are confirmed, it is important that you also investigate the possible abuse of the Division's enforcement authority and its resources. If you are confirmed as Attorney General, will you examine these allegations regarding the Boston case?

**ANSWER:** I am not familiar with those allegations. However, your question indicates that they are already under investigation. If so, I can assure this Committee that I would seriously review the findings of any such investigation and take appropriate action.

26. One of the most disturbing aspects of the U.S. Attorney scandal is the evidence that some of the U.S. Attorneys were fired for failing to use their offices for political gains. The U.S. Attorney in New Mexico was fired after he refused to prosecute Democrats for election crimes because he felt the accusations were not supported by the evidence. The U.S. Attorney in Washington was let go after he refused to bring election fraud cases against Democrats in the state's 2004 Governor's race. There is also evidence that political advisors in the White House were involved in the effort to press U.S. Attorneys to bring cases to benefit Republicans.

a. Do you agree that no U.S. Attorneys should be removed for refusing to bring cases they believe lack legal basis? If confirmed, will you investigate whether political motivations had a role in the U.S. Attorney firings?

**ANSWER:** As I understand it, there is a mechanism in place to allow U.S. Attorneys who have a conscientious objection to bringing a specific case not to participate in that case; that said, the Department does have priorities, and U.S. Attorneys, like its other employees, are charged with enforcing the law. I believe that whether political motivations had a role in the U.S. Attorney firings is already under investigation.

b. Will you pledge that if confirmed, you will not allow the political arm of the White House to influence decisions on prosecutions?

**ANSWER:** Yes.

27. I'm also troubled by the Civil Rights Division's record in enforcing Title VII, the law against job discrimination based on race, gender, national origin or religion. The Division has filed and resolved far fewer Title VII lawsuits of all kinds compared to the previous Administration, even though it now has more attorneys. If you exclude cases developed by the Clinton Administration or by a U.S. Attorney's office, according to the Division's website, it's filed only 42 Title VII job discrimination cases since 2001. That's an average of only 7 cases a year. The Section currently has almost 40 attorneys, so it should have a stronger enforcement record. Do you agree that this record raises serious questions on whether the Department of Justice is adequately enforcing the laws against job discrimination?

**ANSWER:** As I am not familiar with the details of the cases that have been brought—including their complexity, scope, and potential impact—I would be hesitant to agree that the numbers alone raise serious questions.

28. The number of cases brought by the Department alleging a pattern or practice of discrimination against women, African Americans, or Latinos, is especially 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 in the Clinton Administration each year. 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?

**ANSWER:** The Department of Justice, through the Civil Rights Division, has as its mission enforcing the Civil Rights laws. The Division must, when enforcing these laws, seek to maximize its resources and impact. Part of my review as to whether the Civil Rights Division is in the best position possible to fulfill its historical mission will naturally include a consideration of whether additional pattern or practice or other job discrimination cases should be brought.

29. I'm also concerned that the Division has backed away from bringing cases on behalf of African Americans and Latinos. According to the Equal Employment Opportunity Commission, each year since 2002, approximately eight times as many race discrimination charges have been filed nationwide by African Americans as by whites, although whites make up a far greater proportion of the overall population. This is a powerful indication that race discrimination against African Americans occurs more frequently in the nation's workplaces than race discrimination against whites. Yet the Section has filed almost as many cases alleging national origin or race discrimination against whites as against African Americans and Latinos combined. No one should be the victim of discrimination, regardless of their race. But the Division's focus should also reflect the reality of where the greatest problems occur, and charges of racial and ethnic discrimination against African Americans and Latinos make up the largest group of charges of discrimination. If confirmed, will you review the Division's record and priorities on job discrimination to ensure that the Division's enforcement activities reflects the areas of greatest need?

**ANSWER:** Please see the response to question 28.

30. As a judge, you frequently dismissed workers' cases of job discrimination, often denying them the chance to have their claims decided by a jury. I'm troubled that in some of these cases, you seemed to ignore or disregard clear evidence in the workers' favor.

In Sorlucco v. New York City, which was finally decided in 1992, you were twice reversed by the Second Circuit for overturning a jury verdict in favor of a female police officer who claimed that her employer retaliated against her after she reported having been raped at gunpoint by a more senior officer. First, you ruled that she should not even have a chance to present her claims to a jury. The Second Circuit overturned your decision, and ordered that the police officer be given a trial. After Officer Sorlucco won at trial, you tried to throw out the jury verdict. The Second Circuit overruled you again, saying you had abused your discretion as a judge.

In a 2005 case, Tomassi v. Insignia Financial Group, the Second Circuit ruled you "failed to apply the correct legal standard" when you dismissed an age discrimination case. The worker was a 60-year-old woman subjected to repeated negative remarks about her age by a supervisor. He suggested she should retire, admitted he wanted to hire workers who were "younger, energetic" and "attractive," and lied about the reason for replacing her with a 25-year-old employee. You said there wasn't enough evidence to give the worker her day in court, and dismissed her supervisor's negative comments about her age as simply "stray remarks."

In Lopez v. Metropolitan Life Insurance Company, you ruled against an African American worker of Jamaican descent who claimed he was denied a job because of his race. You denied him a trial, and your opinion barely even mentioned that the employer had told the applicant he was unlikely to succeed in attracting clients because the applicant had an accent and there were few African Americans in the area the company served. Most people would say that if an employer suggests someone can't do the job because he has an accent and only African Americans customers will want to work with him, it's at least relevant to the question whether there's been discrimination. But in weighing the evidence, you failed to discuss these critical facts.

a. Although you sometimes ruled for victims of workplace discrimination, on the whole, your record suggests you may be skeptical of workers who claim to suffer discrimination. When Senator Feinstein asked you about the Sorlucco case during your hearing, you said that you believe discrimination is wrong, and that you personally opposed a rule barring women from a club of which you previously were a member. Your stand in that instance is commendable. However, discrimination is often far less stark than the example you provided of a per se rule against admitting women members, and, often must be proved by indirect evidence viewed in the totality of the circumstances. Generally, the Department is faced with cases – like those you considered as a judge – in which the defendant does not admit to having a blanket discriminatory rule, and discrimination must be proved by circumstantial evidence. Why are you the right person to help turn around the Division's poor record on job discrimination?

**ANSWER:** I believe that I am the right person to lead the Department of Justice at this time. As I testified, I believe that I have a record of 40 years of service as a lawyer, as an assistant U.S. attorney, as a judge, in my interactions with my colleagues, with my employees, and in my personal standards, that demonstrate my fitness for this position and the standard that I would bring to the Department.

b. Why did you give such little weight to supervisors' statements suggesting bias in the Lopez and Tomassi cases?

**ANSWER:** To the extent that I gave particular weight to certain statements and not to others, I did so for the reasons set forth in my opinions.

31. 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 last year after they were alleged to have fought with a white student. For 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. Sen. Leahy, I, and other members of Congress have asked the Department to describe the actions it has taken to respond to the events in Jena. We have not received any response.

- a. If confirmed, will you get back to us promptly on that issue?

**ANSWER:** To the extent that information requested has not already been provided, yes.

- b. 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 and the Department of Education to determine whether the Department of Justice is doing all it can to address this the problem?

**ANSWER:** To the extent that disparate discipline in schools violates federal law the Department of Justice is charged with enforcing, I believe the Department can and should enforce those laws vigorously.

32. In a series of cases, the Supreme Court has interpreted the definition of "disability" under the Americans with Disabilities Act in a restrictive manner that has led several courts to conclude that people with a range of serious health conditions including epilepsy, diabetes, cancer, HIV, and mental retardation are not persons with disabilities protected by the Act.

- a. In your view, does the Supreme Court's narrow interpretation of the definition of "disability" under the Act reflect the intent of Congress when it enacted the law?

**ANSWER:** The Supreme Court's decision is the law of the land unless and until the Americans with Disabilities Act is amended by Congress.

- b. What are the possible ramifications of this interpretation for veterans returning from war with conditions such as traumatic brain injury, loss of the use of limbs, post traumatic stress disorder, or epilepsy?

**ANSWER:** I believe that Congress is in the best position to determine the potential ramifications of the Supreme Court's jurisprudence and whether amendment to the law is necessary or advisable.

**Prosecution of Former Governor Don Siegelman of Alabama**

There has been a great deal of publicity recently surrounding allegations of partisan motivation in the prosecution of former Governor Don Siegelman of Alabama. Do you plan to review ongoing prosecutions, grand jury proceedings and investigations to ensure that there are no other proceedings with similar partisan motivation? If so, who will conduct those inquiries?

**ANSWER:** I can assure this Committee that, if confirmed, I will work to ensure that each and every Department employee understands that cases must be brought and prosecuted based on the law and the facts, not partisan considerations.

**DC Gun Ban**

For almost three decades, the District's ban on handguns and assault weapons has helped reduce the risk of deadly violence. City residents and public officials overwhelmingly support the ban, and until the recent decision, courts have upheld it. In that decision, the D.C. Circuit found that D.C.'s gun ban was unconstitutional under the Second Amendment. The Supreme Court has yet to decide whether it will review the ruling, so residents of the District are waiting to see if the current gun ban will remain in force. It's obvious that allowing more guns on the streets and in our community will increase the number of violent deaths in D.C., including homicides, suicides and accidental shootings. It's more likely that deadly gun violence will erupt in our public buildings, offices, and neighborhoods.

D.C. has a major gun violence problem already because of steady flow of guns into the District from other states with more lenient laws. The effectiveness of the District's current ban on gun possession is demonstrated by the fact that virtually none of the guns used in crimes in the District originated there. The solution to D.C.'s gun crime problem is in strengthening lax gun laws elsewhere, not weakening those in the District. According to the Bureau of Alcohol, Tobacco, Firearms and Explosives, nearly all guns used in crime in the city originated outside of the District – coming from jurisdictions with gun laws far less strict than the District's. The tragic and graphic stories of gun violence that capture front-page headlines in the District show that the current gun-safety laws need to be strengthened, not abolished.

33. What is your view of the Second Amendment?

**ANSWER:** I believe that the Second Amendment does guarantee an individual right.

34. Do you agree with former Attorney General Ashcroft that "the text and the original intent of the Second Amendment clearly protects the right of individuals to keep and bear firearms"?

**ANSWER:** Although I have not studied Attorney General Ashcroft's statements or reasoning in this area, I do agree with the general proposition that the Second Amendment guarantees an individual right.

35. Why should the District be prevented from regulating guns under an individual-rights view of the Second Amendment?

**ANSWER:** I have not closely studied the extent to which gun control regulations would be constitutional in light of an individual-rights view of the Second Amendment. It is my understanding, however, that this issue has been presented to the Supreme Court on certiorari.

**Assault Weapons Ban**

Assault weapons are killing machines intentionally designed to maximize their deadly power by using a rapid rate of fire. Over and over, the nation has endured horrific mass shootings that might have been less devastating if we had an effective and permanent ban on these killing weapons and their ammunition. As the Virginia Tech tragedy reminded us, the high capacity ammunition clips used with these weapons virtually guarantee that a killer can inflict severe damage in a brief period of time. In one of the worst mass shootings in recent history, a troubled college student engaged in a killing spree lasting only 9 minutes that inflicted over 100 wounds on the victims. An estimated 170 shots were fired – about one shot every three seconds. In the end, more than 50 students, staff and faculty were injured or killed. Although the weapons involved at Virginia Tech were not semiautomatic weapons, investigators recovered 15-round and 10-round magazines -- magazines that were banned for ten years under the Assault Weapons Ban.

Many organizations have called for a renewal of the assault weapons ban. In a recent report, the International Association of Chiefs of Police called for a complete ban on military-style assault weapons. They pointed out that a 2003 analysis of FBI data revealed that almost 20% of officers who died in the line of duty between 1998 and 2001 were killed with weapons that could be classified as assault weapons. They've also called for a ban on .50 caliber sniper rifles, which can penetrate armor plating and destroy aircraft. These weapons are currently sold with less restrictive federal controls than standard handguns. We know from a GAO report that these weapons have been obtained by drug dealers in Indiana, Missouri and California. As Seattle policy analyst Bob Scales points out, the assault weapons issue is "not just a police issue. It's a public health issue, it's a youth issue and our schools are involved."

The risks of these weapons not only jeopardize lives in our communities. They also pose a serious threat to law enforcement. According to the National Law Enforcement Officers Memorial Fund, during the first six months of 2007, more than 101 U.S. police officers have been killed on duty already this year – the highest number of such deaths in 29 years. More than half were the result of fatal shootings. Homicides involving assault weapons are on the rise. The failure to renew the ban has undermined the safety of our streets, our neighborhoods and our schools. These high-capacity weapons and ammunition have no place in any community in America.

36. What is your position on the assault weapons ban? What about .50 caliber rifles?  
(See answer below)
37. Would you support legislation that regulates high capacity magazines? (See answer below)
38. Part of the answer to this violence is linked to reducing the number of assault weapons on the street. Would you be willing to work with those of us in Congress opposed to the ban?

**ANSWER:** I am not familiar with the specifics of the assault weapons ban and what would or would not come within that ban. I can assure this Committee, however, that if confirmed, I would seek the views of ATF and career prosecutors in considering this issue.

### **Hate Crimes**

Hate crimes violate everything our country stands for. More than 8,000 hate crimes are reported every year in the United States, but that's only the tip of the iceberg. The Justice Department confirmed in 2001 that many hate crimes go unreported. The Southern Poverty Law Center estimates that the real number of hate crimes committed in the United States each year is closer to 50,000. Despite the large number of such crimes every year, there's been a steady decline in hate crime prosecutions and convictions by the Department of Justice. In 1999, the Department charged 45 persons with hate crimes and convicted 38. In 2006, the Department charged 20 and convicted 19. Hate crime prosecutions have essentially been cut in half by the Bush Administration. Shamefully, the 2005 and 2006 editions of the FBI crime data compendium, *Crime in the United States*, contain no summary of hate crime data, a section that had previously been included since 1996. Hate crimes have obviously become less of a priority in recent years.

The numbers suggest a serious shift in the Department's priorities away from hate crime investigations and prosecutions, which is very troublesome. The current federal hate crime law was passed soon after the assassination of Martin Luther King, Jr. Today, however, it is a generation out of date. It still does not protect many vulnerable groups in society from bigotry and hate-motivated violence. Too often, these hate crimes go unnoticed. Last month, the Senate passed legislation to protect additional classes of victims and provide increased resources for state and local governments to investigate and prosecute hate crimes, but President Bush has threatened to veto the bill if it reaches his desk. The Administration's official position is that such legislation is "unnecessary and constitutionally questionable."

39. Do you share the Administration's view of the pending hate crimes legislation?

**ANSWER:** I have not had the opportunity to review either the legislation or the Administration's position.

40. Would you be willing to publicly support our efforts to expand hate crime legislation to protect victims of such bigotry?

**ANSWER:** As I am unfamiliar with the legislation, I would be hesitant to commit one way or the other.

#### **Rising Crime Rates and Federal Funding for Law Enforcement**

The Attorney General needs to take a more active role to see that the federal government is doing its part to assist state and local law enforcement in combating violent crime. The FBI has reported an increase in the crime rate for the second year in a row. The trend is disturbing because crime rates had been falling steadily since the mid-1990s. Clearly, we need to provide greater federal support to state and local law enforcement. But, we're doing just the opposite. As crime rates are going up, federal funding for state and local law enforcement is going down. Two important federal anti-crime programs have been steadily losing funds: the community policing program and the grants to combat gangs and local crime. The COPS program has been improving community policing across the country with federal grants to state and local law enforcement to hire and train more police, purchase new crime-fighting technologies, and develop more effective police strategies. It's been a major success. It put more officers on the street in 13,000 communities across the country and was an important factor in reducing violent crime by over 26% between 1994 and 2001. It's an excellent return on investment.

In Massachusetts, Boston experienced serious increases in gang and firearm violence during the late 1980's and early 1990's. We had the highest-ever homicide total of 152 in 1990. Significant investment from the COPS program -- a total of \$17 million from 1994-2000 -- helped the Boston Police to dramatically decrease gang, gun and youth violence, quickly bringing the number of homicides down to the lowest level ever in 1991 - only 31 homicides has kept it there through in 2000. But in 2001, youth, gun and gang violence began to increase, but by 2005 and 2006 had since then doubled. During these six years period support dwindled. Boston received only \$3 million in this period. Now, the President wants to cut the community policing program by 94 percent, and virtually eliminate the anti-gang grants.

41. What is your response to the President's threat to veto the Senate appropriations bill that would add \$550 million for community policing grants and \$1.4 billion for Byrne grants to combat violent crime and gangs?

**ANSWER:** I am not familiar with the details of the Senate appropriations bill, any specific items, or the President's veto threat.

42. What actions can the Department of Justice take to help state and local governments dealing more effectively with rising crime rates and falling funding?

**ANSWER:** The Department is, and should be, fully committed to providing assistance to state and local governments and law enforcement--assistance that is designed to help state and local

governments address crime problems in the most efficient way, within resource constraints. The Department can provide assistance in a wide range of ways, including means like training or equipment, not just through direct financial assistance.

#### **Crime Prevention**

Former Attorney General Gonzales stated in a speech earlier this year at the National Press Club that the Justice Department believes "...prevention is the real solution to crime among our youngest citizens. By law, the federal government has only a very limited role in prosecuting juvenile offenders – the vast majority of such crimes are prosecuted by the states. These are not issues that the Department can fix through heightened enforcement or by using federal tools. Instead we must focus on helping out communities that have plans and structures in place to work on prevention and offer positive alternatives to crime, violence and gang membership." Those were his words.

43. As Attorney General, would you have a similar philosophy on prevention?

**ANSWER:** I believe that, particularly with respect to the issue of juvenile crime, prevention is critical. As many have observed, we cannot prosecute our way out of this problem. Instead, we must prosecute the worst of the worst, with prevention efforts aimed at the rest.

44. What role, do you believe the Department of Justice should have in encouraging crime prevention programs?

**ANSWER:** The Department should, and I believe does, take a leading role in encouraging effective crime prevention programs. The Department can do so through identification of best practices and effective prevention programs, and encouragement of state and local governments to adopt them.

### Sentencing Guidelines

The United States has the highest incarceration rate in the world. Over 2.2 million Americans are being held in federal or state prisons or local jails. The federal prison system is now the largest prison system in the country -- larger than any state system -- with nearly 200,000 prisoners. Two-thirds of these prisoners are African American or Hispanic. Nearly twelve percent of all young African-American men are incarcerated. Women are the fastest-growing part of the prison population, and more than 1.5 million children have a parent behind bars. These numbers suggest serious systemic failures in our society, especially the disproportionate impact of the criminal justice system on minorities and the poor.

Disparity in sentencing is a long-standing problem. Many of us on the committee worked together to produce the bipartisan Sentencing Reform Act of 1984 to balance the goal of impartial sentencing with discretion to make the sentence fit the crime in individual cases. We sought to correct the often outrageous sentencing disparities that resulted from consideration of race, gender and other illegitimate criteria. Before the enactment of the Sentencing Reform Act, Judge Marvin Frankel described these disparities as "terrifying and intolerable for a society that professes devotion to the rule of law."

Some judges think the Act went too far in limiting their discretion. As a federal judge in 1988, you ruled that the sentencing guidelines were unconstitutional. One could say that you were ahead of your time in light of recent Supreme Court decisions on constitutional problems with the guidelines. As a result, the federal sentencing guidelines are now advisory. But they still authorize judges to consider a wide range of so-called "relevant conduct" in deciding on sentences.

45. Has your opinion of the sentencing guidelines changed since your ruling in the *Mendez* case?

**ANSWER:** Yes, particularly in view of the Supreme Court's decision in *Mistretta* and *Booker*.

46. Given that you previously determined that the sentencing guidelines are unconstitutional, what is your opinion of the Justice Department's attempt to re-establish a mandatory sentencing guideline system? (See answer below)
47. How difficult will it be for you to reconcile your opinion as a judge on the sentencing guidelines with your responsibility as Attorney General to support the Administration's policies? (See answer below)
48. If sentencing guidelines are abolished, what sort of sentencing rules would you recommend to replace them? (See answer below)

**ANSWER:** The issue of sentencing is obviously a very complex one. I would bring to bear my experience as a federal judge to any consideration of sentencing, be it consideration of guidelines reform or statutory mandatory minimums.

#### **Mandatory Minimums**

The Administration strongly supports sentencing guidelines, and in June, the Department of Justice proposed legislation that would once again make the guidelines mandatory by creating a "minimum guideline system with an advisory maximum penalty" structure. In other words, the Department is advocating mandatory minimum sentences for all federal crimes, while leaving the maximum sentences advisory.

In a recent report, the United States Sentencing Commission found that "the rate of imprisonment for longer lengths of time climbed dramatically" in the last two decades and that "there has been a dramatic increase in time served by federal drug offenders." A major factor in the large increase in incarceration is the use of mandatory sentences, especially for low level drug offenders. According to the Sentencing Project, drug arrests have tripled over the last 25 years to a record 1.8 million in 2005, and the number of drug offenders in prisons and jails has increased by twelve-fold since 1980. Almost half a million people are incarcerated in state or federal prisons or local jails for drug offenses. Mandatory sentences have contributed to the enormous increase in the prison population.

49. What is your view of mandatory sentences in light of the Department of Justice proposal to impose mandatory minimum sentences for all federal crimes? (See answer below)
50. Do you have any concern that increasing the use of mandatory minimum sentences will increase the disparate impact of such sentences on poor and minority communities?

**ANSWER:** The issue of sentencing is obviously a very complex one. I would obviously bring to bear my experience as a federal judge to any consideration of sentencing, be it consideration of guidelines reform or statutory mandatory minimums. As I understand it, however, one goal of mandatory minimums or sentencing guidelines is to promote uniformity and eliminate disparities in sentencing.

### Crack-Powder Laws

The crack-powder laws illustrate how mandatory minimum sentences can become a severe problem. The crack powder laws were originally designed to punish those at the highest levels of the illegal drug trade, such as traffickers and kingpins. However, the amount of a drug that triggers the harsh sentences is not associated with high-level drug dealing. A 2005 Sentencing Commission report found that only 15% of cocaine traffickers were high-level dealers. The overwhelming majority of defendants are low-level participants, such as street dealers, lookouts or couriers. These laws also have a severe impact on the African American community. In 2005, 82% of crack cocaine defendants were African Americans, even though they represent only a third of those who actually use the drug.

Under the current sentencing structure, the ratio for powder and crack cocaine is 100:1. One gram of crack cocaine triggers the same penalty as 100 grams of powder cocaine. Possession of 5 grams of crack cocaine triggers a 5 year mandatory minimum penalty. This is the only drug that has a mandatory prison sentence for a first-time possession offense. Senator Hatch and I recently introduced legislation to reduce the ratio from 100:1 to 20:1, and eliminate the mandatory minimum sentence of 5 years for first-time possession. The amount of crack cocaine triggering a mandatory minimum sentence would be raised from 5 grams to 25 grams, to reflect the most serious cocaine traffickers. The cocaine laws would be more consistent with the penalty structure for other types of drugs and would address the disparities in sentencing.

The Sentencing Commission recently amended the guidelines for crack cocaine by reducing the sentencing ranges, a change that will affect 78% of federal defendants. An analysis of the amendment suggests that if the amendment is made retroactive, nearly 20,000 non-violent, low level drug offenders would be eligible for a reduction in their sentences. However, the Commission recognized this as only an initial step in eliminating unwarranted disparities in the federal crack powder laws, and they have strongly urged Congress to act on the 100:1 ratio.

51. What is your view on the Sentencing Commission's proposed amendment to the guidelines for crack cocaine? (See answer below)
52. What's your position on the existing mandatory minimum sentences for crack cocaine? (See answer below)
53. Are you opposed to the proposal that Senator Hatch and I offered to repeal the mandatory 5 year sentence for mere possession?

**ANSWER:** I am aware generally of the debate concerning the differential sentencing of crack as opposed to powder cocaine offenses. I am also generally aware of the Sentencing

Commission's proposed amendment to the guidelines for crack cocaine offenses. I believe that this is a complex issue, and am reluctant to opine on specific approaches absent further study.

#### **Department of Justice Priorities**

Federal law enforcement data show a major shift in the types of criminal prosecutions currently being pursued by the Department of Justice. Since 2000, white collar crime prosecutions are down 27%, while organized crime cases have declined 48%. Prosecutions of government employees for corruption have dropped 14%. Meanwhile, prosecutions for immigration, terrorism and national security cases have increased dramatically. Immigration cases have increased by 127% since 2000. Federal resources have also been redirected to national security and terrorism-related investigations. The proposed budget for the FBI is a useful example. The FY 2008 proposed distribution of funds for the FBI includes 60% for intelligence and counter-terrorism work; 33% for criminal law enforcement; and 7% for state and local assistance.

There is no question that investigating and prosecuting terrorism must be a high priority, but we must not forget the importance of protecting our citizens from everyday crime. For the second year in a row, violent crime has increased. Funding has been reduced for important law enforcement initiatives such as the COPS Program and the Byrne Grant Program. By focusing the majority of our resources on foreign threats, we may be compromising our safety here at home. Neglecting to pursue white collar criminals and corrupt officials can have an adverse effect on our economic well-being and our trust in the government.

As a federal district court judge, you've presided over hundreds of cases, ranging from drugs and weapons to terrorism and white collar crime. You undoubtedly understand how crime can undermine community safety and public trust. As Attorney General, you will have a major role in shaping the priorities of the Department.

54. Do you agree that a balanced approach would be more effective in meeting our security goals both domestically and internationally? (See answer below)

55. What actions would you take to improve the distribution of resources to ensure that we do not compromise the safety of our communities?

**ANSWER:** I agree that the Department of Justice must take a balanced approach to fulfilling its mandate of enforcing federal laws running the gamut from terrorism, to white collar offenses, to civil rights. If confirmed, my review of the Department of Justice's current priorities and allocation of resources would be guided by that belief.

**Juvenile Justice and the 'Jena 6'**

The "Jena 6" case is a stark reminder that, despite the progress in reducing racial disparities in the justice system, they're still serious problems, especially in the juvenile justice system. 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 last year after they were alleged to have fought with a white student. For 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 received a slap on the wrist.

In 1998, Congress addressed the issue of disproportionate minority contact within the juvenile justice system. States were asked to collect data on juvenile contacts with police, courts and corrections. Currently, states are required only to "address" efforts to reduce racial disparities. Clearly, more needs to be done. DMC is a problem in every state in the country. Youth of color are more likely to be detained, to be formally charged in juvenile court, and to be confined to state correctional systems than white youth who have committed the same types of offenses and have similar delinquency histories. Despite making up only 16% of the youth population in America, African Americans youth comprise more than 58% of youth admitted to adult prisons.

56. The circumstances in Jena suggest a large difference 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 and the Department of Education, to determine whether the Justice Department is doing all it can to address the problem? (See answer below)
57. What steps would you take to address this problem?

**ANSWER:** To the extent that disparate discipline in schools violates federal law the Department of Justice is charged with enforcing, I believe the Department can and should enforce those laws vigorously.

58. Would you support requiring states to take concrete steps to reduce racial disparities in the juvenile justice system, such as providing the federal government with more detailed information on the monitoring, evaluation and reporting of detained youth? (See answer below)

59. Research demonstrates that youth of color are treated more harshly than white youth – even when charged with the same offense. However, in many parts of the country, no accurate data exists on the number of Hispanic or Latino youth in the juvenile justice system. Would you support efforts to improve data collection, so that there is more information on detention rates across the country – and to help jurisdictions reduce any disparities that exist?

**ANSWER:** Historically, the juvenile justice system has been a matter of state concern. That said, Congress can certainly legislate in that area, including imposing requirements to provide the government with more detailed information and data collection generally.

**Transfer of Youth to Adult Court**

There are 200,000 youths that are tried, sentenced or incarcerated as adults every year in the United States. The majority face charges for nonviolent offenses. On any given day, nearly 7,000 young people are locked up in adult jails – a number reflecting a growing trend over the last decade. According to the Department of Justice, between 1990 and 2004, the number of youth in adult jails increased by 208%. One in ten youths incarcerated on a given day is in an adult jail. In 1997, youth of color comprised 46% of the cases transferred by the judicial system to adult criminal court and 58% of the youth admitted to state prisons.

In a recent study of metropolitan New York and New Jersey, teenagers prosecuted in adult courts were 26% more likely to be re-incarcerated. Research shows that longer sentences do not reduce the likelihood of re-arrest either in the juvenile or adult court. A study found that the suicide rate of juveniles in adult jails is 7.7 times higher than in juvenile detention centers. Although youths 15 to 21 made up only 13 percent of the prison population, they comprised 22 percent of all suicide deaths in prison. Additionally, nearly 10% of the youth interviewed in a recent study reported a sexual attack or rape attempt against them in adult prisons, compared to one percent in juvenile institutions.

60. Given the data on this issue, what is your view on the transfer of youth to the adult system?

**ANSWER:** As I have not had the opportunity to study this issue or the relevant data, I would be hesitant to make such a commitment.

61. Would you be willing to work with the Committee on efforts to reduce the number of youths transferred to the adult criminal system?

**ANSWER:** As I have not had the opportunity to study this issue or the relevant data, I would be hesitant to make such a commitment.

**Juveniles and Mental Health**

A disturbing trend has developed called “warehousing” – which places youths with mental illnesses in the juvenile justice system because no appropriate treatment is available. More than 9,000 children a year are placed in juvenile justice systems so that they can receive mental health care, which often is not available. Two-thirds of juvenile detention facilities report holding children, sometimes as young as seven, who are waiting for mental health placements. Overall, about 7% of youth in detention facilities are awaiting such placement.

It is now well established that the majority of youth involved with the juvenile justice system have mental health disorders. Youth in the juvenile justice system experience substantially higher rates of mental disorder than youth in the general population. Studies consistently document that anywhere from 65% to 70% of youth in the juvenile justice system meet criteria for a diagnosable criteria mental health disorder.

62. What is your view on the number of mentally ill juveniles currently detained – even though they have not been convicted of any crime?

**ANSWER:** I am not familiar with this data and therefore would be reluctant to offer my view.

63. Are you willing to work with Congress and the Office of Juvenile Justice and Delinquency Prevention to provide better care for youths with mental illness who come into contact with the criminal justice system – not for any crimes but for medical treatment?

**ANSWER:** Yes.

**Prison Rape Elimination Act of 2003**

64. Sexual violence in detention is a serious human rights issue. In *Farmer v. Brennan* in 1994, the Supreme Court recognized that the failure to protect inmates from this form of abuse can amount to cruel and unusual punishment, in violation of the Eighth Amendment to the Constitution. Every U.S. jurisdiction has a law criminalizing custodial sexual misconduct. The federal government began addressing this problem through the Prison Rape Elimination Act in 2003. It calls for the analysis of the incidence and effects of prison rape and the provision of adequate funds to protect detainees from sexual abuse. Will you fully enforce the Act's mandate to establish a zero-tolerance standard for sexual violence in detention facilities across the country? (See answer below)
65. One of the Act's key provisions is the development of national standards for the detection, prevention, reduction, and punishment of sexual violence in detention. It created the National Prison Rape Elimination Commission to study the problem and prepare standards. The Commission has convened expert working groups on particular issues. Each working group is composed of experts in the relevant fields, including corrections administrators, researchers, government consultants, and advocates. Once the Commission has preliminarily approved the standards, and after a public comment period and subsequent Commission revisions, if any, the Attorney General will have one year to publish a final rule adopting national standards, based on his independent judgment and giving due consideration to the recommended standards provided by the Commission. What degree of deference will you give the experts who have worked together over the past year to develop the standards and ensure that they sufficiently balance the costs of compliance with the urgent need to improve inmate safety? (See answer below)
66. Once the national standards are adopted, all corrections systems will be required to comply with them. The Attorney General must establish procedures ensuring compliance and reducing the discretionary grants by five percent to states that fail to adhere to the standards. As Attorney General, will you promptly develop a policy that strictly enforces the expectation that all jurisdictions will fully comply with every provision of the ratified national standards? (See answer below)
67. The Attorney General is authorized to provide grants for research through the National Institute of Justice or any other appropriate entity. Will you use this grant-making power to compile information about the problem of prisoner rape, and refuse to support efforts that seek to minimize the extent of the problem? (See answer below)
68. One of the stated purposes of the Act is to "increase the accountability of prison officials who fail to detect, prevent, reduce and punish prison rape." As Attorney General, will you take responsibility for ensuring that sexual violence is not tolerated by personnel within federal facilities? (See answer below)

69. Under federal law, a person with custodial, supervisory or disciplinary authority who engages in a sexual act with someone in federal detention or custody has committed a felony. As the nation's chief law enforcement officer, will you encourage the criminal prosecution of federal officials who abuse their authority by engaging in sexual contact with detainees, and seek severe penalties for such violations? (See answer below)
70. There has been ongoing concern about the Texas Youth Commission, where more than 2,000 allegations of sexual and physical abuse of juvenile detainees have recently come to light. The Dallas Morning News reported that the Justice Department had collected information over the course of four years but failed to prosecute anyone or do anything to produce agency-wide reforms. Former department attorneys told reporters that the political climate in the Department discouraged the prosecution of official misconduct. Will you ensure that such abuses return to the top of the Civil Rights Division's agenda? (See answer below)
71. Sexual violence has a disproportionate impact on the most marginalized prisoner populations, especially gay and transgender inmates. Do you agree that the right to be free from sexual abuse is universal, and must be protected regardless of a prisoner's status, sexual orientation, or gender identity?

**ANSWER:** I agree that sexual violence in detention is a very serious problem. As a judge, one could encounter this issue in a variety of contexts, including a motion for a downward departure based on an increased risk that an individual would be victimized, criminal prosecution of perpetrators, or civil suits arising out of specific incidents. As Attorney General, my perspective would obviously be a bit different, particularly given that the Bureau of Prisons is a part of the Department. I have not studied the specifics of the applicable law, but can assure this Committee that the Department of Justice will fully enforce the relevant federal laws. Moreover, the Bureau of Prisons will comply fully with the mandates of the law, and will strive to provide an example that state systems can follow.

## Nomination of Michael B. Mukasey for Attorney General

**Questions for the Record**  
Senator Joseph R. Biden, Jr.**Politicization of Hiring/Termination Decisions**

On September 14, 2007, I sent a letter to then serving Attorney General Alberto Gonzales requesting a briefing to the Senate Judiciary Committee by October 15, 2007 on the hiring process and conversion of political appointees to career positions at the Department of Justice. To date, I have received no response from the Department (a copy of this request will be forwarded to you upon request).

- Do you intend to respond to my request within a reasonably short time should you be confirmed as Attorney General? And, will you, or an appropriate designee, provide this briefing to the Senate Judiciary Committee staff?

**ANSWER:** I am fully committed to providing information to this Committee to help it carry out its oversight responsibilities, including in this area.

- Given the politicization of the hiring and termination process of political appointees and career positions at the Department, will you commit to taking steps to ensure that any conversion of political appointees to career positions is transparent, non-political, adheres to all applicable rules and regulations, and avoids even the appearance of impropriety?

**ANSWER:** It is my understanding that applicable rules, statutes, and guidelines governing the conversion of political appointments to career positions already exist, and that those rules are designed to ensure that the process does not take political considerations into account. I will ensure that the Department rigorously follows these authorities.

**COPS and Assistance to Law Enforcement**

- In your hearing testimony you expressed the view that grants programs such as COPS were meant as a short-term supplement to states. In your view, what are the appropriate circumstances for the implementation of grant assistance such as the COPS program to local law enforcement?

**ANSWER:** As I understand it, guidelines are currently in place to ensure that funds are appropriately allocated. Those initial grants are designed to allow states to leverage their assets in a manner to meet local law enforcement needs.

- The increase in crime around the country to levels not seen since the 1990s, the post-9/11 reallocation of FBI resources away from traditional crime to counterterrorism, and the reduction in the number of state and local law enforcement officers has created a perfect storm for police and sheriffs departments. Put simply, state and local law enforcement are being asked to do more with less. Under these circumstances isn't limited competitive grant assistance from the federal government to state and local law enforcement appropriate? If not, please elaborate on the circumstances under which you would feel that federal financial assistance to state and local law enforcement would be warranted.

**ANSWER:** There may very well be circumstances in which direct federal financial assistance would be appropriate. However, there may be other circumstances where federal assistance is better provided through other means, such as through training.

#### **Military Commissions Act of 2006**

- During debate on the Military Commissions Act of 2006, Senator John Warner stated that all the techniques banned by the United States Army Field Manual on Intelligence Interrogation including "water boarding," forcing detainees to be naked, applying beatings, electric shocks, burns, or other forms of physical pain, using dogs, and inducing hypothermia or heat injury, constitute "grave breaches" of Common Article 3 of the Geneva Conventions and are "clearly prohibited" by the Act.<sup>1</sup>
- Senator Warner – one of the Military Commissions Act's primary authors – was expressing the intent of Congress to criminalize the use of these techniques when it passed the Military Commissions Act. Will you stand by Senator Warner's interpretation of the law he authored? If not, why not?

**ANSWER:** In enacting the Military Commissions Act of 2006, Congress prohibited "grave breaches" of Common Article 3, such as torture, cruel or inhuman treatment, murder, and mutilation and maiming. In determining whether a particular practice is prohibited under those standards, the primary analysis would be to consider the text of the prohibitions themselves.

#### **Torture**

- Article 2 of the Convention against Torture states, in relevant part: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

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<sup>1</sup> Congressional Record, September 28, 2006, p. S10390.

- Do you believe any “exceptional circumstances” exist that would justify torture? If so, please describe those circumstances in as much detail as possible.

**ANSWER:** No.

- As attorney general, would you authorize the use of torture in any circumstances? If so, please describe those circumstances in as much detail as possible.

**ANSWER:** No.

**Waterboarding**

- The US has long taken the position that techniques such as waterboarding, forced standing, and sleep deprivation constitute war crimes. As early as 1901, a US Army Major, Edwin Glenn, was sentenced to 10 years hard labor for waterboarding a captured insurgent in the Philippines. US military commissions after World War II prosecuted Japanese troops for engaging in waterboarding and other techniques allegedly currently being employed by the CIA. A Japanese soldier named Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to “stand at attention for seven hours” (*United States of America v. Tetsuo Ando*, Yokahama, May 8, 1947). Another was sentenced to 10 years for, among other things, forcing a prisoner to “bend his knees to a half bend, raise his arms straight above his head, and stay in this position anywhere from five to fifteen minutes at a time” (*United States of America v. Chikayoshi Sugota*, Yokahama, April 4 1949).
- Do you believe the US was right to prosecute these men?

**ANSWER:** I believe that the United States should prosecute any illegal treatment of prisoners during wartime. I am not, however, aware of the particular facts and circumstances surrounding these prosecutions, including what other acts the defendants were charged with doing.

- If the Department of Justice now takes the position that waterboarding, forced standing and use of stress positions are legal – and within the bounds of Common Article 3 – what grounds will we have to condemn or prosecute enemies of the US if they engage in such practices against captured US forces in the future?

**ANSWER:** I am not aware of the legal positions of the Department of Justice, beyond what has been stated publicly. Accordingly, I do not know the

Department's views as to whether any of the techniques that you mention are consistent with Common Article 3. As a general matter, American soldiers are entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could potentially apply to American citizens, and that presents an additional reason why it is important for the United States to adhere fully to its treaty obligations, including those under Common Article 3.

### **Hamdan**

In the wake of the *Hamdan* decision, everybody – including the administration – has acknowledged that Common Article 3 of the Geneva Conventions applies to the treatment of anyone the US takes into custody in the fight against terrorism. The same minimal standard that protects US troops and citizens applies to the people we have taken into custody – which means that anything we say can be lawfully used against those in our custody can also be lawfully used against captured Americans.

- Would you agree, then, with the commonsense principle that we should not employ any interrogation techniques against enemy prisoners that we would consider unlawful if used against Americans?

**ANSWER:** As a general matter, American soldiers are entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could potentially apply to American citizens, and that presents an additional reason why it is important for the United States to adhere fully to its treaty obligations, including those under Common Article 3.

- If the government of Iran or North Korea captured an American, held him incommunicado with no access even to the Red Cross, tied his hands to the ceiling and forced him to stand without sleep in the cold for days on end, would you consider that acceptable? Would it be acceptable for Iran or North Korea to strap that captured American to a table, stuff his mouth with a cloth, and pour water over his face to create a sensation of drowning?

**ANSWER:** Both Iran and North Korea are signatories to the Geneva Conventions. If they were to capture an American soldier, we would rightly insist that they be treated consistent with the protections that the Conventions afford prisoners of war, and such methods would not be consistent with those protections.

### **Rendition**

Many have noted that President Clinton initiated the so-called rendition program. But renditions under Clinton were designed to bring terrorist suspects to justice – by bringing them here to the United States to face charges, as was done with respect to a suspect in the 1993 World Trade Center bombing, or by returning them to their countries of origin to be tried for their crimes or imprisoned pursuant to past convictions.

The program changed under President Bush – into rendition away from justice, by taking detainees from places like Italy and Germany where they could have been prosecuted to places where they were hidden away from any court. Some of those rendered away from justice were innocent victims – individuals like Khaled el Masri, the German abducted in Macedonia, and Maher Arar, the Canadian arrested at JFK airport, who were then sent to Syria, where they were not charged with any crime, but held incommunicado and abused. And others – such as Khalid Sheikh Mohammad (KSM) and other high value detainees – rendered to secret prisons and other undisclosed locations where they are widely alleged to have been tortured and abused, making it difficult, if not impossible, to charge them before a tribunal and bring them to justice as the victims of 9/11 deserve.

- How can you justify the rendition of individuals away from justice?

**ANSWER:** I understand the term “rendition” to mean the transfer of a person from one country to another, outside the context of a formal extradition treaty. The question of the propriety of a transfer would depend upon the facts and circumstances of a particular case, including whether there was a legal basis for detaining the individual in the first place.

- If the purpose is to gather intelligence, why would the United States trust interrogations carried out by Egyptian or Syrian intelligence agencies – agencies that the United States has long acknowledged and criticized for engaging in torture and abuse?

**ANSWER:** I am not aware of the facts and circumstances concerning any rendition. It is my understanding that both United States law and policy prohibit the transfer of anyone in the custody of the United States to another country where it is “more likely than not” that the person would be tortured, and should I be confirmed as Attorney General, I would ensure that the Department of Justice provides legal advice consistent with that standard. That said, I understand that there are other departments, such as the Department of Defense or the Department of State, with more direct responsibility for carrying out our policies in this area.

- If the purpose is to keep them off the streets, why the need for secrecy and incommunicado detention in a place where they can never be brought

to justice? Do you think that the leaders of al-Qaeda didn't know when KSM was arrested? And that by detaining him in secret the US somehow tricked al-Qaeda into thinking he was still at-large, and if the US had acknowledged his arrest and detention they would be giving away a great secret?

**ANSWER:** I do not know what considerations underlay the detention of Khalid Sheikh Mohammed.

#### **President's constitutional powers**

When asked whether the president's constitutional powers allow him to authorize an illegal act, you responded: "If by illegal you mean contrary to 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."

- In his well-known concurring opinion in the Steel Seizure Case (*Youngstown Sheet & Tube Co. v. Sawyer*), Justice Jackson articulated an often-cited test for evaluating the limits of presidential power during wartime. Justice O'Connor cited this case in support of her statement in *Hamdi v. Rumsfeld* that, "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Do you subscribe to Justice Jackson's test, which limits the president's wartime power in a particular area when Congress has passed legislation in that area, or do you believe the president's power under Article II of the Constitution is plenary?

**ANSWER:** As I explained in my hearing testimony, I agree with the three-part framework for evaluating the lawfulness of executive action that Justice Jackson articulated in his concurring opinion in *Youngstown Sheet & Tube Co.*

#### **U.S. Attorney Dismissals & Executive Privilege**

- Do you believe the reputation of the Department of Justice has been damaged by the way former Attorney General Gonzales handled the firings of the US Attorneys and the manner in which the Department and the White House explained the firings to Congress and the American people?

**ANSWER:** I believe that all involved have acknowledged that the recent dismissals of United States Attorneys were not handled appropriately, and I agree with that assessment.

- If so, and if confirmed, what steps will you take to correct those mistakes to ensure that such inexcusable conduct does not happen under your watch?

**ANSWER:** If I am confirmed, I will conduct a comprehensive review of the Department's policies and procedures, including those governing the United States Attorneys.

- As you know, the Inspector General at the Justice Department has commenced investigations into the conduct of the former Attorney General Gonzales and others former Department personnel regarding testimony provided to this Committee about the firings of U.S. Attorneys.
- If confirmed, do you promise that you would not interfere with, hinder or otherwise obstruct these investigations, even if upholding this pledge were contrary to the President's (or his advisers') direction?

**ANSWER:** Yes.

- If the Inspector General uncovers potential criminal conduct by Mr. Gonzales or any other Department personnel, will you promise to appoint a nonpartisan special prosecutor to handle any such finding of improper conduct?

**ANSWER:** I believe that the members of the Department have the integrity and ability to discharge whatever responsibilities they may have in this matter. As I emphasized in my testimony, all cases will be brought and prosecuted based on the facts and the law. Partisan considerations will not play a role in the charging and administration of cases.

- The Department of Justice has taken the legal position that former top White House aides, such as Harriet Miers and Karl Rove, are immune even from appearing before a Congressional Committee. Do you believe that the President's invocation of Executive Privilege protects *former* top White House officials from even appearing before Congress in response to a validly issued subpoena?

**ANSWER:** I do not believe that a presidential adviser's status as a former or present official would affect the applicability of the immunity in question.

- The White House under President Bush has taken unprecedented steps to "politicize" federal agencies that should be independent from political influence. From the hiring and firing to bankruptcy judges to the formulation of national drug control policy, the White House Office of Political Affairs has had enormous and improper influence. In fact, when the former head of that office testified before this Committee, she

remarked, "I took an oath to the President." Of course, her oath was in fact to the Constitution and she quickly corrected this mistake when pointed out by Chairman Leahy.

- o Will you allow the Office of Political Affairs to, in any way, influence decisions about the hiring or firing of DOJ personnel?

**ANSWER:** Career personnel decisions will not be based in any way on political affiliation or philosophy. Rather, the Department will make those decisions based on merit and on a commitment to legal and professional excellence and the mission of the Department of Justice.

- o Will you pledge not to provide the Office of Political Affairs any information about any ongoing investigation, civil or criminal?

**ANSWER:** Civil and criminal cases will be brought and prosecuted according to the facts and the law. Partisan considerations will play no role in these matters.

- o How else can you assure me and the American people that you will not be subject to such improper influence, that you will speak truth to power, and that you will above all else uphold your oath to the Constitution and the rule of law?

**ANSWER:** My record as a Federal District Court Judge and as an attorney reflects a commitment to the rule of law. I will not hesitate to express my opinions and to hold individuals accountable to the law.

- This summer the Justice Department announced that, even if Congress issued a contempt of Congress citation in response to an official's failure to appear pursuant to a validly issued subpoena, it would block prosecution of any contempt of Congress charge against presidential aides (current or former) covered by Executive Privilege.
  - o Do you believe that the Constitution and the principle of separation of powers allow the Department to prevent a U.S. Attorney from pursuing such a contempt citation?
    - If so, please explain in detail your legal rationale.
    - If not, will you pledge to allow any U.S. Attorney to use his or her prosecutorial discretion in such instances to determine whether there is probable cause to charge the contempt citation?

**ANSWER:** A criminal case under the contempt statute should not be brought unless and until the prosecutor is convinced that the defendant intended to commit a crime. The prosecutor's decision, as to this as well as to other

elements of a charged crime, should be based on his assessment that he possesses facts which will allow him to prove the case beyond a reasonable doubt. As I also testified, I understand that it is the long-standing Department of Justice position that the criminal contempt of Congress statute does not apply to an executive branch official who declines to comply with a congressional subpoena based on the President's assertion of executive privilege. That rationale has been discussed in OLC opinions written by former Assistant Attorney General Walter Dellinger and by former Assistant Attorney General Ted Olson.

- o On the first day of your testimony before this Committee you indicated that if Congress referred a contempt citation to the U.S. Attorney and the President invoked Executive Privilege, the U.S. Attorney must make an independent determination of the merits of the Executive Privilege claim before deciding whether to proceed. Yet, later you seemed to indicate that it would be improper for the U.S. Attorney to pursue such a citation if DOJ had instructed it not to.
  - Which view do you hold?
  - If it is the former, doesn't this put the U.S. Attorney in a position of deciding the merits of the claim of Executive Privilege, a job that is more appropriately suited for the courts?
  - If it is the latter, doesn't this make any claim of Executive Privilege absolute?
    - Then how do you square that action with the Supreme Court authority of *U.S. v. Nixon*, which recognized a qualified – not absolute – privilege.
    - Under this view, would the U.S. Attorney ever review the merits of the contempt claim, or must he or she simply refuse to pursue every contempt referral based on the Department's (and the Administration's) direction?

**ANSWER:** In my testimony, I stated that in any case, the U.S. Attorney must make a decision as to whether the law and facts support bringing a particular prosecution, including a contempt prosecution. Moreover, although the U.S. Attorney must make a decision as to whether to bring a case, the U.S. Attorney is bound by the position of the Department of Justice. As noted, the Department has long taken the view that no crime is committed when an executive branch official declines to comply with a congressional subpoena based on the President's assertion of executive privilege.

I do not believe that this position renders the privilege claim to be absolute. As recognized in *United States v. Nixon*, a privilege claim may yield to a grand jury subpoena, and the federal courts have the final say with respect to

the privilege claim. Disputes between Congress and the President, however, have historically have been resolved by an accommodation process, rather than by a contempt of Congress prosecution.

- Is it your view that 2 U.S.C. § 194 does not apply in any case where the President has invoked Executive Privilege?
  - If so, is this based on your views on Executive power rooted in Article II? If not, what is the basis for this view?

**ANSWER:** No.

#### **Renewing the Federal Assault Weapons Ban**

- The Federal Assault Weapons Ban expired in 2004. The ban had prohibited the manufacture and sale to civilians of AK-47s and other semi-automatic assault weapons, as well as high-capacity magazines holding more than 10 rounds. As you know, the bloodiest shooting in U.S. history on the campus of Virginia Tech involved a shooter with large capacity magazine clips, which would have been illegal for purchase had the ban been extended.
  - What steps will the Department of Justice take to urge Congress to renew the Assault Weapons Ban?

**ANSWER:** As I understand it, the President has said he will sign legislation to renew the Assault Weapons Ban. I would support his decision.

- Will you actively push for renewing the Assault Weapons Ban?

**ANSWER:** The President has indicated a willingness to sign such legislation, which may provide a substantial incentive for Congress to act.

- Do you believe renewing the ban is important to fighting gun crimes, saving lives, and improving public safety?

**ANSWER:** Renewing the Assault Weapons Ban could very well have a positive effect in these areas.

- Do you believe that high-capacity ammunition magazines, like the ones used by the Virginia Tech shooter, should be illegal?

**ANSWER:** As I understand it, if the ban were renewed, it would make these high-capacity magazines illegal once again. That aspect of the ban could very well have a positive effect.

#### **Drug Sentencing**

As a federal judge in Manhattan, you've addressed and dealt with the scourge of drug use on our city's streets and the effects it has on lives, families, and our society. Under federal law it takes 100 times more powder cocaine to trigger the same sentences as it does for crack cocaine.

- Do you believe that the penalties for these two forms of the same drug should be equalized?
  - If so, would you do so by raising penalties for powder cocaine, and if so, why do these penalties warrant increased sentences?
  - If not, please explain your view with specific, evidence-based reasons.
- Do you believe that the current mandatory minimum sentence of five years for simple possession of five grams of crack cocaine should be repealed? If not, why do you believe that crack cocaine should be the only drug for which there is a mandatory minimum sentence for simple possession for a first time offender?

**ANSWER:** Sentencing policy, including as to crack and powder cocaine, raises a number of substantial, difficult, and complex questions. Although I am not yet familiar enough with the details of these policies to comment fully, I will study this issue carefully and consider any ways in which these policies may be improved. In studying this issue, I will bring to bear my experience as a District Court Judge in applying the drug laws.

#### **Civil Law**

- There has been much discussion in recent years about whether the U.S. judicial system should even consider or look at foreign law or customs in determining our own precedent. Without relying on it as precedent, do you believe that foreign laws or customs might ever be useful comparisons or perspectives when deciding issues that have little precedent in U.S. case law?

**ANSWER:** As reflected in my testimony, such laws and customs could be useful when making policy decisions.

**Nomination of Michael B. Mukasey to be Attorney General of the United States  
Written Questions from Senator Herb Kohl**

Office of Legal Counsel Independence

1. In 2004, 19 former Office of Legal Counsel (OLC) officials outlined a number of principles that they believe should guide OLC opinions. One of their recommendations included the principle that "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies." According to press accounts, the Office of the White House Counsel and the Office of the Vice President have been deeply involved in the drafting of opinions issued by the Office of Legal Counsel.

**Is it appropriate for the White House to be involved in the drafting of OLC opinions before OLC renders final advice on the legality of Administration policies, whether ongoing or proposed?**

**Will you place limitations on communications between OLC officials and the White House prior to the issuance of final OLC opinions?**

**ANSWER:** It would seem to me natural to have communications between the Office of Legal Counsel and the agency or entity that has requested a particular legal opinion. As the White House may very well be one such entity, I would be hesitant to impose any blanket limitations. That said, if confirmed, I would review opinions to ensure that they reflect the considered and independent judgment of the Department.

2. According to Jack Goldsmith, during his time as head of OLC, he withdrew more opinions than any of his predecessors. One of those opinions was the August 2002 torture memo that you called a "mistake." According to a recent *New York Times* story, in February 2005, OLC issued another opinion endorsing the "harsheset interrogation techniques" ever used by the CIA. Many view this as a reinstatement of the withdrawn August 2002 memo.

**Will you commit to notifying Congress if other opinions withdrawn or modified during Goldsmith's tenure at OLC were reinstated, in whole or in part, or if the policies or programs affected were continued based on similar or new legal reasoning after Attorney General Gonzales was sworn in as Attorney General on February 3, 2005?**

**ANSWER:** I have not reviewed the opinions in question. As I understand the circumstances, these opinions may well be classified and privileged. The decision whether to discuss matters relating to these opinions with Congress would have to be informed by the classified or privileged status of the opinions.

Interrogation of Enemy Prisoners

3. During the hearing, you acknowledged that Congress has the authority to prohibit torture and cruel, inhuman and degrading treatment. You also expressed the belief that the current statutes

in this area are constitutional. On the issue of electronic surveillance, however, you left open the possibility that the President may have inherent powers that Congress cannot limit under the Foreign Intelligence Surveillance Act. You referred to former Attorney General Griffin Bell, who said that FISA may not have reached the limits of presidential authority.

**Do you believe the same is true of Congressional limitations on interrogation? Can Congress define these limitations however it chooses, or do you believe that the President has certain inherent powers to interrogate enemy prisoners that Congress cannot limit?**

**ANSWER:** As I explained at my hearing, I do not believe that the President has authority to authorize torture or cruel, inhuman or degrading treatment. Congress has the authority to prohibit such acts, and it has properly done so. I do not believe that congressional action in this area is likely to interfere with the inherent powers of the President. Over the past several years, Congress and the President have worked together in this area to protect the country and uphold our Nation's values, and I would hope and expect that cooperation to continue.

**4. Do you believe that torture is an effective method of interrogation that elicits valuable intelligence information?**

**ANSWER:** Torture is prohibited under United States law without regard to whether it would elicit valuable intelligence information. With respect to your specific question, I do not regard myself as an expert on the effectiveness of interrogation methods.

**5. Do you believe that cruel, inhuman and degrading treatment, or other coercive techniques that fall short of torture, are effective methods of interrogation that elicit valuable intelligence information?**

**ANSWER:** Likewise, cruel, inhuman, and degrading treatment is prohibited under United States law without regard to whether it would elicit valuable intelligence information. With respect to your specific question, I do not regard myself as an expert on the effectiveness of interrogation methods.

**6. Many national security experts argue that the abusive interrogation techniques authorized by the Administration have undermined our efforts to combat terrorism around the world. Specifically, they argue that the use of abusive interrogation tactics strains relationships with our allies, fuels anti-Americanism, and bolsters terrorist recruitment. Former Secretary of State Colin Powell suggested that the world is "beginning to doubt the moral basis of our fight against terrorism."**

**Do you agree with these criticisms of the use of abusive interrogation techniques?**

**ANSWER:** I am not aware of what interrogation techniques have been authorized, nor am I in a position to know whether they are abusive. Accordingly, I do not have sufficient information to evaluate whether our interrogation practices have been effective in aiding our fight against

terrorism. I agree, however, that the appeal of American values is one of the principal weapons in our fight against terrorism, and it is critical that we maintain those values, even while we take effective and lawful measures to protect our citizens.

7. In 2005, Congress passed the Detainee Treatment Act in response to public allegations of ongoing abuse by government interrogators. That law was intended to govern interrogations by all government personnel, including the Central Intelligence Agency. According to the *New York Times*, OLC issued an opinion saying that the aggressive interrogation methods being used at the time were not impacted by that law.

**Do you believe it is appropriate for OLC to issue secret opinions interpreting Congressional statutes and then refuse to share that interpretation with Congress?**

**ANSWER:** I have not reviewed any unpublished OLC opinions. Based on press reports, the opinions in question appear to have addressed the classified CIA program, and therefore, it is not surprising that such opinions would not be disclosed publicly. Beyond the classified context, I understand that OLC opinions may consist of confidential legal advice provided to senior Executive Branch officials, and the need to protect the attorney-client relationship might further counsel against disclosure. I do believe, however, that apart from the question of disclosing specific legal advice to clients, that the Department of Justice should make every effort to ensure that Congress is aware of the Department's views on legal matters of interest to Congress.

State and Local Law Enforcement

8. When I asked you about the COPS program, you said it was not supposed to be an ongoing funding program for police departments. You went on to say that it should encourage state and local governments to pick up the funding for these positions when the federal funds run out. I do not disagree with that. However, we have to deal with the reality on the ground today. Medium-sized cities around the country have seen record increases in violent crime in recent years. As a result of cuts to the COPS Universal Hiring Program, police departments in those cities have large numbers of vacancies, without the funding to fill them.

**Do you agree that we have an obligation to provide assistance under the COPS Hiring Program to these communities today to help combat violent crime?**

**ANSWER:** As I testified, my understanding is that the COPS program was designed to provide state and local communities with funding to fill needed law enforcement positions. Those new law enforcement officers will hopefully improve the localities' ability to prevent and fight crime. After a period, the states were to assume the responsibility of funding those positions. That said, the federal government can and should provide all possible assistance to state and local efforts to combat violent crime. Such assistance may include direct federal financial assistance, but would also include training, identification of best practices, and other forms of assistance.

Antitrust

9. I have been very disappointed in a sharp cutback of antitrust enforcement at the Justice Department. The Justice Department's own statistics show that, compared to the last four years of the Clinton administration, the number of merger investigations initiated by the Justice Department in the most recent four years for which there are complete statistics (FY 2003-2006) has declined by nearly 60 percent, and the numbers of mergers challenged have declined by 75 %. And the number of non-merger civil investigations has declined by over a third during these last four years as compared to the last four years of the Clinton administration.

Additionally, mergers among direct competitors in highly concentrated industries affecting millions of consumers have been approved by the Justice Department in recent years – including the Whirlpool/Maytag deal, and AT&T's acquisition of Bell South, to name just two – without the requirement of any divestitures or consent decrees to protect consumers, often over the objections of Justice Department career staff. Sometimes it appears that the Department has been more concerned with lessening the burden on merging companies in the merger review process than protecting the American consumer. Indeed, in October 2006, the New York Times editorialized that Justice Department merger policy “often appears to be little more than ‘anything goes.’ One gets the impression at times that the referee has left the playing field.”

**Do you share my concern at what appears to be a sharp decline in antitrust enforcement at the Justice Department? And what steps will you take to reverse this trend?**

ANSWER: The Antitrust Division serves an important function by facilitating free and open markets. Although I am not familiar with the statistics or specific cases you cite, I will ensure that the Antitrust Division is in the best position to accomplish its responsibilities and priorities.

10. **Do you agree with the conclusion contained in the Antitrust Modernization Commission's April 2007 Report that merger law, as reflected in the joint Justice Department/Federal Trade Commission Horizontal Merger Guidelines, is fundamentally sound and should apply without modification to high tech industries?**

ANSWER: Although I am not familiar with the conclusions of the Antitrust Modernization Commission, I am committed to ensuring that the antitrust laws are fairly and uniformly applied.

11. **Are there any recommendations of the Antitrust Modernization Commission which you believe would require changes to the Justice Department's policies or practices which you favor implementing? Are there any with which you disagree?**

ANSWER: Again, I am not sufficiently familiar with the recommendations of the Antitrust Modernization Commission to offer any meaningful comments.

12. The Antitrust Modernization Commission's April 2007 Report stated:

“Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where . . . [the immunity] is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.”

**Do you agree with this statement and the principle that exemptions from the antitrust law should be disfavored?**

**ANSWER:** As I indicated previously, the principles of antitrust law allow for free and open markets. Restraints on trade should generally be viewed with disfavor and skepticism. As a judge, I demonstrated my understanding of the relevant law when I enjoined the Motion Picture Association of America from implementing a ban on allowing independent filmmakers to distribute extra tapes or video disks of their movies prior to award shows.

13. I have introduced legislation, S. 772, the Railroad Antitrust Enforcement Act, which would remove the antitrust exemptions currently protecting the freight railroad industry and authorized the Justice Department to bring action to block mergers and acquisition in the railroad industry that violate antitrust law.

**Do you support this legislation?**

**ANSWER:** I am not familiar with this legislation.

14. We have received allegations of anti-competitive and monopolistic conduct by DFA, the nation's leading milk marketing cooperative. One allegation in Florida is that independent dairy cooperatives could not have their milk processed in plants affiliated with DFA unless the independent cooperative paid the processor millions of dollars about the cost of processing the milk. It is alleged that this and other anti-competitive conduct destroys the ability of independent cooperatives to compete and ultimately results in higher milk prices to consumers.

We have been informed that a year ago the staff of the Antitrust Division recommended to the Assistant Attorney General for Antitrust that the Justice Department pursue an antitrust case against DFA, but that the Assistant Attorney General has taken no action on that recommendation.

**Will you pledge to investigate this issue, and to pursue an antitrust enforcement action should Antitrust Division staff find that the basis exists for such an action?**

**ANSWER:** I am not familiar with these specific allegations and would hesitate to make such a pledge without becoming more familiar with the subject.

**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)?

**ANSWER:** Torture is a defined term under United States law. Section 2340 of Title 18 defines torture as "an act . . . specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions)." Section 2340 further defines "severe mental pain or suffering" to include "the prolonged mental harm caused by or resulting from . . . the threat of imminent death." Accordingly, under the statute, a threat of imminent death specifically intended to inflict prolonged mental harm would be torture prohibited under United States law.

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)?

**ANSWER:** The President has a constitutional obligation to protect and defend the country. When it comes to an attack on the country, the President's obligation clearly would persist for as long as the attack persists. Congress, of course, has a similar obligation to enact measures necessary for the country's defense, and I certainly would expect that Congress would act under those circumstances.

- How broad is the President's authority during this time? Are there any constitutional limits on that authority?

**ANSWER:** Yes. The President's authority with respect to protecting the country clearly remains subject to constitutional limits, which include the individual protections of the Bill of Rights.

- What if Congress didn't act at all? Would the President have unlimited authority, even in contradiction of previous statutes Congress had enacted?

**ANSWER:** No, as discussed, the President's authority remains subject to constitutional limits, and in addition, it would remain subject to all constitutional statutes that Congress had passed.

- Once Congress acts, does that immediately terminate the President's authority?

**ANSWER:** It would depend on what action Congress takes. The President retains an obligation to protect and defend the country, but as noted, he also would be obliged to comply with all constitutional statutes.

- 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?

**ANSWER:** The President is not required to wait until the enemy strikes a blow before he may take measures to protect the country. That said, in matters of prevention, it clearly is better for Congress and the President to act together to protect the country.

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.

**ANSWER:** The President has an obligation to faithfully execute our Nation's laws, and our Nation's highest law is the Constitution. Therefore, if the President believes that a statute falls outside the bounds of the Constitution, the President would be obliged to follow the Constitution.

- 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?

**ANSWER:** Yes, I agree that he should. In addition, my understanding is that if the Executive Branch declines to enforce a statute or seeks to challenge a statute on the ground that it is unconstitutional, the agency head who does so has a statutory obligation to notify Congress. *See* 28 U.S.C. § 530D(a)(1), (e). If confirmed, I would comply with that statutory obligation.

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?

**ANSWER:** I signed an order vacating the material arrest warrant after notice from the government that the subpoena was being withdrawn. As demonstrated by my subsequent opinions in that case, I believed it necessary for Mr. Padilla to have access to counsel, even if he was no longer being held under the material witness statute.

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?

**ANSWER:** I cannot articulate and implement a standard for the President to remove United States Attorneys. That said, as I testified, I would think that there are relevant factors to be considered as part of any assessment of a U.S. Attorney. Those factors include competence, honesty, and any unjustified refusal to follow Department policy.

- 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?

**ANSWER:** I will communicate these priorities through standard channels such as written memoranda. I will not hesitate to let a U.S. Attorney know if I determine that he or she is not meeting these 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?

**ANSWER:** No. Other improper reasons would include, for example, basing such a decision on race or sex or other impermissible bases.

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?

**ANSWER:** The President sends nominations for United States Attorney positions to the Senate. I will do everything that I could to facilitate the selection and nomination of qualified individuals for these positions.

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?

**ANSWER:** As I indicated in my testimony, this situation is not generally optimal. These appointments might be appropriate in certain limited circumstances, however, such as when a Departmental need may only be met by certain individuals and when such an appointment would not disrupt the operations of that United States Attorney's office.

8. During the hearing I asked you about your rulings in the case of *Sorlucco 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 Sorlucco by treating her differently than it treated the perpetrator. Officer Sorlucco 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 Sorlucco had been fired.

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

**ANSWER:** As I indicated in my opinion, I believed that the jury's verdict could not be sustained as a matter of law.

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

**ANSWER:** As explained in my opinion, I believed that the evidence as to certain elements of the claim for relief was legally insufficient.

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 *Sorlucco* 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?

**ANSWER:** As indicated in my testimony and demonstrated in my record as a lawyer and a Federal District Judge, I am committed to enforcing all of the Nation's laws in a fair, just, and equitable manner. That commitment necessarily includes statutes such as the Civil Rights Act. Additionally, as I testified, I believe that the Civil Rights Division occupies a special and integral place at the Department. As part of my initial and comprehensive review of the Department's policies and priorities, I will ensure that the Department has the resources it needs to carry out its responsibilities and to enforce the Nation's civil rights laws.

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?

**ANSWER:** I will familiarize myself with the Attorney General's role in promulgating and enforcing BIA procedures and will take any appropriate action.

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?

**ANSWER:** I am unfamiliar with this potentially complex issue and would hesitate to make such a commitment.

- 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?

**ANSWER:** As I am unfamiliar with this particular issue, I am reluctant to commit to specific steps at this time.

**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.

**ANSWER:** The Constitution charges both Congress and the President with the obligation to take measures necessary to protect the country. Neither branch has sole responsibility for the country's defense. Within their respective spheres, each branch does have the exclusive right to exercise certain powers necessary for defending the country. For example, only Congress can appropriate funds and only the President can command troops in battle. Neither branch can, in the name of defending the country, violate the Constitution nor would the President's obligation to defend the country permit him to ignore constitutional laws.

- b. Please cite the clauses in the Constitution that in your view grant the President the authority to "protect" or "defend" the country.

**ANSWER:** I would cite the Vesting Clause (Art. II, § 1) and the Commander in Chief Clause (Art. II, § 2, cls. 1). The Treaty Clause (Art. II, § 2, cls. 2) also recognizes the President's primary role in conducting our Nation's foreign affairs. The Supreme Court has recognized that these provisions, individually and collectively, provide the President with broad authority to take action to protect and defend the Nation from foreign threats. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("[T]he historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (describing the President as the "sole organ of the federal government in the field of international relations"); *United States v. Sweeny*, 157 U.S. 281, 284 (1895) (explaining that the Commander in Chief clause "vest[s] in the President the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war.").

- c. Do you believe that protecting or defending the country is within the President's exclusive sphere of authority?

**ANSWER:** No.

- 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?

**ANSWER:** As I noted in my response to the question above, the President’s authority to protect and defend the country is not exclusive. The Constitution clearly grants Congress important powers in this area. I believe that the authorities of Congress and the President generally complement each other, and there can be no question that cooperation between the branches is the most effective means to protect and 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.

**ANSWER:** No. The President must comply with the Constitution and all constitutional statutes. From time to time, difficult separation of powers questions may arise when an Act of Congress would limit authority that the Constitution has conferred upon the President. Justice Jackson’s concurring opinion in *Youngstown Sheet and Tube Co.* established a three-part framework for evaluating the lawfulness of presidential action. Thankfully, such disputes are rarely settled by the courts. Rather, as I stressed during my hearing, I believe that we are strongest as a nation when the branches act cooperatively and attempt to resolve any disagreements through mutual respect and accommodation.

- 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?

**ANSWER:** Among other things, the Commander-in-Chief Clause gives the President the authority to defend the Nation against attack and to lead the military. The Clause does not give the President the authority to ignore other constitutional limitations or to ignore constitutional statutes passed by Congress. The President must comply with these limitations, even when taking measures to defend the Nation.

- 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.

**ANSWER:** No. As I discussed at my hearing, no person, including the President, stands above the law. The President must follow all constitutional laws and he may not authorize a subordinate to violate such a law. As discussed, difficult separation of powers questions may arise when a statute encroaches upon matters that the Constitution commits to the President. Such cases are properly resolved under Justice Jackson's framework from *Youngstown*. The country is best served, however, when such issues are resolved by cooperation between the branches.

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?

**ANSWER:** Not necessarily. Whether the President is employing a "war-based authority" would depend upon the specific facts of the case. Insofar as the United States is involved in an armed conflict with the al Qaeda terrorist organization, electronic surveillance of al Qaeda members likely would fall within the President's "war-based authority." The electronic surveillance of other terrorists may engender a different analysis. I do want to clarify, however, that I believe that the *Youngstown* framework would govern the analysis of a conflict between the President's authority and a statute of Congress in this area.

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?

**ANSWER:** As I testified, FISA has been and continues to serve as the foundation for conducting foreign intelligence surveillance of persons in the United States. That said, it is well established that the President has the constitutional authority to conduct foreign intelligence

surveillance. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *see also In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002). A difficult separation of powers question may arise to the extent that the President's authority comes into conflict with FISA's limitations. Such a conflict would be governed by the *Youngstown* analysis, and in light of the statutory limitation the President's authority would be at its "lowest ebb"—but that is not to say such inherent authority to act does not exist. I believe it is a well-established principle of constitutional law that each branch of government has authorities that another branch cannot take away. (For instance, as I noted at the hearing, the Senate has the power to consent to the confirmation of the President's nominees, and a nominee who was not confirmed would not have a valid legal claim to challenge the Senate's decision not to confirm him or her.)

With that said, as I emphasized at the hearing, if such a case were to arise, I believe that the best thing for the country would be for Congress and the Executive Branch to work together so as to ensure that we have the laws necessary to protect the country.

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?

**ANSWER:** Yes, the President has an obligation to comply with all valid laws passed by Congress.

- b. If not, please explain why the Senate should not adopt Prof. Rubinfeld's test in voting on your nomination.

**ANSWER:** Please see my response to Question 4(a).

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?

**ANSWER:** Yes, I agree as a general matter. Of course, the Supreme Court has recognized that matters may arise in which no party would have standing to contest the action in court or where the matter itself might constitute a non-justiciable political question.

- 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?

**ANSWER:** Yes. As I explained in my testimony, our Government works best when the branches act cooperatively and attempt to resolve their disagreements through accommodation and mutual respect.

- 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?

**ANSWER:** The President may not violate a constitutional statute. If he determines that a statute is unconstitutional, I agree that he should so notify Congress. In addition, my understanding is that if the Executive Branch declines to enforce a statute or seeks to challenge a statute on the ground that it is unconstitutional, the agency head who does so has a statutory obligation to notify Congress. See 28 U.S.C. § 530D(a)(1), (e). If confirmed, I would comply with that statutory obligation.

- 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?

**ANSWER:** Yes, as discussed in my previous answer.

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.

**ANSWER:** Yes.

- 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.

**ANSWER:** I was concerned by the Inspector General's March 2007 report on the FBI's use of National Security Letters, particularly reports of the use of so-called "exigent letters." As I understand it, as a result of the Inspector General's findings, the FBI has increased training, guidelines, and compliance controls, and the Department has increased its oversight, primarily through the National Security Division. I believe that these represent positive and necessary steps and, if confirmed, would review these steps, satisfy myself that these steps are sufficient, and work with Director Mueller to ensure that these types of problems did not recur.

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?

**ANSWER:** No.

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?

**ANSWER:** The Constitution established a system of government that has served us well for more than two hundred years. My respect for our constitutional structure does not depend on the actions of a particular branch. As I have emphasized, however, there can be no question that it is in the interests of the country for both branches to act with mutual respect and accommodation.

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?

**ANSWER:** I believe that the Executive Branch must do everything within the law and the Constitution to protect the country.

- 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?

**ANSWER:** The Justice Department's obligation is to provide the President with the best view of the law.

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?

**ANSWER:** I still have not come to a conclusion. As I testified, I believe there are good arguments on both sides of that issue.

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?

**ANSWER:** I was not a part of that conversation, and so I am not in a position to evaluate those remarks. I can say that I have great respect for the FISA Court and believe that the court plays an important role in protecting the privacy rights of Americans.

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?

**ANSWER:** There is no doubt that Congress has the constitutional authority to cut off funding for a particular military conflict. I do not yet have a view on whether it would be constitutional for Congress to set a deadline for withdrawing troops from a conflict. I would emphasize again that our government works best when the President and Congress resolve such disagreements through cooperation and mutual accommodation.

- b. If Congress were to enact such legislation, does the President have to abide by it?

**ANSWER:** If the law is constitutional, then the President must comply with 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?

**ANSWER:** It is up to Congress to determine what offenses may merit imposition of the death penalty. By making the death penalty an available option with respect to certain offenses, Congress has found (as expressed in the statute), a federal interest coextensive with the statutory reach. The Department of Justice is charged with enforcing the law as Congress has written it.

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?

**ANSWER:** It is my understanding that there are extensive procedures in place governing the Department's consideration of whether or not to seek the death penalty and the Attorney General's decision in any given case. These guidelines are designed to ensure uniformity in the consideration and ultimate decision.

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?

**ANSWER:** I can certainly appreciate and understand this Committee's interest in this important topic. However, I would be hesitant to make such a commitment before having the opportunity to consult with the relevant attorneys in the Department of Justice, including the United States Attorneys.

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?

**ANSWER:** I am not currently familiar with the method by which attorneys are selected for the Capital Case Review Committee, the current composition of which may very well reflect ideological or philosophical diversity.

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?

**ANSWER:** I agree that these regulations implement a statute addressing one of if not the most sensitive areas of law. There can be no greater sanction than the imposition of the death penalty. If confirmed, I would certainly review the proposed regulations with those considerations in mind.

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?

**ANSWER:** As I am not familiar with the statute or the proposed regulations, I would hesitate to conclude that I would have a conflict of interest should I be confirmed.

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?

**ANSWER:** I am aware generally of the debate concerning the differential sentencing of crack as opposed to powder cocaine offenses. I believe that this is a complex issue, given the impact both crack cocaine and the current sentences have had on vulnerable members of our society. I am reluctant, however, to opine on specific approaches absent further study.

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?

**ANSWER:** As a former judge, I see the benefits to discretion. That said, there are also benefits to uniformity and consistency in the imposition of sentences.

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?

**ANSWER:** The Department of Justice clearly must take a lead role in assisting state and local law enforcement officers. This assistance can be provided through a variety of means, including direct financial assistance, identification of best practices, training, and provision of equipment. The goal must be to assist the state and local governments to maximize their own abilities to fight violent crime. It is my understanding that the COPS program was originally designed to be federally funded at the outset, to be replaced with state and local funding over time. This seems to me to have been a sensible approach, particularly where the Department continues to provide substantial funding to state and local law enforcement task forces and other programs.

- 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?

**ANSWER:** As stated above, direct federal assistance is not the only means by which the Department of Justice can provide assist state and local law enforcement. Moreover, I am not familiar with the current funding levels, and would be hesitant to opine absent further study.

c. If confirmed, what else will you do to reduce the violent crime rate?

**ANSWER:** I firmly believe that the Department of Justice has numerous ways in which it can help to reduce the violent crime rate. For example, I have been impressed by some of the Project Safe Neighborhood initiatives that have been described to me. In addition, the Department has an important role to play in assisting state and local law enforcement efforts to combat violent crime, through direct financial assistance, training, identification of best practices, and other means. Combating violent crime is and should continue to be a high priority of the Department.

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?

**ANSWER:** Yes.

b. Under what circumstances would the appointment of a special counsel be appropriate?

**ANSWER:** As a general matter, I believe that the dedicated men and women of the Department of Justice are fully capable of pursuing any federal prosecution. To be sure, there may be circumstances in which appointment of a special counsel may be appropriate, but I am unable to specify those circumstances at this time.

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?

**ANSWER:** I do not know of any reason why Mr. Bradbury's continued supervision of OLC would be inconsistent with the Vacancies Act.

- b. Will you urge the White House to put forward a new nominee for this important position at the Department?

**ANSWER:** The decision whether to withdraw Mr. Bradbury's nomination and send a new nomination to the Senate is the President's. My understanding is that Mr. Bradbury is a highly competent and dedicated public servant.

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?

**ANSWER:** It depends upon the constitutional provision that is at issue. The McCain Amendment extends the protections of the Fifth, Eighth, and Fourteenth Amendments to any detainee anywhere in the world. On the other hand, it is settled law that Fourth Amendment does not apply to alien detainees outside the United States.

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?

**ANSWER:** No.

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?

**ANSWER:** No. The prohibitions on torture and on the grave breaches of Common Article 3 of the Geneva Conventions (as codified in the War Crimes Act) make no distinctions based on the identity of the actor or the 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.

**ANSWER:** No. Torture is torture, and it is always prohibited, regardless of the citizenship of the victim.

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?

**ANSWER:** Yes.

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?

**ANSWER:** Yes, although as I noted, depending on the nature of the violation, it can mean that the individual is not entitled to the protections that the Geneva Conventions afford to prisoners of war.

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?

**ANSWER:** No, I do not believe I was aware of those specific reports.

- 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?

**ANSWER:** Please see my previous answer.

- c. If you were not aware of these documents, do you consider the treatment described above to be humane?

**ANSWER:** As I testified, it is my understanding that the enemy combatants detained at Guantanamo Bay, Cuba have been treated quite humanely by the United States servicemen and women who operate the detention facility. Although I have not been to Guantanamo Bay myself, I have read reports from those who have visited, and they have generally been quite complimentary about the conduct of the United States military and the conditions of confinement of those who have been detained there. Certainly, the reports that you describe above do not sound consistent with these general reports of humane treatment. I was not aware of the reports you cite or the circumstances that occasioned them. They certainly would not appear to be consistent with the standards of the Army Field Manual on Interrogations.

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 dignified 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?

**ANSWER:** A United States Attorney is due notice of perceived deficiencies in his or her performance.

- 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?

**ANSWER:** No.

- 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?

**ANSWER:** No.

- 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?

**ANSWER:** No.

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?

**ANSWER:** If confirmed, it would be the Department's policy that only a very small group of individuals at the Department would be permitted to respond to a phone call from a member of Congress or someone from the White House who wanted to discuss an ongoing criminal case or investigation. Each of those individuals would understand that cases and investigations are to be pursued based on the law and the facts alone, not political considerations, and would have the stature to communicate that message to a Member of Congress.

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?

**ANSWER:** I am not familiar with the specific procedures you reference. I can assure you, however, that if confirmed, each person who is charged with the hiring of career attorneys will be made aware that those decisions are to be made on the basis of merit and commitment to the Department's mission, not on partisan political considerations.

32. What will you do if you learn that certain attorneys now working at the Department were hired based on an improper political test?

**ANSWER:** Career Department of Justice employees must be hired and retained on the basis of competence and dedication to the mission of the Department of Justice. Regardless of the circumstances surrounding particular hires, each individual will be required to enforce the law without regard to political considerations.

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?

**ANSWER:** Disputes between Congress and the President over matters of executive privilege historically have been resolved by an accommodation process, rather than by a contempt of Congress prosecution.

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 had been killed in a military aircraft crash. The government submitted an affidavit claiming that it could not produce the Air Force's crash investigation report because it would reveal military secrets about the plane's equipment. The Supreme Court upheld the privilege without ever looking at the document. Decades later, the document was declassified; it revealed no military secrets, but it did suggest that the crash was caused by faulty maintenance.

- 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.

**ANSWER:** Whether or not to submit each and every document to the judge in a particular case is something that must be addressed on a case-by-case basis, bearing in mind that although the Department may be litigating the case, the equities at stake may be those of a different agency or department. You can be assured, however, that my review would be informed by my almost two decades of service as a federal judge.

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?

**ANSWER:** Racial profiling is wrong and should be impermissible. It is my understanding that Department of Justice guidelines make this very clear. That said, I am certainly open to examining any legislation on this important issue.

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?

**ANSWER:** No.

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?

**ANSWER:** Yes.

- b. In your view, which is a more prevalent and serious threat to American elections today: voter fraud or voter suppression?

**ANSWER:** I do not know at this time.

- 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?

**ANSWER:** I agree that the Department's efforts must be made in the most efficient way to insure the accessibility and integrity of the vote.

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?

**ANSWER:** The Department is charged with enforcing all such laws and, should I be confirmed, I will work to ensure that the Department does so.

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?

**ANSWER:** Yes, if I am confirmed, I will commit to the vigorous enforcement of all civil rights statutes, including Section 2 of the Voting Rights Act.

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?

**ANSWER:** Yes.

- b. Are there statutory or constitutional problems with using the material witness statute to hold someone indefinitely?

**ANSWER:** Yes.

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?

**ANSWER:** I believe this is a very difficult question, and one that would require additional study. I have not determined the circumstances under which such a statute could be constitutional.

- d. Do you believe that the President has the constitutional authority to authorize indefinite material witness detentions even if prohibited by Congress?

**ANSWER:** No, whether or not 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.

**ANSWER:** I believe that I acted appropriately throughout that case. Nor do I believe that the record of the case supports any claim that I lacked objectivity or subjected a New York defense attorney to mockery.

b. In retrospect, do you think you handled this case appropriately?

**ANSWER:** Yes.

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?

**ANSWER:** No.

c. Would you be willing to release to this Committee the transcripts of all the material witness hearings over which you presided?

**ANSWER:** The proceedings of the material witness hearings over which I presided have been sealed by order of a federal court. It would not be my decision whether or not to release the transcripts.

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?

**ANSWER:** I do not know the answer to these questions. Moreover, I would be bound by the secrecy requirements of Federal Rule of Criminal Procedure 6(e).

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.

**ANSWER:** I agree with the Court's decision in *Hamdi*, which held "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. 507, 533 (2004).

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?

**ANSWER:** I understand that the United States concluded that it was in the national interest to return Mr. Hamdi to Saudi Arabia. I do not know the specific reasons for that conclusion, but it certainly was a matter within the Government's discretion.

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?

**ANSWER:** The Fifth Amendment applies to all federal criminal proceedings, regardless of subject.

- 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?

**ANSWER:** The requirement that the prosecution prove its case beyond a reasonable doubt is and should be the standard in federal criminal cases, regardless of the crime.

- 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?

**ANSWER:** The use of classified information in criminal proceedings is a complicated one. However, Congress has set forth governing standards in the Classified Information Procedure Act. These procedures apply with respect to classified information, regardless of the crime charged.

- 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?

**ANSWER:** Such access is, in fact, guaranteed.

**Questions for the Record to Judge Michael B. Mukasey  
From Senator Charles E. Schumer**

1. You assured me in our private interview and at your confirmation hearing that you will undertake a review of existing Office of Legal Counsel opinions if you are confirmed. In particular, you agreed to review and re-examine legal opinions relating to the Terrorist Surveillance Program, detention, interrogation, and torture.

- i. If confirmed, do you pledge not only to review any operative legal opinions, but also to correct and/or withdraw any that you find are problematic?

**ANSWER:** I will review any such opinions and will correct or withdraw any opinions that I find to be legally unsustainable.

- ii. If confirmed, do you commit to telling Congress and otherwise publicly announcing when you have completed your review of operative OLC opinions?

**ANSWER:** I will take appropriate steps to make it known to Congress that I have completed this review.

- iii. If confirmed, do you commit to disclosing to Congress and otherwise publicly announcing whether you have directed that any OLC opinion be corrected and/or withdrawn?

**ANSWER:** Yes, to the extent it can be done without compromising national security or relevant privileges.

2. At your confirmation hearing, you stated that you would review the Administration's legal justification for its assertion of executive privilege with respect to Congress's investigation into the firing of nine United States Attorneys. Although you testified that you had not had the opportunity to carefully read Solicitor General Paul Clement's written opinion in support of the invocation of privilege, you did say that the section of the opinion relating to third-party communications with the White House caused you to wonder, "Huh?"

- i. If confirmed, do you commit to reviewing the legal bases for the Administration's assertion of executive privilege in this matter within 30 days of taking office?
- ii. Do you commit, after your review, to providing your own opinion on the matter to Congress?

**ANSWER:** If I am confirmed as Attorney General, I will review the legal bases for the Administration's assertion of executive privilege as quickly as I can, and I will take whatever actions are appropriate following that review. I will be committed to working with Congress on this issue, as on other issues.

3. At our first meeting, I asked you about the Inspector General's upcoming report on the conduct of the Attorney General and other matters related to the firing of United States Attorneys. I asked you whether, if you are confirmed and the Inspector General makes a criminal referral, your Department will bring a criminal case. You assured me that you will review it carefully and if there is a case to be brought, you will absolutely bring it.

- i. Do you stand by that commitment?

**ANSWER:** I stand by my commitment to review the recommendations of the Inspector General (which may or may not include a recommendation to pursue criminal charges), and to ensure that the Department brings any appropriate criminal charges.

4. There was wide concern when President Bush's Justice Department put political appointees instead of career attorneys in charge of hiring for the Department's prestigious summer law clerk and Honors Attorney programs. In April, the Department put hiring back in the hands of career officials.
  - i. Do you commit to leaving career attorneys in charge of making these new hires, and do you commit to reexamining the hiring process and establishing any new safeguards needed to ensure that hiring for career attorneys is not governed by partisan or ideological considerations?

**ANSWER:** Although I am not familiar with the specifics of these hiring decisions, I reiterate that partisan considerations will play no role in the hiring and management of career attorneys.

5. Currently, both the Office of Professional Responsibility and the Office of the Inspector General are investigating whether political considerations were taken into account in hiring decisions by the Department of Justice's Civil Rights Division.
  - i. Do you commit to cooperating fully with this investigation?

**ANSWER:** Yes.

- ii. Following the conclusion of this investigation, do you pledge to make any changes necessary to ensure that political or partisan considerations do not taint hiring decisions?

**ANSWER:** I will make any changes necessary to ensure that neither political nor partisan considerations will play a role in the hiring decisions of career attorneys.

6. Since late 2004, the Civil Rights Division and other Justice Department components have been required to assist with an overload of deportation cases that have consumed up to 60% of appellate dockets. I am concerned that this immigration backlog is weakening civil rights enforcement. Immigration enforcement is very important, but setting law enforcement priorities should not be a zero-sum game.
  - i. If you are confirmed, will you commit to reviewing this situation and giving Congress (a) an estimate of when the immigration backlog will clear and/or (b) a request for whatever additional authority or resources are needed to ensure that immigration prosecutors can handle deportation cases without tying up other divisions of the Department?

**ANSWER:** As I am not familiar with the specifics of the current backlog, I cannot give a responsible or informed estimate. I agree that it is critical for the Department to have sufficient resources to carry out its responsibilities.

7. In recent elections, we have seen many despicable attempts to spread false information to voters. These misinformation campaigns are clear efforts to confuse or frighten voters and prevent them from getting to the polls. Yet the Justice Department has few tools to combat these practices because it is not a federal crime to lie to voters about basic election-related facts such as voter eligibility rules or the time and place of an election.
  - i. Do you agree that we need to update our voter protection laws in order to give the Justice Department new tools to combat voter deception in federal elections?

**ANSWER:** I have not studied this issue in sufficient detail to offer comment.

- ii. Do you agree that it should be a federal crime to spread false information about basic election facts with the intent to prevent another person from voting?

**ANSWER:** If it is not already unlawful voter fraud to spread false information about basic election facts such as the time and place of election, it should be.

8. As Professor Jed Rubenfeld, writing in a *New York Times* Op Ed piece, dated October 23, 2007, points out, you suggested at your hearing that the President's obligation to obey a federal statute depends on whether his authority "to defend the nation" trumps his duty to follow the law. I agree

with Professor Rubinfeld that the President has no authority to disobey a Constitutional law.

- i. Do you agree with this bedrock principle?

**ANSWER:** Yes, I agree that the President must comply with all constitutional statutes.

- ii. Can you state directly and clearly your view of the President's authority to disregard a duly enacted and constitutional federal statute?

**ANSWER:** The President has no such authority.

9. If you are confirmed and your Justice Department experiences serious disagreement over whether a specific law enforcement or intelligence tool is permissible under existing law, do you pledge to come to Congress to resolve the disagreement and seek a specific legal authorization for the practice in question?

**ANSWER:** As Attorney General, it is my responsibility to resolve differences within the Department. I would not hesitate, however, to seek advice and assistance from leaders outside the Department – including Congress – if such assistance would help resolve any issues or controversies.

10. If you are confirmed, and if it comes to your attention as the Attorney General that there has been any unintentional misuse or intentional abuse of new powers granted in FISA modernization legislation, do you commit to coming forward and immediately disclosing this misuse or abuse to Congress?

**ANSWER:** It is my understanding that reporting requirements are currently in place. I will work to ensure that all relevant officials and offices scrupulously comply with these requirements.

**Senator Dick Durbin**  
**Written Questions for Attorney General Nominee Michael Mukasey**  
**October 25, 2007**

1. When we met prior to your confirmation hearing, you told me the Geneva Conventions are “a two-way street” and suggested that our country should not comply with the Conventions if our enemies do not. During your hearing, I asked you about Common Article 3 of the Geneva Conventions. You seemed to take the position that only certain elements of Common Article 3 govern the United States’ treatment of detainees. You said:

What part of Common Article 3 the Supreme Court found in *Hamdan* was applicable through, I believe through the Universal Code of Military Justice, unless I’m confusing my cases. I can’t, as I sit here, recall precisely what part of Article 3 the Supreme Court found applicable. I thought they were talking about the need for a trial and for an opportunity for a detainee to get a hearing. I did not think that that concerned interrogation techniques.

This seems to contradict the Administration’s interpretation of the *Hamdan* decision. For example, during a Senate Judiciary Committee hearing on July 18, 2006, I asked then Attorney General Gonzales, “All U.S. personnel, including intelligence personnel, are now required, do you believe, to abide by Common Article 3 in the treatment of detainees?” In response, he said:

I read the [*Hamdan*] opinion, it says it applies to our conflict with Al Qaeda. ... That is what it says, without qualification. ... I mean, the court says, we believe, in *Hamdan*, that in our conflict with Al Qaeda, Common Article 3 applies.

- a. **Do you agree that Common Article 3 governs the treatment of all detainees, without qualification?**

**ANSWER:** My remarks at the hearing were directed at the specific issue addressed in *Hamdan*. I agree that the Court’s holding in *Hamdan* means that Common Article 3 applies to all detainees in our armed conflict with al Qaeda.

- b. **Do you agree that all interrogation techniques used by U.S. personnel must comply with Common Article 3?**

**ANSWER:** Because Common Article 3 applies to our armed conflict with al Qaeda, I agree that Common Article 3 governs the interrogation of all detainees in that conflict, including those detained at Guantanamo Bay, Cuba.

- c. **If all interrogation techniques used by U.S. personnel must comply with Common Article 3, could enemy forces legally use all such techniques**

**against American prisoners?**

**ANSWER:** With respect to the present armed conflict, it seems unrealistic to expect that al Qaeda would comply with any legal standard, because members of al Qaeda demonstrate no respect for the law of war. Rather, they murder and torture the people whom they capture. With respect to other conflicts, United States military personnel would be entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. That said, I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could potentially apply to American citizens, and that presents an additional reason why it is important for the United States to adhere fully to its treaty obligations, including those under Common Article 3.

2. As you know, the President recently issued an Executive Order interpreting Common Article 3 of the Geneva Conventions as applied to CIA detention and interrogation. The Military Commissions Act (MCA) reaffirmed the President's authority to interpret the meaning and application of the Geneva Conventions, just as he may interpret any treaty. The MCA did not grant the President the authority to redefine or narrow the Geneva Conventions. In fact, during consideration of the MCA, Congress specifically rejected the Administration's request to redefine Common Article 3.

Nonetheless, the Executive Order seems to redefine the meaning of Common Article 3 in a manner that would permit abusive interrogation techniques. Common Article 3 states that "outrages upon personal dignity, in particular humiliating and degrading treatment" are absolutely prohibited (emphasis added). The Executive Order, on the other hand, prohibits "willful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the bounds of human decency" (emphasis added). In other words, humiliating and degrading treatment, which Common Article 3 absolutely prohibits, is permitted under the Executive Order as long as it is not "willful and outrageous" or a reasonable person would not consider it "beyond the bounds of human decency."

**In your opinion, does the Executive Order comply with our nation's legal obligations under Common Article 3?**

**ANSWER:** I have no reason to believe that the Executive Order is not fully consistent with Common Article 3. As I noted at the hearing, if confirmed as Attorney General, I will review the Department of Justice's legal analysis with respect to the standards that apply to the treatment and interrogation of detainees, and I will ensure that the Department of Justice does not authorize any practice falling short of our obligations under Common Article 3.

3. On June 19, 2007, during his confirmation hearing to be CIA General Counsel, John Rizzo was asked about the difference between the prohibition on cruel, inhuman and degrading treatment and Common Article 3 and said, "the prohibitions are actually

somewhat similar. ... the Due Process Clause bars interrogation techniques that 'shock the conscience.' So that would be the applicable legal standard I would say in both – in both statutes.”

**Do you agree with Mr. Rizzo?**

**ANSWER:** I am not familiar with Mr. Rizzo's testimony. I do not doubt that many practices that would be prohibited as “outrages upon personal dignity” also would be prohibited as “cruel, inhuman and degrading” treatment. Under United States law, “cruel, inhuman and degrading” treatment is defined by reference to the constitutional standards that the Supreme Court has held to protect Americans, and I would presume that our Constitution affords American citizens with protections that are equal or greater than what the Geneva Conventions provide to unlawful enemy combatants. That said, these are clearly two different legal standards, arising out of different legal frameworks, and accordingly, I would expect a separate analysis would be required in determining whether particular conduct satisfies one or the other.

4. As I told you during your confirmation hearing, the Judge Advocates General, the highest-ranking military lawyers in each of the U.S. Armed Forces' four branches, told me unequivocally that each of the following techniques is illegal and violates Common Article 3 of the Geneva Conventions: 1) painful stress positions, 2) threatening detainees with dogs, 3) forced nudity, 4) waterboarding (i.e., simulated drowning) and 5) mock execution. On July 24, 2007, during his last appearance before the Senate Judiciary Committee, I asked Alberto Gonzales whether it would be legal for enemy forces to subject an American citizen to these same techniques. Unlike the JAGs, he equivocated, saying, “[I]t would depend on circumstances, quite frankly.” For each of the five techniques named above, please respond to the following questions:

- a. **Would it be legal for enemy forces to use this technique on an American detainee?**
- b. **Would it violate Common Article 3 of the Geneva Conventions for enemy forces to use this technique on an American detainee?**
- c. **If the United States does not explicitly and publicly prohibit the five techniques named above, how can we plausibly argue that it would be illegal for enemy forces to subject Americans to such treatment?**

**ANSWER:** I well understand your concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

As a general matter, American soldiers are entitled to the full protections that the Geneva Conventions afford to lawful prisoners of war, which go beyond the baseline protections of Common Article 3. That said, I agree that in interpreting and applying Common Article 3, we are interpreting legal principles that could potentially apply to American citizens, and that presents an additional reason why it is important for the United States to adhere fully to its treaty obligations, including those under Common Article 3.

Your question asks about the hypothetical use of certain coercive interrogation techniques, and as described at the hearing and in your question, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use. Third, I would not want any *uninformed* statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I can provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques would constitute a violation of Common Article 3 of the Geneva Conventions.

Congress has prohibited certain acts, such as murder, mutilation, rape, and cruel or inhuman treatment, as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on "cruel or inhuman treatment" would be of particular relevance. That statute, similar in structure to the federal anti-torture statute (18 U.S.C. § 2340), prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

**5. Do you agree that it would be inappropriate for the Senate to confirm a Justice Department nominee who is under investigation by the Department's Office of Professional Responsibility?**

**ANSWER:** It would depend on the facts and circumstances of the individual case.

6. Last year, the Justice Department's Office of Professional Responsibility opened an investigation into the conduct of Justice Department attorneys who authorized the NSA program. In an unprecedented move, President Bush personally denied security clearances to the Justice Department investigators, effectively blocking the investigation. H. Marshall Jarrett, the head of OPR, has stated:

Since its creation some 31 years ago, OPR has conducted many highly sensitive investigations involving Executive Branch programs and has obtained access to information classified at the highest levels. In all those years OPR has never been prevented from initiating or pursuing an investigation.

In August 2006, Senator Kennedy, Senator Feingold and I sent President Bush the attached letter asking him to allow the Justice Department internal investigation to go forward. We have not yet received a response to this letter. Please review this letter and respond to the following question.

**If you are confirmed, will you pledge to review this issue and to make a recommendation to the President regarding whether the OPR investigation of the Justice Department's role in the NSA program should be allowed to proceed?**

**ANSWER:** It is my understanding this issue has already been decided. I have

committed, however, to reviewing the over-all circumstances of this matter.

7. I am concerned that it will be difficult for you to restore the credibility of the Justice Department without new leadership at the Office of Legal Counsel. Although he has not yet been confirmed, Steven Bradbury has been the de facto head of OLC for over two years. There are serious unresolved questions about Mr. Bradbury's role in the NSA warrantless surveillance program. During the confirmation process, Mr. Bradbury has refused to answer straightforward questions from Judiciary Committee members about torture. According to a recent article in *The New York Times*, in 2005 Mr. Bradbury signed two OLC legal opinions approving the legality of abusive interrogation techniques. On October 16, 2007, Senators Kennedy, Feingold and I sent the attached letter to President Bush urging him to withdraw the nomination of Steven Bradbury to head OLC. Please review the letter and respond to the following question.

**If you are confirmed, will you recommend that the President select a new nominee to head OLC?**

**ANSWER:** The responsibility to withdraw a nominee for or to nominate individuals to fill Senate-confirmed positions lies with the President. It is my understanding that Mr. Bradbury is a highly competent and dedicated public servant.

8. The Justice Department has refused to provide OLC opinions regarding surveillance, interrogation techniques, and detention standards to the Judiciary Committee. When we met, I asked you about secret OLC opinions. You compared these memos to "brainstorming memos" written by your judicial clerks or congressional staff and said you wouldn't want such memos to be made public. OLC opinions are not brainstorming memos. They are the Executive Branch's official interpretation of the law and are binding on all Executive Branch agencies.

**a. Will you acknowledge that OLC opinions are different from brainstorming memos written by a judicial clerk or congressional staffer?**

**ANSWER:** Yes.

**b. Would you agree that there should be a presumption that OLC opinions will be public unless there is some compelling national security rationale for keeping them confidential?**

**ANSWER:** Although I agree as a general matter that the government must be able to explain itself to the public, there are valid reasons other than national security to keep confidential these opinions, which represent the considered legal advice from the Office of Legal Counsel to clients within the Executive Branch.

**c. If you are confirmed, will you pledge to review personally all OLC opinions regarding surveillance, interrogation techniques, and detention**

**standards to determine whether each of these opinions can be provided to Congress and to determine whether the legal analysis and conclusions of each of these opinions is correct?**

**ANSWER:** Yes.

**d. In conducting this review, will you pledge to consult with career Justice Department, Defense Department and CIA attorneys with expertise in these areas?**

**ANSWER:** I will consult with those attorneys and individuals who can provide substantive advice in these areas. The decision to consult with a particular attorney or individual will not depend on that individual's career or non-career status.

**e. If you disagree with the legal analysis and/or conclusions of any of these OLC opinions, will you pledge to rescind this opinion?**

**ANSWER:** I will carefully review all advice given in these areas and will ensure that the Department of Justice does not authorize any practices that are inconsistent with the law. If I determine that any operative OLC opinions in these areas are legally unsustainable, I will rescind or modify them.

9. According to the *New York Times*, in 2005 Mr. Bradbury authored an opinion on so-called "combined effects," which authorized the CIA to use multiple abusive interrogation techniques in combination. Alberto Gonzales approved this opinion over the objections of then Deputy Attorney General Jim Comey, who said the Justice Department would be "ashamed" if the memo became public. The *New York Times* also reported that Mr. Bradbury authored and Alberto Gonzales approved an OLC opinion concluding that abusive interrogation techniques such as waterboarding do not constitute cruel, inhuman or degrading treatment. This opinion was apparently designed to circumvent the McCain Torture Amendment, then being considered by Congress, which clarified that such treatment is absolutely prohibited.

**Would you agree that when OLC issues an opinion that has the effect of circumventing legislation then being considered, or recently passed by, Congress, that Congress should be notified?**

**ANSWER:** This issue requires careful deliberation on a case-by-case basis, bearing in mind the importance of Congress's oversight responsibilities.

10. In your recent *Wall Street Journal* op-ed, "Jose Padilla Makes Bad Law," you suggest that Guantanamo detainees "may be put in custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation – a practice, known as rendition, followed during the Clinton administration."

**a. What is your basis for stating that rendition is a practice “followed during the Clinton administration”?**

**ANSWER:** My understanding is that a number of former officials have publicly described the Clinton Administration’s practices concerning renditions. For instance, as you note in question 11, former CIA official Michael Scheuer has discussed the practice.

**b. Why did you not mention the Bush Administration’s use of this practice?**

**ANSWER:** My article was premised upon an awareness of the Bush Administration’s practice of rendition, because that practice has been widely discussed. The impression that I was seeking to dispel was that the Bush Administration was the first to utilize the practice.

11. According to Michael Scheuer, the former head of the CIA’s Bin Laden Unit, there is a crucial difference in the way rendition was used during the Clinton and Bush Administrations. Under President Clinton, detainees were required to be taken to countries where there was outstanding legal process against them, not for the purpose of interrogation, while under President Bush, renditions are done solely for the purpose of interrogation and detainees are rendered to countries that frequently use torture. Some call Clinton’s approach “rendition to law” and Bush’s “rendition to torture.”

**a. Do you believe rendition for the purposes of interrogation is legal?**

**ANSWER:** I understand the term “rendition” to refer to any transfer of a person from one country to another outside the context of formal extradition proceedings. The propriety of a given rendition will turn on the facts and circumstances of the particular case, including the lawfulness of the detention in the first place.

**b. Would it be legal if the intelligence service of a foreign country detained an American in the United States and transferred him to another country for interrogation?**

**ANSWER:** I cannot imagine a circumstance in which a foreign intelligence agency could lawfully detain an American citizen in the United States, much less transfer him to another country for purposes of interrogation or otherwise.

12. I am concerned about recent reports that Guantanamo detainees with a credible fear of torture have been sent to countries that routinely engage in torture, including Libya, Saudi Arabia, and Tunisia. I support reducing the Guantanamo detainee population, but this must be done in compliance with our legal obligations. The Administration relies on so-called “diplomatic assurances” as the legal basis for concluding that a detainee will not be tortured. It is difficult to understand how the Administration can rely on promises from countries that routinely violate their legal obligations not to use torture as the basis for

concluding a detainee will not be tortured.

**a. Do you think relying on non-legally binding diplomatic assurances from a country that routinely engages in torture satisfies our legal obligations not to transfer an individual to a country where she or he is at risk of torture?**

**ANSWER:** I am not familiar with diplomatic assurances as a general matter or how they are used in particular cases. It is my understanding that United States law and policy prohibit the transfer of anyone in the custody of the United States to another country where it is "more likely than not" that the person would be tortured. Should I be confirmed as Attorney General, I would ensure that the Department of Justice adheres to this practice. I also would note that there are other agencies, such as the Department of State and the Department of Defense, that are more directly involved in the negotiations that lead to the transfer of individuals.

**b. Would it be legal for another country to send an American detainee to a country that routinely engages in torture on the basis of diplomatic assurances?**

**ANSWER:** The United Nations Convention Against Torture ("UNCAT") prohibits transferring any person to another country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Senate, upon ratifying the UNCAT, explained that "substantial grounds" means "more likely than not." Accordingly, it would not be legal for a country to transfer any person, whether an American or otherwise, to another country where it is more likely than not that he would be tortured.

10. The recent killing of 17 Iraqis in a shooting involving U.S. security firm Blackwater has highlighted the need for greater oversight of contractors in Iraq. In the last several years, the Defense Department and the CIA Inspector General have referred a number of detainee abuse cases involving contractors and civilians to the Justice Department. These agencies will only refer an allegation to the Justice Department if they believe it rises to the level of criminal behavior.

In 2004 then Attorney General Ashcroft transferred all pending Justice Department detainee abuse cases to the U.S. Attorney's Office for the Eastern District of Virginia. It has been three years since this transfer and in that time there has not been a single indictment in any of these cases. During the same time period, the Defense Department has prosecuted numerous military personnel for detainee abuses. Of course, every case must be considered on its individual merits, but it is difficult to believe that every case referred by the CIA IG and the Defense Department was baseless. What troubles me most is the appearance that servicemembers are being held to a higher standard than others when it comes to fighting the war on terrorism.

**a. Please provide an update on the detainee abuse cases referred to the U.S. Attorney's Office for the Eastern District of Virginia. How many of these investigations are still ongoing? How many have been closed?**

ANSWER: I am not familiar with the details or status of these cases.

**b. Does it concern you that so many military personnel have been prosecuted while none of the contractors implicated in these cases have been?**

ANSWER: I am not familiar with the details of these cases.

**c. If you are confirmed, what will you do to improve the Justice Department's oversight of private security contractors in Iraq and Afghanistan?**

ANSWER: I am not sufficiently familiar with the details of this issue to offer specific suggestions at this time.

11. According to the *Washington Post*, before you were confirmed you "spent part of the weekend meeting with leading figures in the conservative world, seeking to allay their concerns about [your] philosophy and suitability for running [the] Justice Department."

**a. With whom did you meet?**

ANSWER: Prior to the announcement of my nomination, I met with former Attorney General Edwin Meese III, Lee Casey, Leonard Leo, David Rivkin, Jay Sekulow, and Edward Whelan.

**b. Who asked you to take these meetings?**

ANSWER: Officials within the White House. I cannot remember the specific individuals.

**c. In addition to "leading figures in the conservative world," have you met with any leaders of civil rights or human rights organizations?**

ANSWER: Since my nomination, I have not formally met with any non-governmental organizations or their leaders.

12. If confirmed, you would serve as Attorney General in the run-up to a hotly contested presidential election. There is a perception in some quarters that this Administration has, to some extent, played politics with important national security issues. We saw this in 2004, when President Bush argued that our national security would be threatened if the PATRIOT Act was not reauthorized immediately, even though the law did not sunset until the end of 2005. Many are concerned that this Administration will try to use the Protect America Act [the recently-passed FISA law] or some other national security legislation for the same purpose in the 2008 election.

**If confirmed, how would you ensure that important national security issues do**

**not become inappropriately politicized during your tenure?**

**ANSWER:** I have spoken and written about the need for reasoned, careful, and informed debate in matters of national security. I have also emphasized that the Department will bring and prosecute cases, as well and make decisions, based only on the law and facts of a given situation - not based on any political concerns.

13. I read the *Wall Street Journal* op-ed in which you wrote that the PATRIOT Act “has become the focus of a good deal of hysteria, some of it reflexive, much of it recreational.” The Justice Department’s Inspector General has concluded that the FBI was guilty of “serious misuses” of National Security Letters and failed to report these violations to Congress and a White House oversight board. The Inspector General also reported that the number of NSL requests has increased exponentially from about 8,500 the year before enactment of the Patriot Act to an average of more than 47,000 per year and that even these numbers were “significantly understated” due to flaws in the FBI’s database.

I believe the abuses documented in the Inspector General’s report demonstrate the need for reasonable reforms to the PATRIOT Act that I and a bipartisan group of Senators proposed years ago in a bill called the SAFE Act. For example, the PATRIOT Act allows the FBI to issue NSLs for the sensitive personal information of innocent Americans without any connection to a suspected terrorist. As the Inspector General report noted, the standard for issuing an NSL “can be easily satisfied.” The SAFE Act would restore a standard of individualized suspicion for using an NSL, requiring that the FBI to certify that the records sought have some connection to a suspected terrorist.

**If you are confirmed, are you willing to work with Congress to ensure that the PATRIOT Act includes adequate protections for innocent Americans?**

**ANSWER:** It is my understanding that several such safeguards were put into place as part of the reauthorization of the USA PATRIOT Act, and that new oversight mechanisms have been established within the Department of Justice in response to the findings of the Inspector General with respect to the FBI’s use of National Security Letters. I would like to evaluate the effectiveness of those safeguards before recommending additional legislative measures.

14. You have publicly defended the Justice Department’s detention of Arab men after 9/11. But the Justice Department’s Inspector General found that none of the 762 individuals held as “September 11 detainees” were charged with terrorism-related offenses, and that the decision to detain them was “extremely attenuated” from the 9/11 investigation. The Inspector General concluded that the Justice Department’s designation of detainees of interest to the 9/11 investigation was “indiscriminate and haphazard.” The Inspector General also found detainees were subjected to harsh conditions of confinement and “a pattern of physical and verbal abuse.”

**a. What is your reaction to the Inspector General's findings?**

**ANSWER:** I am not sufficiently familiar with the details of these findings to offer comment.

**b. If you are confirmed, will you pledge to implement fully the Inspector General's recommendations for fixing these serious problems?**

**ANSWER:** I am not sufficiently familiar with the details of these recommendations to offer any specific commitments.

15. The following questions concern your *Wall Street Journal* op-ed, "Jose Padilla Makes Bad Law."

**a. You suggest that the government was forced to use the material witness law to detain suspects because we don't have a statute authorizing administrative detention on the basis of reasonable suspicion, as countries like the United Kingdom and Israel do. Do you think that the law should allow administrative detention of American citizens without criminal charges?**

**ANSWER:** Congress has the responsibility to decide whether and under what circumstances to amend the material witness statute. I have not advocated such a change in the law but have merely pointed out that such laws exist elsewhere.

**b. In your op-ed, you state that, while in military custody, Padilla reportedly confessed to plotting to detonate a dirty bomb, and you lament that the government was unable to use this confession because Padilla did not have access to legal counsel. Do you think the government should be able to use the confessions of terrorism suspects against them, even if they violate the Constitution?**

**ANSWER:** Confessions that violate the Constitution are not and should not be admissible in criminal proceedings.

**c. In your op-ed, you cite *Ex parte Quirin* as justification for the detention of Padilla as an enemy combatant. In *Quirin*, the Supreme Court upheld the trial by military commissions of Nazi saboteurs during World War II. The *Quirin* defendants were quickly charged, tried and convicted by military commissions. *Quirin* did not uphold the indefinite detention of American citizens as enemy combatants without charge or trial. Does *Quirin* really support the indefinite detention of American citizens as an enemy combatant?**

**ANSWER:** *Quirin* did not answer this precise question. I note, however, that in that case the Supreme Court did hold that an American working as a German saboteur who

was captured in the United States could be detained and prosecuted by military commission as an unlawful enemy combatant.

19. The resignation of Attorney General Gonzales appears to be linked to the U.S. Attorney firing scandal. Earlier this year, we learned that at least nine U.S. Attorneys were fired in 2006: David Iglesias (NM), John McKay (WA), Bud Cummins (AR), Carol Lam (CA), Kevin Ryan (CA), David Bogden (NV), Paul Charlton (AZ), Margaret Chiara (MI), and Todd Graves (MO).

**Based on what you know about the job performances of these nine individuals, would you have permitted any of them to be terminated if you had been the Attorney General at the time?**

**ANSWER:** I am not sufficiently aware of the job performances of these individuals to offer comment. As I indicated in my testimony, the kinds of issues that should be considered as part of a decision to retain a given United States Attorney would include competency and honesty.

20. The congressional investigation of the U.S. Attorney firing scandal disclosed that certain U.S. Attorneys may have been permitted to keep their jobs because they brought prosecutions against Democratic officials. Norman Ornstein, a scholar at the American Enterprise Institute, had an off-the-record conversation with a partisan Republican former U.S. Attorney and wrote in April 2007: "What was most interesting, however, was his insistence that the big problem was not the eight federal prosecutors fired, but the ones left in place. He told me to watch the cases of those who kept their posts while pursuing unwarranted and politically motivated prosecutions."

Just this week, former Attorney General Richard Thornburgh, a Republican, testified about this issue before the House Judiciary Committee. He testified that the U.S. Attorney in the Western District of Pennsylvania, Mary Beth Buchanan, engaged in a troubling practice of prosecuting Democrats – but not a single Republican – in the run-up to last year's election, stating: "Ms. Buchanan thus succeeded in the Department's apparent mission of casting Democrats in a negative light during the election year."

Speaking more generally about the Justice Department's conduct during the past seven years, Attorney General Thornburgh testified: "We came to learn that those United States Attorneys who, *inter alia*, aggressively pursued Democrats, as opposed to those that did not, remained in place or were promoted. In fact, we learned from the study conducted by Donald Shields and John Cragan, from the University of Minnesota, that this Administration is *seven times* more likely to prosecute Democrats than Republicans."

In addition, there have been recent press reports indicating Karl Rove urged a U.S. Attorney in 2005 to prosecute former Alabama Democratic governor Don Siegelman.

And several months ago, we learned that the U.S. Attorney in Milwaukee, Steven Biskupic, brought a prosecution against a state employee that many people believe was

motivated by a desire to bring bad publicity to the Democratic governor in Wisconsin who was in a tough re-election fight last year. The U.S. Court of Appeals for the Seventh Circuit took the extraordinary step of overturning the conviction in this case and ordering the defendant to be released immediately from prison.

**a. What specific steps will you take to communicate to the 93 U.S. Attorneys that selective prosecution against Democratic officials is unethical and intolerable?**

**ANSWER:** I have already begun to make this message clear through my testimony and I reiterate it here: selective prosecution of anyone for political purposes will not be tolerated. If confirmed, I will communicate additional clear guidance through appropriate channels.

**b. What actions would you take if you learned that an individual currently serving as a U.S. Attorney brought or plans to bring a prosecution against a Democratic official for either partisan gain or professional advancement?**

**ANSWER:** I would recommend the dismissal of that individual.

**c. If confirmed, will you request that former White House officials Karl Rove and Harriet Miers come before Congress to testify about the roles they played in firing or maintaining U.S. Attorneys?**

**ANSWER:** It is unclear what the Attorney General's role would be in making such a request.

21. If you are confirmed to be Attorney General, you will oversee the U.S. Marshals Service, an office within the Justice Department whose primary mission is to protect federal judges and their families. This issue hits home for me, in light of the tragic murders in 2005 of Chicago Federal Judge Joan Lefkow's husband and mother by a disgruntled litigant. I have worked with the Marshals Service over the past two years to improve judicial security for federal judges across the country.

Press reports indicate you were given a Marshals Service protective detail from 1993 to 2005. An October 16 article in the *Washington Post* reported that the Marshals Service filed a grievance against you and another judge for allegedly abusing their services.

Among other allegations, they claim that you, the other judge, or your spouses engaged in the following activities: (1) asking the Marshals Service employees to carry groceries, luggage, and golf clubs, (2) insisting the Marshals Service employees empty your trash, (3) prohibiting the Marshals Service employees on the night shift from flushing the toilet while working, and (4) demanding that Marshals Service employees drive you to your vacation home in dangerous weather conditions.

**a. With respect to you or your wife, are any of these allegations true? If so, please provide an explanation.**

**ANSWER:** On one occasion, I requested to be driven to my vacation home in inclement weather. I made this request only after consulting with the supervisor of the detail and obtaining his opinion that it would not be a problem.

**b. Do you believe it is appropriate for a federal judge or their spouse to make these types of demands on Marshals Service personnel?**

**ANSWER:** I have always dealt with Marshals Service personnel in an appropriate and respectful manner.

**c. What was the resolution of the grievance filed against you by the Marshals Service?**

**ANSWER:** No grievance has been filed against me or my wife. It is my understanding that all grievances have been resolved, although I am not aware of the details.

**d. If you are confirmed, will you pledge not to retaliate against the Marshals Service in any way?**

**ANSWER:** I greatly appreciate the service that the U.S. Marshals provide on a daily and provided to me and my wife for years. I have no reason to retaliate against the Marshals Service and will not do so, if confirmed.

22. Many recent press reports have described a troubling politicization of the hiring process at the Justice Department, particularly in the Civil Rights Division. The hiring process has been largely taken away from career attorneys and given to political appointees, who have packed the Division with Federalist Society members and Republican Party loyalists.

**a. Will you agree to restore the power of Civil Rights Division career section managers to select attorneys they would like to interview and hire through the experienced attorney hiring process?**

**ANSWER:** As I have testified, the Civil Rights Division holds a special place in the Department. I will ensure that no partisan or political considerations will play a role in the hiring and retention of career attorneys in the Department.

**b. Will you agree to restore the power of career attorneys to select individuals they would like to interview and hire through the Honors Program and Summer Law Intern Program?**

**ANSWER:** Although I am not familiar with the specific operations of the Honors Program or Summer Law Intern Program, individuals will not be selected for these programs based on partisan or political considerations.

**c. What other specific steps will you take to ensure that attorney hiring in the Civil Rights Division – and throughout the Department – is based on professional competence rather than ideological purity?**

**ANSWER:** As I have emphasized in my testimony and in my meetings with Senators, political and partisan considerations will have no role in the selection and management of career Department attorneys.

23. In addition to the politicization of the Civil Rights Division's hiring process, serious concerns have been raised about that Division's lack of enforcement on behalf of African Americans. The Civil Rights Division brought the first Voting Rights Act Section 2 lawsuit in history on behalf of whites, but failed to bring a single Voting Rights Act Section 2 case on behalf of African Americans during a five-year period between 2001 and 2006. And it took the Civil Rights Division six years to file their first employment discrimination disparate impact case on behalf of African Americans.

The president of the NAACP Legal Defense Fund, Theodore Shaw, submitted written testimony in conjunction with your hearing and accused the Civil Rights Division of "a retreat from its longstanding commitment to eliminate racial discrimination against African Americans."

**Are you concerned about this retreat? If so, what specific steps would you take to reverse it?**

**ANSWER:** I will enforce all of the Nation's civil rights laws, including all aspects of the Voting Rights Act.

24. My Illinois colleague, Senator Barack Obama, has said: "In our democracy, the goal should be to encourage eligible voters to vote, not to create new barriers to make it more difficult for them to exercise their most basic right."

**Do you agree with that statement? Please explain your answer.**

**ANSWER:** Yes. As I have testified, all eligible persons should have the ability to exercise their right to vote. I have emphasized this point when I have spoken before groups of new citizens and encouraged them to become informed and exercise their new right to vote.

25. The Civil Rights Division's Voting Section has been hit particularly hard over the past seven years. Conservative firebrands like Hans von Spakovsky and Bradley Schlozman were brought into the Division, and they severely politicized voting rights work. They rejected the recommendations of career attorneys in politically sensitive matters and they advanced positions that set back the voting rights of minorities.

One example is their approval of the Georgia photo ID law, which Senator Cardin asked you about at your hearing. This law had a disparate impact against minority voters and was struck down by federal courts as an unconstitutional “poll tax.” Those are the court’s words.

You testified at your hearing that it was “over the top” to characterize the Georgia photo ID law as a poll tax. Your statement is troubling because it reflects a lack of understanding of the case law and of the impact photo ID laws can have in restricting voting rights for minorities, the poor, and the elderly. Such laws are passed in the name of preventing fraud, yet there is virtually no evidence of polling place fraud in America.

There is a major case before the U.S. Supreme Court this term on the constitutionality of an Indiana photo ID law. The Justice Department has not yet publicly indicated whether it will file an *amicus* brief in the case and, if so, which side it will support.

**If confirmed, will you agree to meet personally with the leaders of the NAACP Legal Defense Fund, the Leadership Conference on Civil Rights, and other top representatives of the civil rights community before the Justice Department decides whether to file an *amicus* brief in the Indiana case, so you can hear their side of the story as to why photo ID laws are harmful to minority voters?**

**ANSWER:** I will ensure that the Department will adequately consider the views of all interested parties.

26. The chief of the Voting Section, John Tanner, has made a series of statements and decisions that have led many elected officials and civil rights advocates to call for his resignation. Earlier this month, Mr. Tanner spoke on a panel and argued photo ID laws disenfranchise elderly voters but not minority voters because “our society is such that minorities don’t become elderly the way white people do; they die first” and also that “anything that disproportionately impacts the elderly has the opposite impact on minorities.” Mr. Tanner’s suggestion that photo ID laws don’t harm minority voters because they “die first” is inaccurate and insensitive.

Mr. Tanner, who was handpicked to be the chief of the Voting Section in early 2005 after the previous chief, Joseph Rich, was pressured to leave, has demoralized the section whose primary mission is to safeguard the voting rights of the American people. There has been an unprecedented exodus of Voting Section staff, including nine out of thirteen African-American professional employees, three out of four deputy chiefs, and nearly two-thirds of its career attorneys. Teresa Lynn, an African-American civil rights analyst and 30-year veteran of the Justice Department described the Voting Section as a “plantation” and two African-American employees have filed EEO complaints against Mr. Tanner.

In recent days, it has been reported that Mr. Tanner allowed a member of his staff, Susana Lorenzo-Giguere, to abuse the Justice Department’s travel policy and to receive per diem compensation for personal travel. According to an October 24 *Washington Post*

article, this employee was permitted to collect \$64 per day while spending nearly three months at her beach house in Cape Cod. The Justice Department's Office of Professional Responsibility is investigating Mr. Tanner and Ms. Lorenzo-Giguere regarding this matter.

**Do you believe Mr. Tanner deserves to keep his position as chief of the Voting Section and top voting rights official at the Justice Department?**

**ANSWER:** I am not familiar with the specific facts you have described. To the extent there is an ongoing OPR investigation of any of these matters, it would be inappropriate for me to comment until such investigation is completed.

27. The chief of the Employment Litigation Section, David Palmer, has also been discredited in recent months. Eight former career staff members sent a letter to the Senate in July 2007 stating that Mr. Palmer, who was installed as the chief of the Employment Litigation Section in April 2002 after the previous chief was involuntarily removed, has created a "work environment permeated with partisanship and animosity" in which "he treated many of his subordinates with disdain and contempt." Their letter indicated Mr. Palmer was appointed section chief despite the fact that he was "reprimanded for poor work performance," "did not understand the basic principles of Title VII and constitutional law," and was the subject of one or more discrimination complaints.

The letter also stated: "Over the past several years, Mr. Palmer took a law enforcement organization that was the vanguard of civil rights enforcement for forty years and noticeably changed its direction. The Section has seen a decline in the filing of new cases at the same time that the Section has involved itself in controversial matters that would undermine core civil rights protections. The Section has failed in its core mission to secure the rights of African-Americans, Hispanics, women, and other protected groups, as the number of cases has declined precipitously."

**Do you believe Mr. Palmer deserves to keep his position as the chief of the Civil Rights Division's Employment Litigation Section?**

**ANSWER:** I am not familiar enough with the specific facts to comment on this issue.

28. At your nomination hearing, NAACP Legal Defense Fund president Theodore Shaw gave the following advice about de-politicizing the hiring process at DOJ: "I also think that it would be a good thing for the attorney general and the assistant attorney general, whoever that might be, of the Civil Rights Division to have some dialogue with some of the people who ran the Civil Rights Division under prior administrations, under both parties, as well as some of the career attorneys who have left the department, to get a sense of perhaps how the department could operate to restore its credibility and integrity."

**Would you be willing to engage in such a dialogue with former officials and career attorneys who served in previous administrations under both parties?**

**ANSWER:** I plan to meet with former Department officials, from administrations of both parties, and seek their candid opinions.

29. In response to a question at your nomination hearing about your commitment to civil rights, you indicated that when you served as a federal judge, half of the law clerks you hired were women.

**a. How many law clerks did you hire who were African-American?**

**ANSWER:** None.

**b. How many total law clerks did you hire during your 18 years of service as a federal judge?**

**ANSWER:** Approximately forty-four.

30. According to the FBI's Uniform Crime Reports, violent crime in the United States increased by 2.3 percent in 2005, and increased again by 1.9 percent in 2006. At the same time that violent crime rates have gone up, the Administration has sought to cut funding for Department of Justice programs that provide state and local law enforcement assistance.

**As Attorney General, would you continue the Administration's annual efforts to cut funding for the following Department of Justice programs:**

- The Community Oriented Policing Services Program?**
- The Edward Byrne Memorial Justice Assistance Grant Program?**
- The State Criminal Alien Assistance Program?**
- The Drug Court Discretionary Grant Program?**
- Juvenile Justice and Delinquency Prevention Act programs?**

**ANSWER:** As I testified, it is my understanding that programs such as the COPS Program were designed to provide initial funding for states to hire needed law enforcement personnel. That funding is intended to allow states and localities to make a significant impact in preventing and reducing crime in their jurisdictions. I am not familiar with the specifics of each of the programs set forth above. I agree, however, with the general principle that the Department of Justice is uniquely situated and obligated to provide assistance to state and local law enforcement.

31. When I became aware earlier this year of the serious health risks associated with the use of restraints on pregnant inmates, I began working with the Federal Bureau of Prisons and the U.S. Marshals Service to clarify their policies regarding the use of such restraints.

**a. Do you believe that pregnant inmates should be shackled or restrained in ways that put the pregnancy or the health of mother or child at risk?**

ANSWER: No.

**b. If you are confirmed as Attorney General, would you work with me to ensure that agencies within the Department of Justice have policies in place to protect pregnant inmates and their children from the adverse health impacts of certain uses of restraints?**

ANSWER: I am obviously concerned about the health of female prisoners and their unborn children. I am not familiar with these specific policies or how to improve them, but I would appreciate your input on this topic.

32. In August 2004, the Office of Legal Counsel issued a memorandum concluding that the Second Amendment secures an individual right to keep and to bear arms.

**a. Do you agree with this endorsement of the view that the Second Amendment protects a right to possess firearms for private purposes unrelated to the militia, even though that view been rejected by most Federal appeals courts and conflicts with the holding of the U.S. Supreme Court in *United States v. Miller*?**

ANSWER: Based on my own study, I believe that the Second Amendment protects an individual right to keep and bear arms.

**b. Do you support efforts to overturn federal, state and local gun control laws on the grounds that these laws violate the "individual right" interpretation of the Second Amendment?**

ANSWER: It is my understanding that a *certiorari* petition is currently pending before the Supreme Court which seeks a resolution of the application of the Second Amendment. I believe that it would be unwise to comment on this litigation at this time, especially given that the Department may be asked for its views or file a brief in connection with this case.

**c. It is an unfortunate fact that there are federal firearms licensees (FFLs) who knowingly sell or supply guns to gang members and other criminals. It is imperative that we break these supply chains and keep guns out of the hands of those who are prohibited from using them. If you are confirmed as Attorney General, will you make it a Department priority to identify and prosecute those FFLs who supply guns to gangs and criminals?**

ANSWER: I understand that ATF has enforcement policies in place that target such corrupt FFLs, and as Attorney General I will seek to enforce all applicable laws.

33. In recent years, numerous federal agencies have sought to preempt established bodies of state law through the rulemaking process, despite the absence of underlying statutory

authority for such preemption. On several occasions, federal agencies have inserted statements regarding the preemptive effect of agency rulemakings within preambles to final rules published in the Federal Register, without providing notice and an opportunity to comment on such preemption statements.

**a. Do you believe it is appropriate for a federal agency to state in the Federal Register that an agency rule or regulation preempts state law, where Congress has not expressly authorized such preemption and where compliance with duties imposed by state law does not make compliance with the federal rule or regulation impossible?**

**ANSWER:** In answering this question, I would engage in a case-by-case analysis. In so doing, I would consider whether the particular regulation reflected a reasonable interpretation of the statute it sought to implement.

**b. Do you believe it is appropriate for a federal agency to state in the Federal Register that an agency rule or regulation preempts state law, without providing notice and an opportunity to comment on such statement?**

**ANSWER:** Again, this determination would depend on the individual facts and law of that particular rulemaking.

34. On October 24, 2006, Dr. David Cornbleet of Chicago was brutally murdered in his office by a former patient, Hans Peterson. Peterson is a U.S. citizen who was born in the United States and who had lived in the United States up until the time of the murder. After the murder, Peterson fled to the French West Indies, turned himself in to the French authorities, and confessed to killing Dr. Cornbleet. Peterson's mother was a French citizen, and therefore Peterson is also considered a French citizen under French law. Because French law prohibits the extradition of French citizens to the United States, France is refusing to extradite Peterson to face trial for his crimes in Illinois. Media reports indicate the Peterson purposefully fled to French territory and turned himself in to French authorities because he knew that if he was convicted for murder under French law, he would face more lenient punishment than under American law.

**a. If you are confirmed as Attorney General, will you work to see that justice is done in the matter of Dr. Cornbleet's murder?**

**ANSWER:** I am not familiar with the specific facts of Dr. Cornbleet's murder.

**b. If you are confirmed as Attorney General, will you work with other federal agencies to ensure that U.S. citizens who have dual citizenship with another country are not able to commit murder within the United States and then surrender to the authorities of the other country in order to avoid justice in the United States?**

**ANSWER:** It is true that dual citizenship can raise complex issues. I would consider this type of question on a case-by-case basis and examine the facts and applicable law in each situation in which it arose.

35. The National Institute on Drug Abuse reports that about half of state and federal prisoners meet standard diagnostic criteria for alcohol or drug dependence. Yet only 13% of those needing drug abuse treatment receive it while incarcerated. This means that many of the 650,000 inmates who are released back into the community each year have not received treatment for their addiction. This makes them likelier to relapse, and to recidivate.

**a. What steps do you believe the Department of Justice should take to address the issue of addiction among the federal inmate population?**

**ANSWER:** I agree that this issue presents a problem. I am not sure of the specific steps that have been taken to this point and what programs are available to help resolve it. I would be willing to examine this issue, evaluate the effectiveness of current programs, and consider what additional steps could be taken in this regard.

**b. What assistance would you recommend that the Department provide to states with regard to addiction treatment programs for prisoners?**

**ANSWER:** Again, I do not know what programs currently exist to help resolve this issue. I would be willing to examine this issue and evaluate the effectiveness of current programs and what additional steps could be taken.

36. In September 2006, the Bureau of Justice Statistics released a report stating that 45% of federal prisoners suffered from mental health problems. Many of these prisoners will also be released into society at some point.

**a. What steps do you believe the Department of Justice should take to address the mental health problems of inmates in order to reduce recidivism?**

**ANSWER:** I agree that the Department should work to reduce recidivism. As I am not familiar with the Department's current mental health programs, I would have to study this issue further before I could offer meaningful comment.

**b. What assistance would you recommend that the Department provide to states with regard to mental health treatment programs for prisoners?**

**ANSWER:** As I am not familiar with the Department's current mental health programs, I would need to study this issue further before I could offer meaningful comment.

37. Asylum law in the United States lacks the flexibility or openness of other nations and is designed to address the common difficulties of politically active men, but often

neglects the horrors that women face. For example, in the Rodi Alvarado case, a Guatemalan woman who had been routinely abused by her husband and ignored by local police, fled to the United States. She would have been killed had she returned to her native land. She was granted asylum initially, but that was overturned by an administrative immigration court, at which point then Attorney General Janet Reno proposed new rules that would address this hole in the law and create more gender equity.

Those rules were stayed by Attorney General John Ashcroft, and the Alvarado case, along with other similar cases, have either remained in limbo, or have been decided on narrow legal grounds. The Department of Homeland Security has expressed dismay over how narrowly the law is being read and wants more protections for female asylees. In effect, they would like the Reno regulations to be adopted, or other similar rules that end this limbo and strike at the problem of inflexible and inequitable asylum law. This has put DHS at odds with the Department of Justice, which has so far refused to promulgate new regulations that will overturn the rigid immigration appellate ruling.

**If you are confirmed as Attorney General, will you make a commitment to support regulations that will equalize the law and make American asylum law more open to the particular plight of women and girls?**

**ANSWER:** I do not know the specific details regarding the government's current asylum policies and do not know the facts surrounding Ms. Alvarado. As a result, I am reluctant to offer comment at this time.

38. In August 2007, the Transportation and Security Administration released a new policy for the secondary screening of religious head coverings. They did so without consulting the relevant community groups and without pre-training TSA screeners on the cultural implications of the new policy, which created an arbitrary system for checking head coverings, particularly turbans, when passengers successfully passed through primary screening (the metal detector). Many Sikh individuals felt violated, and complained to their community organizations, as well as to TSA. As a result of public pressure, TSA recently revised and improved its policy.

As Attorney General, you would not have direct authority over TSA, but your guidance and opinions on matters relating to profiling would have widespread impact.

**a. Your writings and judicial opinions indicate that on matters of national security you tend to strongly defer to government policies. What assurance can you provide that you would honor individual rights and liberties when offering guidance on profiling and airport screening?**

**ANSWER:** I believe my record as a Federal District Court Judge and an attorney demonstrates a commitment to the legal rights of individuals, and if confirmed I would work to ensure that the legal rights of individuals are respected in all matters, including matters involving national security. I share your view that the government should not engage in religious or ethnic profiling.

**b. Would you discourage agencies, inside and outside of the Justice Department, from promulgating regulations and policies that contain elements of profiling?**

**ANSWER:** I would discourage profiling based on inappropriate or impermissible factors.

**QUESTIONS FROM SENATOR BENJAMIN L. CARDIN****NOMINATION OF ATTORNEY GENERAL****JUDGE MICHAEL MUKASEY****SENATE JUDICIARY COMMITTEE****OCTOBER 25, 2007**

Federal law, 18 USC 2340A, specifies that U.S. citizens, U.S. nationals, and individuals on U.S. soil who commit torture whether here or overseas "shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life."

**1. As Attorney General, will you order the Justice Department to prosecute individuals who have under 18 USC 2340-2340A committed acts of torture?**

**ANSWER:** The Department of Justice has an obligation to bring prosecutions to enforce all valid criminal statutes, and as I explained during the hearing, torture clearly is prohibited by federal law. With respect to particular prosecutions, I would consider them on a case-by-case basis and examine the facts and applicable law in each situation.

**2. As Attorney General, will you order the Justice Department to prosecute of individuals who have participated in conspiracy to commit torture?**

**ANSWER:** As I noted, the Department of Justice has an obligation to enforce all valid criminal statutes, and the conspiracy to commit torture would certainly be a crime under federal law. With respect to particular prosecutions, I would consider them on a case-by-case basis and examine the facts and applicable law in each situation.

Article 2 of the Convention Against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

**3. Do you believe that any "exceptional circumstances" exist that would justify torture?**

**ANSWER:** No.

**4. As Attorney General, would you authorize the use of torture in any circumstances?**

**ANSWER:** No.

**Questions Submitted by Senator Whitehouse for Michael Mukasey:**

1. The State of Rhode Island has a serious problem with human trafficking, which is an important criminal justice and human rights issue. If confirmed, what will you do as Attorney General to ensure that the Department's resources are effectively deployed to combat human trafficking? Does the Department have adequate resources to effectively confront this problem? Is any new legislation necessary to help the Department combat human trafficking?

**ANSWER:** I agree that the government should take appropriate action to disrupt and eliminate the practice of human trafficking. As I have not begun work at the Department, I am not in a position to answer your specific questions, although it is my understanding that the Department's Civil Rights and Criminal Divisions devote significant resources to combating human trafficking. I will, however, consider this important issue as part of my initial review of the Department's priorities and allocation of resources.

2. Do you believe that the President may act contrary to a valid executive order? In the event that he does, need he amend the executive order or provide any notice that he is acting contrary to the executive order?

**ANSWER:** Executive orders reflect the directives of the President. Should an executive order apply to the President and he determines that the order should be modified, the appropriate course would be for him to issue a new order or to amend the prior order.

3. The U.S. has long taken the position that techniques such as waterboarding, forced standing for prolonged periods, and sleep deprivation constitute war crimes. As early as 1901, a U.S. Army Major, Edwin Glenn, was convicted for waterboarding a captured insurgent in the Philippines. U.S. military commissions after World War II prosecuted Japanese troops for engaging in waterboarding and stress positions. A Japanese soldier named Tetsuo Ando was sentenced to five years hard labor for, among other offenses, forcing American prisoners to "stand at attention for seven hours." Similarly, Yukio Asano was convicted for, among other charges, "forcing water into [the American prisoners'] mouths and noses." Do you believe the United States Government was right to prosecute these men?

**ANSWER:** I believe that the United States is right to prosecute any illegal treatment of prisoners during wartime. I am not, however, aware of the particular facts and circumstances surrounding these prosecutions, including what else the defendants were charged with doing.

4. In your testimony to the Senate Judiciary Committee on October 18, 2007, you indicated that you did not know what is involved in the technique of waterboarding and that if the practice of putting someone in a reclining position, strapping him or her down, putting cloth his or her face and pouring water over the cloth to simulate the feeling of drowning "amounts to torture, it is not constitutional." Now that you have had a chance to review the relevant public documents describing waterboarding, can you explain any

circumstances under which waterboarding would not constitute torture?

**ANSWER:** I well understand the concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

Your question asks about the hypothetical use of certain coercive interrogation techniques. As described at the hearing and in your question, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use. Third, I would not want any uninformed statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I do know, however, that "waterboarding" cannot be used by the United States military because its use by the military would be a clear violation of the Detainee

Treatment Act (“DTA”). That is because “waterboarding” and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with the relevant legal standard. Were I presented as Attorney General with the question of whether coercive interrogation techniques, including “waterboarding,” would constitute torture, I would have to examine the statutory elements of torture as set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

5. The Judge Advocates General (JAGs) of the U.S. Army, Navy, Air Force and Marines stated in August 2006 that the use of stress positions, dogs, and forced nudity for interrogation purposes are all unlawful. Do you agree with the JAGs that the use of stress positions, dogs and forced nudity are unlawful? Please address each technique individually, and, if you believe any of these techniques are lawful, please explain the legal basis for each conclusion.

**ANSWER:** Please see the answer to question 4. In determining as a comprehensive matter whether a particular interrogation technique is lawful, I would have to consider not only whether the technique was consistent with the prohibition on torture, but also whether it was consistent with the prohibition on “cruel, inhuman and degrading treatment” under the Detainee Treatment Act and the Military Commissions Act. I would have to ensure also that any technique complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. In this regard, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition

of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

6. On what legal basis would the United States object if the Government of Iran or North Korea detained an American citizen, accused him of engaging in hostile acts, and detained him in secret, denying consular visits and ICRC access, and even refusing to acknowledge his detention?

**ANSWER:** The United States may well be able to object, although the legal basis for the objection would depend on the circumstances of the case. For instance, Iran and North Korea, as well as the United States, are signatories to the Geneva Conventions. In the case of any hostilities between the United States and one of those countries, the Conventions would require them to acknowledge the detention of an American prisoner of war and take appropriate measures to ensure ICRC access.

7. In his book, Jack Goldsmith concluded that, at the direction of the White House, the Office of Legal Counsel had refused to show certain draft opinions to the Department of State in order to “control outcomes in the opinions and to minimize resistance to them.” If you are confirmed as Attorney General, would you allow your attorneys to accept direction from the White House to exclude or ignore the Department of State lawyers when analyzing international law? Can you imagine a circumstance in which it would be appropriate to exclude these attorneys?

**ANSWER:** If I am confirmed, I would ensure that the Office of Legal Counsel had available to it all information necessary to render informed legal advice. That information could very well come from attorneys or employees of Departments other than the Department of Justice.

8. What specific steps will you take, beyond having conversations with current and former Department officials and with members of Congress, to audit which internal processes, rules, traditions, norms, and practices need to be changed or restored in order to support the Department’s return to independent, professional, and non-political standards?

**ANSWER:** As I have mentioned previously, if confirmed, I will conduct a comprehensive review of the Department and its operations. That review will consider, among other issues, the Department’s priorities and how it has allocated its resources. This review will not be limited to conversations but instead will examine the full range of the Department’s goals and operations.

Will you convene a bipartisan “blue-ribbon” commission composed of former high-ranking Department officials to make recommendations in this regard?

**ANSWER:** Regardless of the context or setting, I will seek the views of former Department officials, from Republican and Democrat administrations, as to how the Department may be improved. Additionally, as I mentioned in my testimony, I will seek

the views of the Members of the Senate Judiciary Committee, which I anticipate being a valuable source of information and advice. Given these important and informed sources of input, I see no reason at this time to convene the sort of formal commission you suggest.

**QUESTIONS OF SENATOR CHARLES E. GRASSLEY FOR JUDGE MICHAEL MUKASEY, SENATE COMMITTEE ON THE JUDICIARY, OCTOBER 17, 2007**

**Antitrust**

A) Judge Mukasey, as you know, I've been extremely concerned about increased concentration in the agriculture sector of our economy. I believe that the Justice Department's Antitrust Division needs to dedicate more time and resources to agriculture competition issues. The Justice Department must play a key role in limiting monopolistic and monoplistic behavior in agriculture.

1) I'd like to get a commitment from you that the Antitrust Division, under your watch, will pay heightened attention to agribusiness transactions. Can you give me an assurance that agriculture antitrust issues will be a priority for the Justice Department if you are confirmed?

**ANSWER:** I will meet with senior officials of the Antitrust Division and will discuss your concerns with them. I will also discuss with those officials their priorities and where they believe the resources of the Division should be placed.

2) Judge Mukasey, earlier this year, I introduced S. 1759, the Agriculture Competition Enhancement Act of 2007, which among other things, would require the Justice Department to issue agriculture merger guidelines. With the current Farm Bill debate going on here in the Senate, I'd like to get a commitment from you that DOJ will review the legislation, provide me with comments, and work with me on this bill. Can I get that commitment from you?

**ANSWER:** Although I have not yet had the opportunity to review this legislation, I can commit that, if confirmed, the Department would review it shortly with a view toward resolving outstanding concerns in this area.

**Obscenity**

A) Illegal obscenity is more available now than ever before. Obscenity is abundant on the Internet and on cable and satellite television. In fact, there have been news reports that some people are having pornography sent directly to their cell phones and Palm Pilots.

1) If you are confirmed as Attorney General, will you agree to review the Justice Department's strategy on obscenity prosecutions to ensure that it is as effective as possible?

2) Can you assure me that the Justice Department will prosecute the major producers and distributors of illegal obscenity and make such prosecutions a priority under your leadership?

- 3) It is my understanding that both the Justice Department and the FBI have created Obscenity Prosecution Task Forces to conduct obscenity investigations and prosecutions. If you are confirmed as Attorney General, will you continue to support these task forces and ensure that they are adequately staffed and aggressively pursuing obscenity cases?
- 4) Will you review any obscenity prosecution policies and guidelines that the Justice Department and the FBI have in place to determine whether they are as effective as possible or whether they can be improved to combat the dissemination of obscenity?

**ANSWER:** As I testified, I recognize how pornography and obscene material may cheapen a society, objectify women, and endanger children in a way that we cannot tolerate. If confirmed, I will consult with those who prosecute these cases to determine how best to limit distribution of obscene materials. I will also conduct a comprehensive examination of the Department's strategies and policies with respect to obscenity prosecutions to improve their effectiveness and to ensure that prosecutors have the resources they need to carry out their responsibilities.

#### **Oversight**

A) The Constitution grants Congress the authority to oversee and investigate the activities and operations of the Executive Branch. This duty is both explicit and implicit through various authorities provided in Article 1. Conducting oversight is an essential part of our system of government and an integral part of the system of checks and balances. In the years following 9/11, Congress has given the Department of Justice significant new investigative and enforcement powers, such as those contained in the USA Patriot Act. It is important for Congress to know how well these new investigative and enforcement powers are utilized.

Often times, Congress will ask the Government Accountability Office (GAO) to evaluate the Justice Department, subordinate agencies, as well as programs and activities. These evaluations require the cooperation of the Department in providing documents for review and access to witnesses for interviews. The cooperation of the Department is critical in allowing the GAO to fulfill the requests Congress makes.

- 1) Will you commit to ensuring that GAO requests for access to documents and witnesses are agreed to in a timely manner?
- 2) Will you commit to working with the GAO in a constructive manner to address the oversight and other needs of Congress?
- 3) Will you encourage subordinate agencies of the Department to also cooperate with GAO in a similar fashion?

4) What specific steps will you take to ensure that GAO receives timely access to the information and agency officials it needs to carry out reviews of the Department and its programs?

**ANSWER:** Although I am unfamiliar with the Department's current processes and procedures that are employed when the GAO requests documents and witnesses, I agree that strong oversight helps improve the efficiency and effectiveness of particular programs and helps agencies and departments carry out their mandate in a more successful manner. If confirmed, I will review these policies with a goal of ensuring that Congress is able to carry out meaningful oversight.

B) One of the problems I have encountered relative to receiving documents from the Justice Department is the claim that there is a policy of not releasing Office of Professional Responsibility (OPR) documents. However, OPR documents are routinely provided in civil litigation, and have been provided to Congress in the past. I am aware of no legal support for a general policy of withholding all OPR documents from Congress, and this policy hinders our ability to examine OPR decisions for potential retaliation.

1) If you are confirmed, will you continue this policy of withholding OPR documents from Congress? If so, what is the legal basis for withholding OPR documents from Congress?

**ANSWER:** As I am currently unfamiliar with this policy or its legal basis, I am reluctant to opine that I will or will not continue it. That said, I agree that strong Congressional oversight is beneficial to the Department and to the American people.

#### Youssef Case

A) Bassem Youssef is the FBI's highest-ranking agent fluent in Arabic. He is an Egyptian-American, a Coptic Christian, and an experienced expert in Middle Eastern counterterrorism. He is also an FBI whistleblower who says that the FBI's counterterrorism efforts are being hindered by the FBI's unwillingness to promote agents with his skills and experience into senior management positions. According to FBI officials questioned in the course of Youssef's lawsuit, the FBI's policy for choosing managers in its counterterrorism programs is that (1) knowledge of Arabic is not needed, (2) knowledge of Middle Eastern culture and history are not needed, (3) experience in counterterrorism programs is not needed, and (4) subject matter expertise in Middle Eastern counterterrorism is not needed. I find that hard to believe, but FBI officials explicitly said so under oath. Do you agree with the FBI that these factors should not be considered in promoting managers to oversee the FBI's counterterrorism efforts?

**ANSWER:** The FBI plays a critical role in protecting our Nation from a future terrorist attack. As I testified, I am extremely interested in the Bureau's priorities and the

resources it has to carry out those priorities. I am unfamiliar with the specific factors and problems that you describe; however, I can assure you that I will work with Director Mueller to ensure that the FBI has policies and priorities in place that are designed to maximize the FBI's ability to prevent another terrorist attack.

B) According to Youssef, he is prepared to testify in detail about a host of deficiencies in the FBI's counterterrorism efforts, including its (1) over-reliance on translators, (2) inability to recruit human sources, (3) inability to properly identify, prioritize, and respond to threats, (4) over-reliance on technology, (5) failure to analyze key sources of information, (6) failure to audit the effectiveness of its programs, and (7) failure to adequately staff counterterrorism positions. If confirmed as Attorney General, would you undertake a serious review of these concerns and consider appointing a panel of independent experts to review the FBI's counterterrorism efforts, assess their effectiveness, and recommend policy changes to improve its ability to protect Americans from another catastrophic terrorist attack?

**ANSWER:** As mentioned above, I am extremely interested in the Bureau's priorities and the resources it has to carry out those priorities. If confirmed, it would be among my highest priorities to work with Director Mueller to familiarize myself with the Bureau's counterterrorism efforts, with an eye to ensuring that it has the best possible policies in place.

#### FDA

A) Judge Mukasey, last year I started examining the issue of prescription drugs being sold on the market that have not yet been approved by the Food and Drug Administration (FDA). According to the FDA, almost 2% of all prescription drugs are unapproved drugs. Unapproved drugs may pose heightened risks to the American people because their safety, efficacy, labeling and quality have been not reviewed by the FDA.

In the last year, FDA has taken regulatory action against manufacturers of several unapproved drugs. However, many more unapproved drugs remain on the market, and it has been alleged that Medicaid is being billed inappropriately for these drugs. I have been told that some companies place their own National Drug Codes (NDCs) on the labels of their products, and Medicaid is billed using these invalid NDCs. I have also been told that some companies are sending marketing representatives to doctors' offices to promote the use of their drugs, but doctors are not informed that they would be writing prescriptions for drugs that have not been approved by the FDA.

Judge Mukasey, if these allegations are true, then the federal government should be recouping monies paid for such drugs, and the Department of Justice should be playing a key role in such efforts.

1) Please provide an overview of current efforts by the Justice Department to investigate and recover monies paid for unapproved drugs, including any current cases.

**ANSWER:** Although I am not yet aware of any such efforts, I will work to learn more about this issue if confirmed.

2) Please describe how the Justice Department works with the Department of Health and Human Services' Office of Inspector General (HHS OIG), the FDA, and the Centers for Medicare and Medicaid Services (CMS) to understand and investigate allegations of fraud involving unapproved drugs.

**ANSWER:** I am not yet aware of the Department's efforts in this field but will endeavor to learn more if I am confirmed.

3) Will you commit to ensuring that sufficient resources are devoted to this important safety issue?

**ANSWER:** I will certainly conduct a review of the Department's efforts in this area to determine what those efforts are, how those efforts can be improved, and what resources will be required.

4) What actions will you take to address this issue?

**ANSWER:** Once I become more familiar with the current Department efforts, I will be in a better position to provide specific details.

5) What will you do to encourage coordination between DOJ and HHS OIG, FDA, and CMS?

**ANSWER:** Once I become more familiar with these efforts, I will be in a better position to provide specific details.

**Bankruptcy**

A) Comprehensive bankruptcy reform was enacted a couple of years ago, and because of it, I believe that the bankruptcy system is better and fairer. However, there are many who want to weaken the statute. Will you commit to actively support enforcement of the bankruptcy reform law, and assist in efforts to beat back any attempt to undermine it?

**ANSWER:** If confirmed, I will enforce these laws in a vigorous and responsible manner.

**Money Laundering**

A) Currently, investigative authority for violations of federal money laundering statutes is governed by a Memorandum of Understanding (MOU) between the Secretary of

Treasury, the Attorney General and the Postmaster General. This MOU was signed in August 1990 and delegates federal law enforcement authority among the various federal agencies. I'm concerned that this MOU is outdated, and includes federal agencies that no longer exist or were moved to the new Department of Homeland Security. Given the importance of cutting off funds that are obtained through criminal enterprises and utilized by criminal, terrorist or drug trafficking organizations, I believe that this MOU should be updated and brought into the 21<sup>st</sup> century.

1) Is there an effort underway to begin negotiations between the Justice Department, Department of the Treasury, Department of Homeland Security, and other affected agencies to update the MOU regarding money laundering investigations? If so, when will this be completed?

**ANSWER:** I am not aware of such an effort at this time.

2) If there is no current effort underway to update this MOU, will you pledge to open discussion with the various affected agencies and ensure that federal law enforcement agencies are working under a framework representative of the federal government in the 21<sup>st</sup> Century?

**ANSWER:** If confirmed, once I became more familiar with the interagency workings, I would be in a better position to make this pledge.

B) The FBI took control of terrorist financing investigations in 2003, but, according to Justice Department data, the number of terrorist financing convictions has dropped from 103 in 2003 to just 49 in 2006. According to government officials quoted in the *Los Angeles Times* a month ago, Al Qaeda now has the funding to merge with other extremist groups and provide them with funding, training and logistical support.

1) What steps will you take, as Attorney General, to more aggressively address all the methods these terrorists use to earn, move and store assets?

**ANSWER:** As I testified, I am well aware of dangers of terrorism and have become familiar with some of their activities through my experience as a Federal District Judge. If confirmed, I will ensure that the Department will continue to make the disruption and elimination of terrorist financing a top priority. As I become more aware of the specific operations of the Department and the Bureau, I will be able to consider more specific steps.

#### **DEA**

A) Since the FBI got out of the business of drug enforcement in 2001, the Drug Enforcement Agency has done an admirable job of picking up the slack in major urban areas. Nevertheless, rural areas continue to suffer, partly because the DEA has been hamstrung by a hiring freeze and work-force cuts.

1) While Congress works to ensure that DEA receives adequate funding, what steps would you, as Attorney General, take to ensure that the DEA receives the support it needs to address our nation's drug problems?

**ANSWER:** Illegal drugs are a scourge of our Nation. They cripple neighborhoods and families, take away the opportunities of young people, and place a substantial strain on law enforcement and the judicial system. DEA must have the resources to fight the efforts of those who produce, package, and distribute illegal drugs. If I am confirmed, I will be in a better position to offer more specific ways to help the DEA carry out its mission.

B) DEA is currently under a hiring freeze for new special agents, and I understand that this hiring freeze may extend into FY 2009 or FY 2010.

1) Has the DEA prepared any estimates on the potential shortfall of agents in the future given the current hiring freeze? If so, please provide those estimates.

**ANSWER:** I am unaware of any such estimate.

2) Has the DEA considered the impact that this hiring freeze may have on institutional knowledge and the effectiveness of the agency? Is DEA concerned that this hiring freeze may result in a largely inexperienced agent pool?

**ANSWER:** Although hiring freezes generally can have a damaging impact on the ability of an agency to carry out its mission, I not aware of the answers to this specific inquiry.

**ADDITIONAL QUESTIONS FROM SENATOR GRASSLEY TO JUDGE  
MICHAEL MUKASEY**

1. At the Judiciary Committee hearing, in your answer to my question about the propriety of the FBI participating in the investigation of its own conduct by Inspector General's Office, I was pleased that you shared some of my concerns. You were correct when you said, "having an agency investigate itself is generally not the optimum way to proceed." However, it was disappointing that you went on to express essentially no problem with the FBI's participation in the particular investigation of its issuance of so-called "exigent letters," which the OIG is now conducting.

(a) Please clarify your reasoning as to why what you characterized as "not the optimum way to proceed" should be considered appropriate in this instance.

**ANSWER:** As I understand it, the FBI's deficiencies with respect to the use of national security letters stemmed from a lack of effective controls within the Bureau and an absence of effective oversight and monitoring within the Department. As a result of the Inspector General's March 2007 report, however, significant improvements have been made in this regard. Given these initial steps, it would seem best to let these reforms take effect and then to determine whether those reforms will improve Bureau's national security letter practices. I am not aware of the Bureau's precise role in the current investigation, but believe that if additional concerns arise when assessing the effectiveness of these reforms, that would be a more appropriate time to consider whether a different approach to investigations may be necessary.

(b) Specifically, do you have any basis for believing that the OIG's "preliminary conclusion" was that "nobody bothered to read the form" used to generate exigent letters with false statements?

**ANSWER:** I have no independent basis for the belief, which was based on my own legal assessment of the facts as I know them.

(c) My understanding is that one goal of the OIG's current investigation is to determine exactly who authorized and used the exigent letter form and under what circumstances. An objective, independent determination of these facts is at the heart of the question as to whether any of the false statements made by the FBI in order to obtain phone records without legal process were knowing or willful, and if so, who should be held responsible. How can the public have confidence in that investigation's conclusions if it is being conducted jointly with the FBI—the agency whose conduct is at issue?

**ANSWER:** I am not aware of the FBI's particular role in this aspect of the investigation, so I am reluctant to conclude that the role may or may not undermine public confidence.

(d) Another reason for my concern about the objectivity of this investigation is that a central witness is FBI whistleblower Bassem Youssef. As you may know, Agent

Youssef had previously reported mismanagement of the FBI's counterterrorism program to Congress and subsequently had his transfer to the International Terrorism Operations Section halted in-process, in apparent retaliation for bringing his concerns to Congress. He has now been notified that he is a subject in the investigation regarding the use of exigent letters, even though he claims that he substantially slowed and corrected their use after becoming the head of the FBI's Communications Analysis Unit. Given these circumstances, can you explain why allowing the FBI to participate in the OIG investigation doesn't risk undermining confidence in the objectivity its findings by raising questions of further retaliation?

**ANSWER:** I am not familiar with Mr. Youssef's claims or the circumstances surrounding him.

(e) Will you agree to promptly reconsider this issue if you are confirmed, determine whether it is appropriate to continue to allow the FBI to participate in the investigation, and get back to me directly?

**ANSWER:** I will work with Director Mueller to resolve any concerns raised by the Inspector General as promptly as possible.

**NOMINATION OF JUDGE MICHAEL MUKASEY  
TO SERVE AS U.S. ATTORNEY GENERAL  
QUESTION FOR THE RECORD  
SUBMITTED BY SENATOR KYL**

In February of this year, the Senate Judiciary Committee reported S. 316, a bill that would amend the Clayton Act to create a *per se* antitrust violation in the circumstance in which the holder of a pharmaceutical patent settles a legal challenge brought by a generic drug manufacturer to the validity of that patent, and the terms of the settlement give to the challenger anything of value other than the right to bring a generic drug to market prior to the date of the expiration of the patent. It is my understanding that the Justice Department expressed skepticism of the economic theories underlying this bill in briefs filed in opposition to *certiorari* in the case of *F.T.C. v. Schering-Plough Corp.* At the time when S. 316 was reported out of the Judiciary Committee – *i.e.*, in February of this year, I asked the Justice Department to submit a statement of the antitrust division's views on the merits of this legislation. Despite periodic inquiries as to the status of such a letter, the letter has yet to be made available. S. 316 implicates complex legal issues beyond the expertise of the members of the Judiciary Committee. I am confident that the Congress would benefit from hearing the Justice Department's views on this matter. Once you are confirmed and installed as Attorney General, will you inquire as to the status of this matter and see to it that the Justice Department expresses its views on S. 316?

**ANSWER:** Yes.

**WRITTEN QUESTIONS OF SENATOR LINDSEY GRAHAM,  
SENATE JUDICIARY COMMITTEE,  
FOR MICHAEL B. MUKASEY,  
NOMINEE FOR ATTORNEY GENERAL OF THE UNITED STATES**

**1. Does the waterboarding of detainees held by military or non-military agents of the United States violate the McCain Amendment or Common Article 3 of the Geneva Conventions?**

**ANSWER:** I well understand the concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

I was asked at the hearing and in your question about the hypothetical use of certain coercive interrogation techniques. As described at the hearing, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist

them in training to resist the techniques we actually may use. Third, I would not want any uninformed statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I do know, however, that “waterboarding” cannot be used by the United States military because its use by the military would be a clear violation of the Detainee Treatment Act (“DTA”). That is because “waterboarding” and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including “waterboarding,” would constitute cruel, inhuman or degrading treatment in violation of the McCain Amendment or a violation of Common Article 3 of the Geneva Conventions.

The McCain Amendment extended the prohibition on “cruel, inhuman or degrading treatment” to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase “cruel, inhuman or degrading treatment.”

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known “shocks the conscience” test to determine whether particular government conduct is consistent with the Fifth Amendment’s due process guarantees. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique’s past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that “our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.” 523 U.S. at 850 (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is “arbitrary in the constitutional sense,” a test that asks whether the conduct is proportionate to the

governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

**2. Can the President of the United States, under any circumstances, lawfully violate or order someone to violate the McCain Amendment or Common Article 3 of the Geneva Conventions?**

**ANSWER:** I am not aware of any authority that suggests that the President has the inherent constitutional authority to authorize the cruel, inhuman, or degrading treatment of detainees in violation of the McCain Amendment, nor that the President has the inherent authority to authorize acts proscribed as grave breaches of Common Article 3 under the Military Commissions Act of 2006. The question whether the President otherwise may order a violation of Common Article 3, beyond the grave breaches, is more complicated, because a non-self-executing treaty obligation stands on a different footing from an Act of Congress. My understanding, however, is that the United States remains fully committed to upholding the Geneva Conventions: the Department of Defense has in place specific policies to ensure that all detainees are treated humanely, consistent with Common Article 3, and President Bush has issued an executive order providing specific standards to ensure that the CIA likewise complies with Common Article 3 with respect to its detention and interrogation practices.

**3. Do you believe that Common Article 3 of the Geneva Conventions includes a balancing test to weigh the circumstances surrounding an alleged violation and/or a requirement of specific intent to find a violation?**

**ANSWER:** Common Article 3 requires that its prohibitions be observed “in all circumstances.” Although the prohibitions are absolute, Common Article 3 does require consideration of the circumstances in evaluating whether in fact the governmental conduct would implicate its specific prohibitions. For instance, Common Article 3 may prohibit “murder” regardless of circumstance, but the killing of an enemy combatant on the battlefield would not constitute a “murder.” Thus, in evaluating whether a homicide violates Common Article 3, it would be necessary to consider the circumstances surrounding the act. Even more directly, Common Article 3’s prohibition of “outrages upon personal dignity” requires consideration of the circumstances in determining whether a reasonable observer would deem the conduct to be outrageous.

With respect to your question about specific intent, Common Article 3 contains several prohibitions. Some of these, such as the prohibition on torture, may require specific intent to establish a violation, but others do not.

**4. What is your definition of torture?**

**ANSWER:** Torture is a defined term under the law. 18 U.S.C. § 2340(1) provides that “torture” means “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” Accordingly, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering or (b) prolonged mental harm resulting from certain specified threats or acts.

**5. What is your definition of cruel, inhuman and degrading treatment?**

**ANSWER:** That term also is defined under the law. In ratifying the Convention Against Torture, the United States undertook a reservation providing that “cruel, inhuman and degrading treatment or punishment” means the “cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.” Congress reiterated that definition in both the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006. For a more complete discussion of my understanding of this definition, please see the answer to question 1.

**6. If you believe that the McCain Amendment, which defines cruel, inhuman and degrading treatment with reference to the 5th, 8th, and 14th amendments, includes a balancing test, do you believe that balancing test is specific to the incident in question? Or can it be applied to the War on Terror as a whole?**

**ANSWER:** As noted in the answer to question 1, the McCain Amendment requires compliance with the substantive component of the Fifth Amendment's Due Process Clause, which the Supreme Court has referred to as the "shocks the conscience" test. This test requires "an exact analysis of circumstances" in determining what "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). As the Supreme Court has explained, a court first considers whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

**7. In September, 2007, you made a public statement to the Associated Press in which you described the courts in the Fourth Circuit. You said: "It's easy to have a rocket docket when you have horse-and-buggy cases."**

**In fact, the Fourth Circuit has handled a number of difficult and high-profile cases involving terrorists like Moussaoui, Hamdi, Padilla, and al-Marri. Over the last five years, the Fourth Circuit has rendered decisions in over 125 death penalty cases and routinely handles difficult cases involving a host of constitutional issues.**

**In light of this information, would you like to retract or reconsider your comment on the Fourth Circuit? Please comment on your views of the Fourth Circuit courts.**

**ANSWER:** I made this ill-considered quip in response to a question that contrasted the dockets of the Southern District of New York and the Eastern District of Virginia. Although the SDNY had a backlog of cases at the time of the question, the EDVA maintained its well-deserved "rocket docket" schedule and approach to case management. I am grateful for the opportunity to retract this statement, to express my admiration for the Fourth Circuit, and to express my appreciation of its well-deserved reputation for the just, efficient, and effective administration of its caseload.

**8. Do you agree with the Department of Justice's current position (stated in a 2004 memorandum from the Office of Legal Counsel to Attorney General Ashcroft) that the Second Amendment protects an individual right to keep and bear arms, not merely a right of States or a right restricted to persons serving in militias?**

**If so, do you believe that the Second Amendment applies to the states through the 14th Amendment incorporation doctrine?**

**ANSWER:** Although I have not read the memorandum you cite, based on my own study, I believe that the Second Amendment protects an individual right to keep and bear arms. The question of incorporation presents a difficult and complicated issue, although one that may be addressed later this term by the Supreme Court.

**9. Do you agree with the ruling by the U.S. Court of Appeals for the D.C. Circuit in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007) that the District of Columbia's bans on registration of new handguns, carrying firearms in the home, and possession of a functional firearm in the home violate the Second Amendment?**

**ANSWER:** I have not had the opportunity to study this case carefully. Especially given that the petitions for certiorari are currently pending with the Supreme Court, I am reluctant to opine absent that study. I also do not want to give the impression of prematurely opining on any matter that may be the subject of internal Department of Justice deliberations.

**10. Do you support the long-standing position of the Bureau of Alcohol, Tobacco, Firearms and Explosives (also strongly supported by the Fraternal Order of Police), enacted for the past several years as a rider to ATF appropriations bills (the "Tiahrt Amendment"), that prohibits release of firearms trace information other than for use in a bona fide criminal investigation or prosecution?**

**ANSWER:** Yes. Making such information available without restriction could compromise the effectiveness of law enforcement investigations and pose additional related concerns.

**Questions for Judge Michael B. Mukasey  
Nominee for Attorney General**

**Senator Carl Levin  
October 23, 2007**

1. Would you consider it inhumane to secure a detainee onto a flat surface and slowly pour water directly onto the detainee's face or onto a towel covering the detainee's face in a manner that induced a perception by the detainee that he was drowning?

**ANSWER:** I well understand your concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

Your question, and your subsequent questions, ask about the hypothetical use of certain coercive interrogation techniques. As described at the hearing and in your questions, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances is little more than a hypothetical legal opinion, which is to say it may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use. Third, I would not want any uninformed statement of mine to present our own professional interrogators

in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with either a threat or a promise that could influence their performance in a way inconsistent with the proper limits of any interrogation program they are charged with carrying out.

I do know, however, that “waterboarding” cannot be used by the United States military because its use by the military would be a clear violation of the Detainee Treatment Act (“DTA”). That is because “waterboarding” and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, in determining whether a technique is inhumane, one must consider whether that technique would constitute a violation of Common Article 3 of the Geneva Conventions. First, I would have to ensure that any practice complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts.

Second, I would have to consider whether the practice would be prohibited as “cruel, inhuman or degrading treatment,” which the MCA identifies as an additional prohibition directed at satisfying our Nation’s obligations under Common Article 3. Congress specified in the MCA, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase “cruel, inhuman or degrading treatment.” Finally, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I would undertake a comprehensive review of any coercive interrogation techniques currently used by the United States Government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports the use of such technique.

2. Would you consider it inhumane to intentionally expose a detainee to cold or intentionally immerse a detainee in water until such time as the detainee began shivering?

**ANSWER:** Please see the answer to question 1.

3. Would you consider it inhumane to threaten to transfer a detainee to a third country with the knowledge that the detainee is reasonably likely to fear that country would subject him to torture or death?

**ANSWER:** Please see the answer to question 1.

4. Would you consider it inhumane to force a detainee to remove his clothes or remain naked other than for security or medical reasons?

**ANSWER:** Please see the answer to question 1.

5. Would you consider it inhumane to intentionally subject a detainee to treatment that violates the detainee's religious beliefs?

**ANSWER:** Please see the answer to question 1.

6. The Detainee Treatment Act requires that detainees not be subject to cruel, inhuman, or degrading treatment or punishment, as prohibited by the 5th, 8th and 14th Amendments to the Constitution. An October 4, 2007, New York Times article stated that, in 2005, the Department of Justice determined that "in some circumstances, not even waterboarding was necessarily cruel, inhuman or degrading, if, for example, a suspect was believed to possess crucial intelligence about a planned terrorist attack."

- A. Is the belief that a suspect possesses crucial intelligence about a planned terrorist attack relevant to whether the suspect's treatment is consistent with the constitutional standards in the 5th, 8th, and 14th Amendments?

**ANSWER:** With respect to the treatment of captured terrorists, the Detainee Treatment Act requires compliance with the substantive component of the Fifth Amendment's Due Process Clause, which the Supreme Court has referred to as the "shocks the conscience" test. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 779-80 (2003); *see also id.* at 773 (plurality op.); *id.* at 787 (Stevens, J., concurring in part and dissenting in part). This test requires "an exact analysis of circumstances" in determining what "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998). Such an "analysis of circumstances" certainly would include consideration of whether a detainee possesses crucial intelligence involving a planned terrorist attack.

- B. If the government interest in obtaining information to prevent terrorist attacks is relevant to the constitutional analysis of the Detainee Treatment Act, what is the minimum standard of treatment required by the Detainee Treatment Act, notwithstanding the government interest involved?

**ANSWER:** As I explained in my previous answer, the "shocks the conscience" test requires "an exact analysis of circumstances." In this regard, the Supreme Court has identified two general principles to be relevant to determining what "shocks the conscience." First, the test

requires an inquiry into whether the conduct is “arbitrary in the constitutional sense,” that is, whether the conduct is proportionate to the governmental interest involved. *Id.* at 846. In addition, the test requires an objective inquiry into whether the conduct is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. Although it may not be easy to identify a minimum standard in the abstract, this objective inquiry makes clear that there are some acts, such as torture, that would be deemed to “shock the conscience” regardless of the government interests involved, because they are so manifestly contrary to traditional executive behavior and contemporary practice.

- C. Is the government interest in obtaining information from a suspect who is believed to possess crucial intelligence about a planned terrorist attack relevant to a constitutional analysis of what interrogation techniques U.S. law enforcement operating in the United States are permitted to use in questioning such a suspect?

**ANSWER:** The Due Process Clause establishes one constitutional standard, but it is a standard that must be measured based upon the circumstances and interests at stake. The Supreme Court clearly has recognized that the Government has an important interest in the enforcement of the law. *See, e.g., Lewis*, 523 U.S. at 852-53. At the same time, the Court has recognized the Government to have an even greater interest when it comes to combating terrorism or protecting the Nation’s security from an armed attack. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001). That said, the primary aim of police questioning is the collection of admissible evidence for a criminal trial, and in that context, the Supreme Court has recognized additional constitutional limitations, such as the *Miranda* warnings, that govern the practices of ordinary law enforcement.

**Written Questions for Michael B. Mukasey  
Nominee to be Attorney General for the United States  
From Senator Byron Dorgan**

Questions:

1. As you know, the Department of Justice has a unique legal and moral obligation to provide law enforcement services on reservation lands. How do you expect to coordinate with tribal leaders and convey your vision for meeting this obligation?

**ANSWER:** As I understand it, the Department of Justice works primarily in two ways to carry out these obligations. The Office of Tribal Justice (OTJ) acts as a liaison and primary point of contact between the Department and Native American tribes. Additionally, the Attorney General's Advisory Committee (AGAC) contains a Native American Issues Subcommittee. That Subcommittee consists of United States Attorneys whose districts contain substantial portions of Indian country. In addition, those United States Attorney's Offices that contain substantial portions of Indian country have consistent interaction with tribal leaders. As part of my comprehensive review of the Department, should I be confirmed, I will consult with OTJ and the AGAC Native American Issues Subcommittee about how best to fulfill their legal and moral responsibilities.

2. The Senate Committee on Indian Affairs has held a series of hearings in 2007 documenting the law enforcement crisis in Indian country. How do you plan to address this crisis in terms of personnel and dedication of resources?

**ANSWER:** Should I be confirmed, I will undertake a comprehensive review of the Department's allocation of resources and personnel. As part of the review, I will assess resources and personnel dedicated to addressing law enforcement in Indian country. I anticipate being guided in this aspect of the assessment by OTJ and the Native American Issues Subcommittee.

3. In light of the Government's obligation to tribal public safety, and the Department's specific investigatory and prosecutorial duties, will you establish or elevate an office within Main Justice that will report directly to you or the Deputy Attorney General to coordinate on Native American issues?

**ANSWER:** Should I be confirmed, as part of my comprehensive review of the Department, I will ensure that an appropriate reporting relationship exists between OTJ and senior Department officials. I will also maintain the important relationship that exists between the Native American Issues Subcommittee and the Attorney General.

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SUBMISSIONS FOR THE RECORD

**TESTIMONY**

of

**Chuck Canterbury**  
National President  
Grand Lodge, Fraternal Order of Police

on

**the Nomination of  
Michael B. Mukasey to be the next Attorney General of the United States**

before the

**Committee on the Judiciary**

**17 October 2007**

Good afternoon, Mr. Chairman and distinguished members of the Committee on the Judiciary. My name is Chuck Canterbury, the National President of the Fraternal Order of Police. I want to thank you, Mr. Chairman, for inviting me to share with you and your committee the views of our nation's largest law enforcement labor organization in the United States, representing more than 325,000 members in every region of the nation. You know that we regard you as one of the FOP's foremost champions on Capitol Hill, and I am honored that you asked me to be here today to speak, not only for my members, but also all rank-and-file law enforcement officers, who certainly have an interest in making their voices heard on the President's choice to fill the position of our nation's top law enforcement officer. I am pleased to be here today to offer our support for the nomination of Michael B. Mukasey to be the 81st Attorney General of the United States.

Judge Mukasey has a long and distinguished career in public service, which began with his becoming an Assistant United States Attorney in the Southern District of New York. In 1987, he was nominated for a seat on the Federal bench in that same District and was unanimously confirmed by the Senate. He spent the last twenty years as a Federal judge—including his last six as Chief Justice—in one of the toughest, busiest, and most prominent of our nation's Federal courts.

During his tenure, he oversaw some of the most important and complicated national security cases—including the successful prosecution of Omar Abdel Rahman, the Blind Sheik, who plotted to destroy the World Trade Center in 1993. His handling of this case earned him widespread acclaim and respect from his peers in the nation’s legal community. In fact, the U.S. Court of Appeals for the Second Circuit specifically praised him, noting he demonstrated “extraordinary skill and patience” during the case, and superbly handled challenges “far beyond those normally endured by a trial judge.”

Judge Mukasey also issued the very first ruling in the legal challenge brought by Jose Padilla. In a very thoughtful and well-reasoned decision, he ruled that the President does, in fact, have the legal authority to detain, as “enemy combatants,” citizens captured during a time of war. And yet, he also ruled that those citizens should have monitored access to an attorney.

His deft handling of the issues in the Rahman and Padilla cases, and the challenges he faced as the presiding judge in these cases, prompted him to write an article in the *Wall Street Journal*, which argues that current statutes and institutions which comprise the U.S. legal system are ill-suited to handle the prosecutions of terrorist suspects without compromising homeland security or foreign intelligence sources.

Clearly, Judge Mukasey has given a great deal of consideration to the challenges facing our legal system when it comes threats from terrorists. In the opinion of the Fraternal Order of Police, this strongly recommends him for the position of U.S. Attorney General, as we will be facing these challenges as our war of terrorism continues.

The FOP has the honor of representing rank-and-file law enforcement officers and, in many localities and States, we are the bargaining unit for these officers. For this reason, our interest in the cases that Judge Mukasey has been involved in over his distinguished career are not limited to high profile cases related to national security or complex criminal matters. We are very satisfied with his record on those matters. As a labor organization, however, we were also keenly interested in those cases in which he made rulings which touched on the rights of employees—particularly public employees. We are pleased to report to this Committee that he demonstrated just as much skill and even-handedness in the cases we examined as he did in those which generated nightly headlines.

Judge Mukasey and his distinguished careers have earned him the respect of the political community as well. He was unanimously confirmed by the Senate in 1987 and, much more recently, was among those jurists suggested by Senator Charles E. Schumer (D-NY) for appointment to the United States Supreme Court.

Senator Schumer, a good friend of law enforcement, is very aware of the impeccable reputation that Judge Mukasey has earned in his twenty years in New York. He handled politically charged cases without turning them into political theatre. Given his bipartisan support, I believe that Judge Mukasey will be able to rebuild the relationship between the Justice Department and Congress.

Finally, the FOP has been greatly concerned for some time about the large number of vacancies in key positions at the Justice Department. There is a real need for leadership over there—not “Acting” leadership, but officials who have been reviewed by this Committee and confirmed by the Senate. In our view, Judge Mukasey can provide that leadership. His experience as Chief Judge, as a Federal prosecutor, and a lawyer in a large law firm have shown him to be the kind of well-qualified, experienced legal executive who will be able to keep the Department functioning as these vacancies are filled.

His record, both as a prosecutor and a judge, demonstrates a genuine commitment to the law and an appreciation for the challenges law enforcement faces in its ongoing fight against terrorism. We believe that President Bush has made a fine choice in Judge Michael B. Mukasey to lead the U.S. Department of Justice and, on behalf of the more than 325,000 members of the Fraternal Order of Police, we are proud to support his nomination.

Statement  
*United States Senate Committee on the Judiciary*  
**Executive Nomination**  
 October 17, 2007

**The Honorable Benjamin L. Cardin**  
 United States Senator, Maryland

OPENING STATEMENT OF  
 SENATOR BENJAMIN L. CARDIN  
 ON THE NOMINATION OF MICHAEL MUKASEY  
 TO BE ATTORNEY GENERAL OF THE UNITED STATES  
 SENATE JUDICIARY COMMITTEE  
 October 17, 2007

Chairman Leahy, thank you for calling this important hearing today of the Judiciary Committee to consider the nomination of Michael Mukasey to be the 81st Attorney General of the United States.

I had the privilege of meeting with Judge Mukasey several weeks ago in my office. Judge, it is good to see you again here today as you begin your confirmation hearing.

Judge Mukasey knows that my primary concern during his confirmation hearing will be his commitment to restore leadership, professionalism, and independence to the Department of Justice. Your predecessor, Attorney General Alberto Gonzales, no longer had the credibility and independence to perform his job effectively and therefore could no longer work with Congress and be trusted by the American people.

I cannot stress enough to you, Judge Mukasey that this Senator and this Committee want you to succeed. I hope you agree that to do that both Congress and the courts must be equal partners with you, as you strive to enforce the law and protect the cherished civil rights and liberties of all Americans under our Constitution. Our Constitution wisely sets up a system of checks and balances and separation of powers, the so-called "boring part" of the Constitution that Judge Mukasey has referenced in many of his speeches. I am hopeful that some of your independence as a federal judge, when you had lifetime tenure, will transfer with you to the Department of Justice should you be confirmed. As Attorney General of the United States you are the people's lawyer, not the lawyer for the President or a political official in the White House.

Let me just outline a few of the concerns I have had with the Department of Justice under President Bush. In particular, I want to ensure the Justice Department regains its historically strong commitment to civil rights enforcement, including renewed attention in the areas of voting rights and employment and housing discrimination. In the area of voting rights, Judge Mukasey, you are aware of my particular interest in combating despicable campaign tactics used to deliberately disenfranchise minority voters, by distributing campaign materials with incorrect dates for Election Day, threatening voters with arrest if they have unpaid parking tickets or taxes, and threatening naturalized citizens with incarceration. I have joined with Senators Obama and Schumer to introduce legislation to criminalize these practices, which our Committee recently approved and the House of Representatives has passed.

I know of your particular interest and work on the issue of religious freedom and anti-Semitism through the National Conference on Soviet Jewry (NCSJ) and the Anti-Defamation League of B'nai B'rith in the 1980's. I myself have been active in working with NCSJ. In Congress I have been active

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8/28/2008

as a member of the U.S. Helsinki Commission and as a U.S. delegate to the Organization for Security and Cooperation in Europe (OSCE). Over many years I have worked with our European allies to combat racism, xenophobia and anti-Semitism, and to learn and share best practices in terms of educating our youth on the importance of diversity and in strongly condemning and prosecuting hate crimes based on religion, race, nationality, or other protected categories.

I mention this issue, Judge Mukasey, because just yesterday House Judiciary Committee Chairman John Conyers held an interesting and thoughtful hearing on the Louisiana case of the Jena-6, and more broadly asked the question of what the proper role is for the federal government in hate crimes and race-related violence in public schools. I would appreciate hearing your views on this issue, as the United States seems to be experiencing a dramatic rise in the number of hate crimes, most disturbingly by the hanging of nooses in educational institutions.

I also look forward to hearing your views on the war on terrorism, including issues of torture, Guantanamo Bay, military commissions, and your suggestion to create special national security courts to try accused terrorists. I am pleased that Chairman Leahy has created, in this Congress, a new Subcommittee on Human Rights and the Law, on which I am proud to serve with subcommittee chairman Durbin. The subcommittee has continued to examine the compliance of the United States with international law and human rights standards, and I am increasingly concerned that we are continuing to alienate our allies in the war on terrorism by violating the very standards we have agreed to uphold in the United States. The Supreme Court has rebuffed the Bush Administration on several occasions for the indefinite detention without charge or fair trial of accused terrorists held for years in Guantanamo Bay.

We should heed the recommendation of the 9/11 Commission that "the United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law."

I mention this in some detail, Judge Mukasey, because of the repeated disclosure of classified directives and other memoranda which suggest that the Bush Administration has continued to authorize the use of torture to interrogate terrorism suspects, notwithstanding the McCain legislation signed by President Bush that bans such practices. Torture is not only ineffective and harmful to the diplomatic and political alliances we need around the world to fight terrorism, but the use of torture by the United States puts the men and women in greater danger of mistreatment when captured by our enemies abroad. If confirmed as Attorney General you will oversee the Office of Legal Counsel (OLC), and I would urge you to make any classified opinions regarding the use of torture available for review by this Committee in a closed session.

I also look forward to hearing your views on the Foreign Intelligence Surveillance Act (FISA), and the President's authorization to conduct warrantless eavesdropping without approval from Congress or the FISA Court. I voted against the Protect America Act because it weakened the ability of Congress and the FISA court to review electronic intelligence gathering that may target Americans. The FISA court was established in 1978 because of executive branch abuses in domestic intelligence gathering. As you know, the legislation sunsets in February, and one of your most important responsibilities should you be confirmed as Attorney General will be to work with Congress and the FISA Court to come up with a better legal framework and guidelines to carefully oversee this type of surveillance. We must uphold our oaths to the Constitution and strike a proper balance in fighting

terrorism that still protects the fundamental rights and protections enjoyed by Americans. I look forward to your cooperation with this Committee's ongoing investigation into the President's program.

Thank you again Mr. Chairman for holding the hearing today, and I look forward to hearing from the witness today. I am also pleased that you have asked me to chair the hearing during the third panel of witnesses on the nomination of the Attorney General. I look forward to questioning these additional witnesses about the nominee and the steps needed to restore the integrity and independence the Justice Department, repair the morale of its employees, and regain the confidence and trust of the American people that the Department will enforce the rule of law with regard to politics.

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8/28/2008

U.S. Department of Justice



Federal Bureau of Investigation

In Reply, Please Refer to  
File No.

Washington DC 20535

NON-DISCLOSURE STATEMENT

THE UNDERSIGNED ACKNOWLEDGES HAVING BEEN INFORMED BY SPECIAL AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION (FBI) THAT THE NATURE OF THE INVESTIGATION TO BE DISCUSSED IS A NATIONAL SECURITY MATTER, OF INTEREST TO THE FBI, AND HAS BEEN DESIGNATED NEED-TO-KNOW. IT IS REQUESTED THIS INFORMATION NOT BE RELEASED IN ANY FORM TO ANYONE.

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Date

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**United States Senate**COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

October 23, 2007

The Honorable Michael B. Mukasey  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036

Dear Judge Mukasey:

We are deeply troubled by your refusal to state unequivocally that waterboarding is illegal during your confirmation hearing last week. We want to give you an opportunity to clarify your views on this important question.

During your hearing, Senator Whitehouse asked you about waterboarding and you replied, "I don't know what's involved in the technique. If waterboarding is torture, torture is not constitutional."

It is surprising that you are unfamiliar with waterboarding since it has been the subject of much public discussion in recent years. During the second panel of your confirmation hearing, retired Rear Admiral John Hutson, former Navy Judge Advocate General and Dean of the Franklin Pierce Law Center, responded to your testimony as follows:

Other than, perhaps the rack and thumbscrews, water-boarding is the most iconic example of torture in history. It was devised, I believe, in the Spanish Inquisition. It has been repudiated for centuries. It's a little disconcerting to hear now that we're not quite sure where water-boarding fits in the scheme of things. I think we have to be very sure where it fits in the scheme of things.

For centuries, interrogators have used variations on a technique commonly referred to as "waterboarding" or "water torture." In some cases, bound prisoners are completely submerged in water. In other instances, water is forced into the mouths of prisoners. Another variation involves placing a cloth over the face or forcing it into the mouth of a prisoner, followed by water being poured into the nostrils of the prisoner. In yet another variation, cellophane is placed over the face and water is poured over the head of prisoners without any water entering the mouth of the prisoner. What all of these methods have in common is the intent to create a fear of death through drowning.

As Senator Durbin explained during your confirmation hearing, the Judge Advocates General, the highest-ranking military lawyers in each of the U.S. Armed Forces' four branches, told him unequivocally that waterboarding is illegal and violates Common Article 3 of the

Geneva Conventions. Brigadier General Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the Marine Corps, stated that "threatening a detainee with imminent death, to include drowning, is torture under 18 U.S.C. § 2340."

As Admiral Hutson testified, waterboarding has long been recognized as a form of torture and the United States has historically repudiated this practice. Following World War II, the United States prosecuted Japanese military personnel as war criminals for waterboarding U.S. prisoners. "Drop by Drop: Forgetting the History of Water Torture in U.S. Courts," a recent study of waterboarding by law of war expert Evan Wallach, concluded: "In all cases, whether the water treatment was applied by Americans or to Americans, or simply reviewed by American courts, it has uniformly been rejected as illegal, often with severely punitive results for the perpetrators."

The U.S. State Department has long recognized waterboarding as torture and cruel, inhuman and degrading treatment and has criticized other countries for using waterboarding in its Country Reports on Human Rights Practices. For example, in the 2006 human rights report for Sri Lanka, the State Department, based on reports from sources it considers credible, concluded that "the use of torture to extract admissions and confessions was endemic" and stated that methods of torture included "near-drowning." In its annual human rights reports for Tunisia between 1996 and 2004, the State Department criticized the practice of "submersion of the head in water" as torture. The State Department's Tunisia human rights reports for 2005 and 2006 describe this practice as a form of "torture and other abuse."

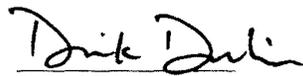
During floor debate on the Military Commissions Act (MCA), Senator John Warner, then chairman of the Senate Armed Services Committee and one of the authors of the MCA, said that waterboarding is "in the category of grave breaches of Common Article 3 of the Geneva Conventions" and would be "clearly prohibited" by the MCA. Senator John McCain, the lead sponsor of the Detainee Treatment Act, has stated, "In my view, to make someone believe that you are killing him by drowning is no different than holding a pistol to his head and firing a blank. I believe that it is torture, very exquisite torture."

Your unwillingness to state that waterboarding is illegal may place Americans at risk of being subjected to this abusive technique. If the United States does not explicitly and publicly condemn waterboarding, it will be more difficult to argue that enemy forces cannot waterboard American prisoners. It also makes it more difficult for the United States to condemn repressive governments that use waterboarding on their own citizens. We are particularly troubled by recent reports that the Burmese military has used this form of torture against democracy activists. Human rights abuses such as this have rightly prompted the Administration to impose additional sanctions against the Burmese regime.

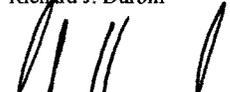
Please respond to the following question: Is the use of waterboarding, or inducing the misperception of drowning, as an interrogation technique illegal under U.S. law, including treaty obligations?

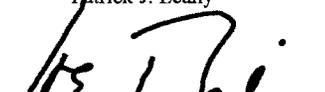
Due to the importance of this issue to your pending confirmation, we would appreciate your prompt response. Thank you for your time and consideration.

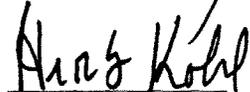
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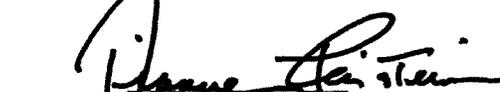
  
Richard J. Durbin

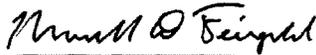
  
Patrick J. Leahy

  
Edward M. Kennedy

  
Joseph R. Biden, Jr.

  
Herb Kohl

  
Dianne Feinstein

  
Russell D. Feingold

  
Charles E. Schumer

  
Benjamin L. Cardin

  
Sheldon Whitehouse

## MICHAEL B. MUKASEY

October 30, 2007

The Honorable Patrick J. Leahy  
United States Senate  
Washington, D.C. 20510

The Honorable Edward M. Kennedy  
United States Senate  
Washington, D.C. 20510

The Honorable Joseph R. Biden, Jr.  
United States Senate  
Washington, D.C. 20510

The Honorable Herb Kohl  
United States Senate  
Washington, D.C. 20510

The Honorable Dianne Feinstein  
United States Senate  
Washington, D.C. 20510

The Honorable Russell D. Feingold  
United States Senate  
Washington, D.C. 20510

The Honorable Charles E. Schumer  
United States Senate  
Washington, D.C. 20510

The Honorable Richard J. Durbin  
United States Senate  
Washington, D.C. 20510

The Honorable Benjamin L. Cardin  
United States Senate  
Washington, D.C. 20510

The Honorable Sheldon Whitehouse  
United States Senate  
Washington, D.C. 20510

Dear Chairman Leahy, Senator Kennedy, Senator Biden, Senator Kohl, Senator Feinstein, Senator Feingold, Senator Schumer, Senator Durbin, Senator Cardin and Senator Whitehouse:

Thank you for your letter of October 23, 2007. I well understand the concerns of the Senators who signed this letter that this Country remain true to its ideals, and that includes how *we* treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no *less* bound by constitutional restrictions than any other government official.

I was asked at the hearing and in your letter questions about the hypothetical use of certain coercive interrogation techniques. As described in your letter, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on

hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

Legal opinions should treat real issues. I have not been briefed on techniques used in any classified interrogation program conducted by any government agency. For me, then, there is a real issue as to whether the techniques presented and discussed at the hearing and in your letter are even part of any program of questioning detainees. Although I have not been cleared into the details of any such program, it is my understanding that some Members of Congress, including those on the intelligence committees, have been so cleared and have been briefed on the specifics of a program run by the Central Intelligence Agency ("CIA"). Those Members know the answer to the question of whether the specific techniques presented to me at the hearing and in your letter are part of the CIA's program. I do not.

I do know, however, that "waterboarding" cannot be used by the United States military because its use by the military would be a clear violation of the Detainee Treatment Act ("DTA"). That is because "waterboarding" and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense ("DOD") or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including "waterboarding" as described in your letter, would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering, or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

I note that the Department of Justice published its interpretation of 18 U.S.C. § 2340 in a December 30, 2004 memorandum to then-Deputy Attorney General James B. Comey,

which superseded the memorandum of August 1, 2002 that I testified was a "mistake." I understand that the December 30, 2004 memorandum remains the Department's prevailing interpretation of section 2341. Although the December 30, 2004 memorandum to Mr. Comey does not discuss any specific techniques, it does state that "[w]hile we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum."

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as "cruel, inhuman or degrading treatment" as set forth in the DTA and the Military Commissions Act ("MCA") -- enacted after the Department of Justice's December 30, 2004 memorandum to Mr. Comey -- which extended the Convention Against Torture's prohibition on "cruel, inhuman or degrading treatment" to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase "cruel, inhuman or degrading treatment."

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known "shocks the conscience" to determine whether particular government conduct is consistent with the Fifth Amendment's due process guarantees. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique's past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that "our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." 523 U.S. 833, 850 (1998) (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is "arbitrary in the constitutional sense," a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an objective inquiry into whether the conduct at issue is "egregious" or "outrageous" in light of "traditional executive behavior and contemporary practices." *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

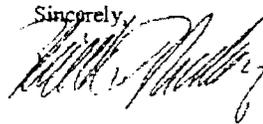
I would have to ensure also that any technique complies with our Nation's obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden us grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation

technique, the prohibition on "cruel or inhuman treatment" would be of particular relevance. That statute, similar in structure to 13 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, to repeat, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, I would not want any *uninformed* statement of mine made during a confirmation process to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with a perceived threat that any conduct of theirs, past or present, that was based on authorizations supported by the Department of Justice could place them in personal legal jeopardy. Third, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use.

I emphasize in closing this answer that nothing set forth above, or in my testimony, should be read as an approval of the interrogation techniques presented to me at the hearing or in your letter, or any comparable technique. Some of you told me at the hearing or in private meetings that you hoped and expected that, if confirmed, I would exercise my independent judgment when providing advice to the President, regardless of whether that advice was what the President wanted to hear. I told you that it would be irresponsible for me to do anything less. It would be no less irresponsible for me to seek confirmation by providing an uninformed legal opinion based on hypothetical facts and circumstances.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States Government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique. I view this as entirely consistent with my commitment to provide independent judgment on all issues. That is my commitment and pledge to the President, to the Congress, and to the American people. Each and all should expect no less from their Attorney General.

Sincerely,  


**Statement of U.S. Senator Russ Feingold**

*In Opposition to Judge Michael Mukasey, Nominee to be the Next Attorney General  
Senate Judiciary Committee*

*As Prepared for Delivery  
November 6, 2007*

I voted against the nomination of Judge Mukasey to be the next Attorney General. This was a difficult decision, as Judge Mukasey has many fine qualities. I was particularly impressed by his determination to depoliticize the Department of Justice. After the debacle of the last Attorney General, this is obviously a very high priority. If nothing else, over the remaining 15 months of the Bush presidency, the Department must recover its credibility and its reputation. Never again should it be led by someone who is willing to wield its awesome power for political purposes or fill its most important positions with individuals chosen for their politics rather than their legal skills. Judge Mukasey appears to have the intelligence, the experience, and the stature to undertake this very important task.

There are other areas where I was favorably impressed by Judge Mukasey. His straightforward promise to stop the disparate treatment of gay employees at the Department of Justice was welcome and refreshing. He indicated his intention to be a much more hands-on manager of the process for seeking the federal death penalty, and when I asked him in writing if a request by a U.S. Attorney to discuss a death penalty decision with Attorney General personally was a valid reason to fire that U.S. Attorney, he answered simply, "No." If Judge Mukasey is confirmed, I look forward to working with him to try to ensure that federal death penalty is fairly administered.

I was also impressed that on several occasions Judge Mukasey was willing to admit in his written answers that some thing he had said or written in the past were incorrect. This Administration needs more people who will admit they were wrong when that is the case. That kind of humility and honesty is often the first step toward correcting mistakes and reaching consensus.

In many respects then, Judge Mukasey is a big improvement on the previous Attorney General. At this point in our history, however, the country needs more. Simply put, after all that has taken place over the last seven years, we need an Attorney General who will tell the President that he cannot ignore the laws passed by Congress. And on that fundamental qualification for this office, Judge Mukasey falls short.

The President's warrantless wiretapping program, instituted after 9/11 and carried out in secret until it was revealed in a New York Times article in December 2005, presented the Department of Justice with a historic test of its integrity and its commitment to the rule of law. Under the previous leadership, the Department failed that test. We need an Attorney General who, when faced with a similar crisis, will look the President in the eye and tell him "No."

When I first met with Judge Mukasey, I questioned him about the two justifications for authorizing warrantless wiretaps that the Department has put forward publicly. With respect to the argument that the authorization for use of military force, or AUMF, somehow authorized warrantless wiretaps, he said, "I don't see that argument." With respect to the argument that the program was legal under the President's Article II powers, he said he was "agnostic."

I and a number of my colleagues returned to this question in the hearings and in written questions for the record. Unfortunately, this time the results were not reassuring. He responded to my question for the record about the largely discredited AUMF justification by saying that "I still have not come to a conclusion. ... I believe there are good arguments on both sides of that issue." That is a statement that ought to give pause to anyone in this body.

His answers to questions concerning the Article II justification indicate that he is no longer agnostic on that question, but instead he has become a believer that executive power trumps the laws written by Congress.

Both at the hearing and in writing, Judge Mukasey stated several times that the President must obey all valid and constitutional statutes, even if he is acting to defend or protect the country. He also said that "FISA is a constitutional law" and that "[a]s a general matter, therefore, the President is not free to disregard or violate FISA."

But he also stated that "difficult separation of powers questions" would arise, and would have to be resolved through the three-part test articulated in the Supreme Court *Youngstown* case, if a statute — and FISA in particular — were to constrain the President's constitutional authority. If FISA is constitutional — and Judge Mukasey says it is — then why are these separation of powers questions so "difficult"? Clearly, Judge Mukasey believes that a law can be constitutional on its face, but can *become* unconstitutional if its application constrains the constitutional authority of the President. There is no difference between this view of executive power and the theory that executive power trumps congressional power. There is no other way to interpret Judge Mukasey's statement to Senator Leahy: "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."

This view is simply contrary to Justice Jackson's three-part test in *Youngstown*. *Youngstown* makes clear that where the President's constitutional authority and a statute passed by Congress come into conflict, the President's powers are reduced by whatever powers Congress holds over the subject — not vice versa. Jackson states that when the President acts against the will of Congress, "he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*. Courts can sustain exclusive presidential control in such a case only by disabling Congress from acting upon the subject." Congress is thus free to constrain the President's constitutional powers to any degree it likes, as long as Congress is acting within its *own* powers in doing so; likewise, the President's actions may be upheld only if they are "within his domain *and* beyond control of Congress."

The argument that constitutional statutes can become unconstitutional ignores this second part of the inquiry – whether the limitation on the President’s authority is in an area where Congress cannot legislate. It is clear that wiretapping is not within the *exclusive* domain of the President, as Judge Mukasey admits that FISA is a constitutional law. Moreover, the executive authority that Judge Mukasey invoked most often – the authority to protect and defend the country – is not exclusive to the President. It is an authority that Congress shares, which Judge Mukasey admitted in answers to written questions.

I have discussed this issue in some detail because extreme theories of executive power have become one of the primary, and most unfortunate, legacies of the Bush Administration. Congress needs to be very clear in rejecting them, and in making respect for the rule of law a non-negotiable qualification for the office of Attorney General of the United States.

Let me say a word about the issue of torture, which has dominated the debate on the nomination of Judge Mukasey in the past week. Last week, the White House press secretary again implied that Members of Congress who have been briefed on the CIA’s interrogation program have approved it or consented to it. That is not the case. I have vigorously opposed the program, and continue to do so. The program is of highly questionable legality, it is inconsistent with our values as a nation, and it does not make our nation any safer. In fact, I believe that it may have the effect of exposing Americans – including military and other U.S. personnel – to greater risk.

I have detailed the reasons for my strong objections to the CIA’s program in classified correspondence, sent shortly after I was first briefed on it. More recently, I have stated my opposition publicly, although I am prohibited by classification rules from providing further details about my concerns in a public setting.

In any event, neither detailed legal and factual analysis, nor knowledge of the operational details of the CIA’s program, is necessary to reach a judgment on whether waterboarding is torture. Waterboarding has been used by some of the most evil regimes in history. It has been considered torture in this country for over a century. If Judge Mukasey won’t say the simple truth – that this barbaric practice is torture – how can we count on him to stand up to the White House on other issues?

America needs an Attorney General who stands squarely on the side of the rule of law. This is not an arid, theoretical debate. The rule of law is the very foundation of freedom and a crucial bulwark against tyranny. Congress cannot stand silent in the face of this challenge by the executive to the crucial underpinnings of our system of government.

Mr. Chairman, the nation’s top law enforcement officer must be able to stand up to a chief executive who thinks he is above the law. The rule of law is too important to our country’s history and to its future to compromise on that bedrock principle.

TESTIMONY  
JOHN D. HUTSON  
RADM JAGC USN (RET.)  
DEAN AND PRESIDENT  
FRANKLIN PIERCE LAW CENTER  
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY  
OCTOBER 18, 2007

This nation was founded on the concepts of support for the Rule of Law. It is largely what makes us the great nation we are. Thomas Paine said in 1776 that "The cause of America is the cause of all mankind." More recently, the renowned geopolitical commentator Bono is reported to have opined that "America isn't just a country, it's an idea."

That cause, that idea, has been the source of America's strength and leadership in the community of nations throughout the years. We are embroiled in an important struggle against world wide terrorism at this particular moment in history. This does not have to be an existential struggle, however. The enemy can't defeat us militarily. He has limited command, control or communications. He has no lift capability. His weaponry is rudimentary, albeit improving as time wears on.

So the terrorists can't win by killing us or even breaking our will to fight. Victory for the enemy is to bring us down to his level, to make us more like him. Our greatest weapon in this struggle is not our military, strong though it is; it isn't our economy or abundant natural resources. It isn't the island nature of our land mass. Thomas Paine and Bono had it right. Our greatest strength is our ideas and our ideals. That's the weapon we used to win the Cold War and that's how we can win this war.

This is an asymmetric war. As such, the strategy should not be to pit strength against strength as in conventional wars. Rather, we must match our strengths against the enemy's weaknesses. We don't have enough bombs, bullets or body bags to sacrifice in this effort against IEDs. The enemy's weakness is that they are devoid of ideals. They have no real vision for a peaceful world. We must win an asymmetric war by matching our strength--our ideas and ideals--against his weakness, a philosophy abjectly devoid of the same.

Although the enemy can't defeat us militarily, we can commit national suicide. Recent history has demonstrated that we are willing to disarm our great nation of our ideals and suffer from self-inflicted wounds. Just as we must fight this war knowing there will be future wars, we must also fight it confident in the knowledge that a peace will eventually ensue. We may not know when, but it will come. If we so debase ourselves by forsaking the Rule of Law for the present, we won't survive the peace in the future.

The notorious January, 2002 memo from then Presidential counsel, Alberto Gonzales, drafted according to all accounts by Department of Justice lawyers, was one of the first and certainly one of the bloodiest self-inflicted wounds. That memo led to the horrors of Abu Graib, indefinite detention at Guantanamo Bay, and Combatant Status Review Tribunals.

Compliance with the Rule of Law shouldn't be viewed a goal which we aspire to achieve. Rather, it provides the floor below which we dare not sink. It is fundamental to our existence as a civilized nation and must not be trivialized as being "quaint" or avoided as an impediment to misguided expediency.

Law isn't practiced in a vacuum, it is practiced in real life and while *good* lawyers know the law, *great* lawyers know about life. That's a quality we need in our next Attorney General. The job description should call for a wise counselor, not just a clever lawyer.

We know that in the recent past, the opinions of the Judge Advocates General of the several Services were not followed, and apparently not even seriously considered. In some cases, their opinions weren't even solicited. The JAGs, however, understand that this isn't the last war we will ever fight. It's not the next to last war. Plato said that only the dead have seen their last war. Moreover, the JAGs know military history well enough to know that this isn't the worst war we have ever fought. We lost 600,000 men in the Civil War, 400,000 in World War II, 50,000 in Korea and 58,000 in Vietnam. Those facts are the part of life and death that military lawyers understand and consider when offering legal advice. They are looking over the horizon to the next war and recognize that we should not ignore the rules by which wars are fought by civilized nations, the "law of armed conflict", just because the war on terror happens to be the present war. As we all know, the effort against terrorism won't end in January, 2009, but in many ways we have been fighting it as though it will.

During the Civil War, which truly was an existential struggle, President Lincoln commissioned Dr. Francis Lieber to devise what came to be called the "Lieber Code" to lay out how we would treat Confederate prisoners in light of the horror of Andersonville Prison. This was the precursor to the Hague Conventions and then the Geneva Conventions. Lincoln's Attorney General, Edward Bates, didn't tell him that it would be inappropriate to treat enemy prisoners as human beings. In the wake of another existential war, World War II, the United States saw fit to adopt the Geneva Conventions, somewhat ironically to protect U.S. troops from the enemy, not the other way around.

The legal missteps we have taken recently, particularly with regard to the application of the Geneva Conventions broadly and interrogation policy specifically, will haunt us for generations unless they are corrected quickly and unequivocally. We must convince the world that we will comply with the Geneva Conventions to the letter, not just because we must, but because we can. We do it out of strength, not weakness; courage, not cowardice. We don't fear prosecution for war crimes under the War Crimes Act, as the January, 2002 memo suggests because we will not even be close to that line.

The next Attorney General must convince the world that the United States will always comply with the admonitions contained in the 1950 publication The Armed Forces Officer (DA Pam 600-2):

*The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war in the spirit and to the letter....Wanton killing, torture, cruelty, or the working of unusual and unnecessary hardship on enemy prisoners or populations is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes....War looses violence and disorder, it inflames passions and makes it relatively easy for the individual to get away with unlawful actions. But it does not lessen the gravity of his offense or make it less necessary that constituted authority put him down....*

If the United States could hold itself up to that standard in the wake of World War II and in the midst of the Korean War, we should be able to do that now. Our new Attorney General must understand that we are not somehow lesser Americans than our forebears of 57 years ago. We can live up to that legacy proudly. I believe we crave that kind of leadership now.

Our next Attorney General, as the chief law enforcement officer in the nation, must be finely attuned to the needs of the military in prosecuting this and any future conflict.

I know from my service as the Navy JAG during Janet Reno's tenure as Attorney General how crucial it is to have an AG who listens to the Military Service perspective and directs the Justice Department to do the same. That is not to argue that the AG and DoJ must always defer to the Service or DoD perspective, but they must solicit it and respect it. They must also ensure that the General Counsel of the Department of Defense listens to and seriously considers the legal opinions of the respective JAGs. The DoD GC is potentially in a very awkward situation with two masters, the Secretary of Defense and the Attorney General.

The General Counsel of DoD, or any Department for that matter, must be encouraged by the Attorney General to stand tall in the face of political pressure when the situation requires it and then supported when he or she does. They must know that it is acceptable to disagree at times. Indeed, it is virtually a requirement in a dynamic organization dealing with difficult issues of supreme importance. A lawyer who is simply a lackey for his or her boss, or worse, provides a pretext of legal cover for misadventures, is worse than worthless, they are dangerous.

The next Attorney General must be capable of recognizing a legal problem, step back from it and analyze it in the context of real life and understand the non-legal consequences of his advice. One might think, "What a clever lawyer. He defined "torture" so narrowly and the defenses to torture so broadly that we can never be found guilty. He has done a great service to the Nation." One would be dead wrong. We have seen the consequences of that sort of twisted legal analysis and we must never repeat it.

Admiral Rickover taught us that there is only one person responsible and that is the person at the top. In terms of the execution of the laws of the United States, that is the Attorney General. He sets the tone. He sets the parameters for debate or even whether debate will be tolerated.

As the Dean of a law school, I travel around the country talking to lawyers, non-lawyers and law students. I certainly talk to law students at the Franklin Pierce Law Center virtually every day. I find it increasingly difficult to explain how we have come to this point in our legal history. I certainly can't justify it. It would be one thing to explain missteps taken in the aftermath of 9/11 if they had been quickly corrected. But how do I explain that even recently the CIA has been authorized to engage in cruel interrogation based on secret legal advice from the Department of Justice? I tell lawyers and law students that I believe law to be the highest calling of all. A society's system of justice determines the goodness or the badness of that society. Not the economy, not military strength, not art, not medicine, but how it treats individuals determines how "good" a society is. In entropic terms, the Rule of Law is the outside force that holds our society together through time. When that force for goodness in the society is impaired, the very fabric of our society is imperiled. Haven't we seen that effect or read about it in history in so many other societies over the millennia? Dare we let the United States become the next former world power because we forsake the Rule of Law?

The Attorney General sits atop that pinnacle in the Executive Branch. As such, the Attorney General is perhaps the most important Cabinet officer of all. He or she must have sublime respect for law but also recognize that laws are meaningless, just words on paper, outside of the context in which they apply. The Attorney General must have an eye to the future, not just the present. The laws must be respected and valued, not viewed as an impediment to be avoided by clever but not wise interpretation. I believe the Rule of Law has come off the rails in recent years. Our next Attorney General must work tirelessly and courageously to get it back on the tracks.

I respectfully urge you to consider these values when you consider the confirmation of Judge Mukasey. He will determine whether the current failures are a swing of the pendulum or a plateau.

Testimony of Dawn E. Johnsen  
Before the U.S. Senate Committee on the Judiciary  
On the Nomination of Michael B. Mukasey  
To Be Attorney General of the United States  
October 17, 2007

I am glad for the opportunity to be here today to discuss the Department of Justice and, in particular, one of its core functions: to help ensure that the rule of law guides governmental action. I had the privilege of serving at the Office of Legal Counsel (OLC) for five years, from 1993 to 1998, including as Acting Assistant Attorney General heading that office from 1997 to 1998. I currently am a professor of law at Indiana University—Bloomington School of Law, where I teach and write about various issues of constitutional law, including presidential power.<sup>1</sup>

My time at OLC, and continued study since, has taught me much about the great potential of the Department of Justice, and OLC in particular, to either promote or undermine the Executive Branch's adherence to the rule of law. I also appreciate the importance of the Department of Justice's role in defending our nation against terrorism, and the tremendous responsibility and pressure the Executive Branch faces in order to protect us all from future attacks.

In our system of government, the President, of course, is not above the law. The Constitution commands that the President "take Care that the Laws be faithfully executed."<sup>2</sup> One of the Attorney General's chief responsibilities is to give the President and others throughout the Executive Branch the legal advice they require to act lawfully. As a general matter, the Attorney General has delegated that work to OLC. OLC's legal determinations are considered authoritative and binding on the entire Executive Branch, unless overruled by the Attorney General or the President (or by OLC itself). As a practical matter, those determinations at times prove final, or go unchecked for years, due to the substantial obstacles to judicial review on issues of national security. OLC thus plays a critical role in upholding the rule of law and preserving our constitutional democracy.

The work of OLC under the current administration has been dangerously compromised. Those of us outside the Executive Branch—and most significantly, this Committee and Congress—cannot fully assess the extent of the problem, due to the Administration's excessive secrecy. We know, however, that on at least some matters of counterterrorism and national security, OLC has not adhered to its traditional role of helping the President fulfill his constitutional obligation to faithfully execute the laws. Instead, under the guise of legal interpretation, OLC has served as a facilitator of policies that do not comply with applicable legal constraints.

Jack Goldsmith, a Harvard Law School professor who served as the Assistant Attorney General for OLC from October 2003 to June 2004, is an important source of some of the details

<sup>1</sup> For a more detailed analysis of the principles that should guide OLC's work, see Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007).

<sup>2</sup> U.S. CONST. art. II, § 3.

of OLC's recent failures.<sup>3</sup> He describes coming to the realization, soon after arriving at OLC, that some OLC opinions issued earlier in the Bush administration "were deeply flawed: sloppily reasoned, overbroad, and incautious in asserting extraordinary constitutional authorities on behalf of the President." "I was astonished, and immensely worried," Goldsmith writes, "to discover that some of our most important counterterrorism policies rested on severely damaged legal foundations."<sup>4</sup> Goldsmith aptly describes OLC opinions as akin to get-out-of-jail-free cards, because they render any subsequent prosecution for violating the law virtually impossible.<sup>5</sup>

This Committee has heard directly from Professor Goldsmith.<sup>6</sup> He has testified, for example, about the shocking hospital visit to then-Attorney General John Ashcroft while he was in intensive care, to urge him to authorize a program that Goldsmith and then-Acting Attorney General James Comey had determined was illegal. James Comey also has testified about that incident.<sup>7</sup> We still do not know the details of their concerns—only that they related to some aspect of the Bush administration's warrantless domestic surveillance program—because the administration continues to refuse to release that information.

I want to focus my testimony on detainee interrogation methods, another subject of Goldsmith's concern, and again a counterterrorism program about which the administration continues to withhold, without adequate justification, critically needed details. Here, Goldsmith's concerns proved so grave he felt compelled to take what he described as the unprecedented step of withdrawing the legal advice given by his OLC predecessor—the only instance he could find in which OLC overturned advice provided within the same administration.<sup>8</sup>

One of the withdrawn opinions was an August 2002 legal memorandum, widely known as the "OLC Torture Memo," in which OLC advised then-Counsel to the President Alberto Gonzales on the meaning of the federal statute that makes it a crime to commit torture.<sup>9</sup> Leaked to the press in June 2004, the Torture Memo first interpreted the scope of the statute in an exceedingly narrow manner, and then methodically explored all conceivable arguments whereby governmental actors who engage in aggressive interrogations, including torture, could escape conviction. It interpreted "torture" as limited only to the most extreme interrogation methods

<sup>3</sup> Jack Goldsmith, *THE TERROR PRESIDENCY* (2007).

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 97.

<sup>6</sup> *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of Jack Goldsmith, former Assistant Attorney General for the Office of Legal Counsel) (not yet published by the Government Printing Office); Dan Eggen, *White House Secrecy on Wiretaps Described*, WASH. POST, Oct. 3, 2007, at A5 (describing testimony).

<sup>7</sup> *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of James B. Comey, former Deputy U.S. Attorney General, Department of Justice) (not yet published by the Government Printing Office).

<sup>8</sup> *Id.* at 146.

<sup>9</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

and went on to suggest defenses to prosecution, including necessity and self-defense, even for methods that do qualify as torture. Most far-reaching, the Torture Memo found that the statute could not be interpreted to allow the prosecution of someone who commits torture “pursuant to the President’s constitutional authority to wage a military campaign,” because to do so would interfere with the President’s Commander-in-Chief power.<sup>10</sup> In exaggerating the President’s war powers in blatantly inaccurate ways, this opinion ignored entirely Congress’s constitutional war powers—such as the power to make rules concerning captures on land and water<sup>11</sup> and for the government and regulation of the land and naval forces.<sup>12</sup> OLC failed to cite or consider the Supreme Court’s directly relevant, landmark *Steel Seizure* case, in which the Court addresses how Congress may limit presidential war powers.<sup>13</sup>

Largely in response to the appalling content of the OLC Torture Memo, nineteen former OLC lawyers came together in 2004 to produce a set of ten principles that we believe should guide the work of OLC and others, most notably the Attorney General, when advising the Executive Branch on the legality of contemplated action. We developed these “Principles to Guide the Office of Legal Counsel” in order to help prevent a recurrence of such terribly and dangerously inappropriate OLC legal analysis.<sup>14</sup> A *New York Times* investigative report published just this month, however, suggests that the problem continues: OLC twice again issued secret interrogation memos, after Goldsmith’s departure, finding that the most extreme CIA interrogation techniques are lawful, whether used individually or in combination.<sup>15</sup> In 2005, of course, Congress enacted the Detainee Treatment Act, which outlawed not only torture, but all cruel, inhuman or degrading treatment of detainees. According to this recent news report, OLC astonishingly interpreted this law to find that even a classic form of torture—simulated drowning through waterboarding—is not cruel, inhuman or degrading.

Congress should respond to OLC’s failures by demanding public accountability and a restoration of the Department of Justice’s tradition of independent legal analysis and respect for the rule of law. The ten “Principles to Guide the Office of Legal Counsel” provide a good framework for that task, and I therefore append the document to this testimony and submit it for the Committee’s consideration. All ten principles are drawn, as the introduction states, from “the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.” They are nonpartisan, consensus principles that are both realistic and aspirational, in that they describe best practices, albeit practices that have not invariably been followed. I will not detail them all here, but highlight two.

Our first and most fundamental principle reads as follows: “When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration’s pursuit of

<sup>10</sup> *Id.* at 35.

<sup>11</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>12</sup> *Id.* at cl. 14.

<sup>13</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

<sup>14</sup> The OLC Principles are reprinted in their entirety at the conclusion of this testimony and also are published as an appendix to Johnsen, *supra* note 1.

<sup>15</sup> Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1.

desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."

In short, OLC has to be prepared to tell the President no. The President of course remains free to act on his own, good faith understanding of the law, but OLC best aids the President's fulfillment of his constitutional obligation to uphold the law by providing accurate, balanced and forthright legal appraisals. This is not, to be sure, simply a matter of predicting how a court would rule. To the contrary, on matters such as national security that courts are less likely to scrutinize, the President and OLC have "a special obligation to ensure compliance with the law."

Importantly, saying no does not mean disabling the government from meeting serious threats to national security. In the most serious controversies from the Bush administration—warrantless domestic surveillance, coercive interrogations and the establishment of military commissions—the critical question was whether the President would take largely secret, unilateral action in violation of statutes or comply with the constitutional process for amending the laws by submitting his recommendations to Congress. The OLC Principles also recognize that OLC's legal advice should not end with saying no. OLC should help craft lawful alternative means by which the President may achieve his objectives.

Second, and I want to state this clearly and emphatically: the Department of Justice must avoid secret law. The OLC Principles provide that "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." Of course, the Executive Branch has some legitimate needs for secrecy, such as to protect the identity of a covert agent or an unknown technological capability. But public disclosure of how the Executive Branch construes the law is especially critical where the Executive Branch does not fully comply with a federal statute. Recent news reports suggest this may be the case with the recently enacted ban on cruel, inhuman and degrading treatment. When the President disagrees with a statute, even when he believes it to be unconstitutional in some respect, the right thing to do nearly always is to go to Congress and seek legislation to change it. If the President nonetheless determines not to comply with the law, at a bare minimum he must explain his defiance to Congress and the public. And when he construes the law in a manner that would come as a surprise to those in Congress who enacted it, he should make that interpretation known. In particular, there appears to be no valid justification for keeping secret the Executive Branch's views regarding which interrogation techniques are legal and which are not. The Department of Defense has made such information public for decades, without any harm to national security. Congress cannot effectively monitor and regulate what the Executive Branch does unless it has some understanding of how the Executive Branch is implementing the laws that Congress already has enacted.

The next Attorney General should make it a priority to undertake a comprehensive review of OLC's work during this administration. He should rescind all flawed opinions, publicize all opinions that will not truly endanger the national security, and restore the integrity and traditional role of the office through the adoption of publicly announced principles and procedures to guide the work of OLC. Congress should engage in aggressive oversight of the

Department of Justice to ensure all this is accomplished, and beyond this, that the Executive Branch complies with the laws.

It pains me to have to be so critical of the Department of Justice, an institution that I greatly esteem, and at which many, many fine career lawyers continue to toil. James Comey, Jack Goldsmith and doubtless many other political appointees, too, have struggled to act with integrity during their service at the Department of Justice. If our country is to return to the bipartisan tradition of Executive Branch action within the law, Congress and the next Attorney General must confront the reality that the problem ultimately derives not from the Department of Justice, but from the President. Numerous reports confirm that President Bush, Vice President Cheney and their top advisors have been deeply hostile to any checks on their counterterrorism policies.<sup>16</sup> Not only external checks—from the courts and Congress and the press and public—but even legal checks from within the Executive Branch, from the President’s own lawyers. Rather than respecting the Department of Justice’s traditional independence, they instead made clear they wanted “forward-leaning” legal opinions that would justify their preferred policies, in order to immunize government officials from prosecution. They have been determined to act unilaterally, except when compelled to go to Congress, as they were by the Supreme Court’s decision in *Hamdan v. Rumsfeld*.<sup>17</sup>

Absent a dramatic change in attitude from the President and in the tone set by the administration—with regard to the rule of law, dealings with the coordinate branches, and openness in government—the next Attorney General will face dramatic pressures and constraints. He nonetheless must persevere and withstand pressures to misrepresent what the law requires. If necessary, he must be prepared to resign or be fired.

The Bush administration has chosen to treat the Constitution’s distribution of power, designed to protect the nation from a dominating branch, as an internal struggle for power in which any unilateral action by the President is counted as a victory because it is power seized from Congress. It has viewed laws constraining executive action or protecting civil liberties as obstacles to be skirted rather than expressions of democracy to be obeyed. Too often, it has rendered legal opinions designed to serve the President’s agenda instead of the rule of law. It is past time for Congress, the courts, and the public to insist that the President return to our bipartisan tradition of Congress and the President working together to protect the American people, under the laws of our nation.

<sup>16</sup> See, e.g., Goldsmith, *supra* note 3; Charlie Savage, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY (2007); Barton Gellman & Jo Becker, *A Different Understanding with the President*, WASH. POST, June 24, 2007, at A1; Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, WASH. POST, June 25, 2007, at A1; Jo Becker & Barton Gellman, *A Strong Push from Backstage*, WASH. POST, June 26, 2007, at A1; Jo Becker & Barton Gellman, *Leaving No Tracks*, WASH. POST, June 27, 2007, at A1.

<sup>17</sup> 126 S. Ct. 2749 (2006).

**Principles to Guide the Office of Legal Counsel**  
**December 21, 2004**

The Office of Legal Counsel (OLC) is the Department of Justice component to which the Attorney General has delegated the function of providing legal advice to guide the actions of the President and the agencies of the executive branch. OLC's legal determinations are considered binding on the executive branch, subject to the supervision of the Attorney General and the ultimate authority of the President. From the outset of our constitutional system, Presidents have recognized that compliance with their constitutional obligation to act lawfully requires a reliable source of legal advice. In 1793, Secretary of State Thomas Jefferson, writing on behalf of President Washington, requested the Supreme Court's advice regarding the United States' treaty obligations with regard to the war between Great Britain and France. The Supreme Court declined the request, in important measure on the grounds that the Constitution vests responsibility for such legal determinations within the executive branch itself: "[T]he three departments of government . . . being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions seems to have been purposely as well as expressly united to the executive departments." Letter from John Jay to George Washington, August 8, 1793, *quoted in* 4 *The Founders' Constitution* 258 (Philip B. Kurland & Ralph Lerner, eds. 1987).

From the Washington Administration through the present, Attorneys General, and in recent decades the Office of Legal Counsel, have served as the source of legal determinations regarding the executive's legal obligations and authorities. The resulting body of law, much of which is published in volumes entitled *Opinions of the Attorney General* and *Opinions of the Office of Legal Counsel*, offers powerful testimony to the importance of the rule-of-law values that President Washington sought to secure and to the Department of Justice's profound tradition of respect for the rule of law. Administrations of both political parties have maintained this tradition, which reflects a dedication to the rule of law that is as significant and as important to the country as that shown by our courts. As a practical matter, the responsibility for preserving this tradition cannot rest with OLC alone. It is incumbent upon the Attorney General and the President to ensure that OLC's advice is sought on important and close legal questions and that the advice given reflects the best executive branch traditions. The principles set forth in this document are based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.

*1. When providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action.*

OLC's core function is to help the President fulfill his constitutional duty to uphold the Constitution and "take care that the laws be faithfully executed" in all of the varied work of the

executive branch. OLC provides the legal expertise necessary to ensure the lawfulness of presidential and executive branch action, including contemplated action that raises close and difficult questions of law. To fulfill this function appropriately, OLC must provide advice based on its best understanding of what the law requires. OLC should not simply provide an advocate's best defense of contemplated action that OLC actually believes is best viewed as unlawful. To do so would deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action. OLC's tradition of principled legal analysis and adherence to the rule of law thus is constitutionally grounded and also best serves the interests of both the public and the presidency, even though OLC at times will determine that the law precludes an action that a President strongly desires to take.

*2. OLC's advice should be thorough and forthright, and it should reflect all legal constraints, including the constitutional authorities of the coordinate branches of the federal government—the courts and Congress—and constitutional limits on the exercise of governmental power.*

The President is constitutionally obligated to “preserve, protect and defend” the Constitution in its entirety—not only executive power, but also judicial and congressional power and constitutional limits on governmental power—and to enforce federal statutes enacted in accordance with the Constitution. OLC's advice should reflect all relevant legal constraints. In addition, regardless of OLC's ultimate legal conclusions concerning whether proposed executive branch action lawfully may proceed, OLC's analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.

*3. OLC's obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC's advice is unlikely to be subject to review by the courts.*

In formulating its best view of what the law requires, OLC always should be mindful that the President's legal obligations are not limited to those that are judicially enforceable. In some circumstances, OLC's advice will guide executive branch action that the courts are unlikely to review (for example, action unlikely to result in a justiciable case or controversy) or that the courts likely will review only under a standard of extreme deference (for example, some questions regarding war powers and national security). OLC's advice should reflect its best view of all applicable legal constraints, and not only legal constraints likely to lead to judicial invalidation of executive branch action. An OLC approach that instead would equate “lawful” with “likely to escape judicial condemnation” would ill serve the President's constitutional duty by failing to describe all legal constraints and by appearing to condone unlawful action as long as the President could, in a sense, get away with it. Indeed, the absence of a litigation threat signals special need for vigilance: In circumstances in which judicial oversight of executive branch action is unlikely, the President—and by extension OLC—has a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.

*4. OLC's legal analyses, and its processes for reaching legal determinations, should not simply mirror those of the federal courts, but also should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.*

As discussed under principle 3, jurisdictional and prudential limitations do not constrain OLC as they do courts, and thus in some instances OLC appropriately identifies legal limits on executive branch action that a court would not require. Beyond this, OLC's work should reflect the fact that OLC is located in the executive branch and serves both the institution of the presidency and a particular incumbent, democratically elected President in whom the Constitution vests the executive power. What follows from this is addressed as well under principle 5. The most substantial effects include the following: OLC typically adheres to judicial precedent, but that precedent sometimes leaves room for executive interpretive influences, because doctrine at times genuinely is open to more than one interpretation and at times contemplates an executive branch interpretive role. Similarly, OLC routinely, and appropriately, considers sources and understandings of law and fact that the courts often ignore, such as previous Attorney General and OLC opinions that themselves reflect the traditions, knowledge and expertise of the executive branch. Finally, OLC differs from a court in that its responsibilities include facilitating the work of the executive branch and the objectives of the President, consistent with the requirements of the law. OLC therefore, where possible and appropriate, should recommend lawful alternatives to legally impermissible executive branch proposals. Notwithstanding these and other significant differences between the work of OLC and the courts, OLC's legal analyses always should be principled, thorough, forthright, and not merely instrumental to the President's policy preferences.

*5. OLC advice should reflect due respect for the constitutional views of the courts and Congress (as well as the President). On the very rare occasion when the executive branch—usually on the advice of OLC—declines fully to follow a federal statutory requirement, it typically should publicly disclose its justification.*

OLC's tradition of general adherence to judicial (especially Supreme Court) precedent and federal statutes reflects appropriate executive branch respect for the coordinate branches of the federal government. On very rare occasion, however, Presidents, often with the advice of OLC, appropriately act on their own understanding of constitutional meaning (just as Congress at times enacts laws based on its own constitutional views). To begin with relatively uncontroversial examples, Presidents at times veto bills they believe are unconstitutional and pardon individuals for violating what Presidents believe are unconstitutional statutes, even when the Court would uphold the statute or the conviction against constitutional challenge. Far more controversial are rare cases in which Presidents decide to refuse to enforce or otherwise comply with laws they deem unconstitutional, either on their face or in some applications. The precise contours of presidential power in such contexts are the subject of some debate and beyond the scope of this document. The need for transparency regarding interbranch disagreements, however, should be beyond dispute. At a bare minimum, OLC advice should fully address

applicable Supreme Court precedent, and, absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation. Absent transparency and clarity, client agencies might experience difficulty understanding and applying such legal advice, and the public and Congress would be unable adequately to assess the lawfulness of executive branch action. Indeed, federal law currently requires the Attorney General to notify Congress if the Department of Justice determines either that it will not enforce a provision of law on the grounds that it is unconstitutional or that it will not defend a provision of law against constitutional challenge.

*6. OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.*

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise. There nonetheless will exist some legal advice that properly should remain confidential, most notably, some advice regarding classified and some other national security matters. OLC should consider the views regarding disclosure of the client agency that requested the advice. Ordinarily, OLC should honor a requestor's desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action. For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formation. In all events, OLC should in each administration consider the circumstances in which advice should be kept confidential, with a presumption in favor of publication, and publication policy and practice should not vary substantially from administration to administration. The values of transparency and accountability remain constant, as do any existing legitimate rationales for secret executive branch law. Finally, as discussed in principle 5, Presidents, and by extension OLC, bear a special responsibility to disclose publicly and explain any actions that conflict with federal statutory requirements.

*7. OLC should maintain internal systems and practices to help ensure that OLC's legal advice is of the highest possible quality and represents the best possible view of the law.*

OLC systems and processes can help maintain high legal standards, avoid errors, and safeguard against tendencies toward potentially excessive claims of executive authority. At the outset, OLC should be careful about the form of requests for advice. Whenever possible, agency requests should be in writing, should include the requesting agency's own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow. Where OLC determines that advice of a more generally applicable nature would be helpful and

appropriate, it should take special care to consider the implications for its advice in all foreseeable potential applications. Also, OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred; legal "advice" after the fact is subject to strong pressures to follow an advocacy model, which is an appropriate activity for some components of the Department of Justice but not usually for OLC (though this tension may be unavoidable in some cases involving continuing or potentially recurring executive branch action). OLC should recruit and retain attorneys of the highest integrity and abilities. OLC should afford due respect for the precedential value of OLC opinions from administrations of both parties; although OLC's current best view of the law sometimes will require repudiation of OLC precedent, OLC should never disregard precedent without careful consideration and detailed explanation. Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a "two deputy rule" that requires at least two supervising deputies to review and clear all OLC advice. Finally, OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.

*8. Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.*

The involvement of affected entities serves as an additional check against erroneous reasoning by ensuring that all views and relevant information are considered. Administrative coordination allows OLC to avail itself of the substantive expertise of the various components of the executive branch and to avoid overlooking potentially important consequences before rendering advice. It helps to ensure that legal pronouncements will have no broader effect than necessary to resolve the question at hand. Finally, it allows OLC to respond to all serious arguments and thus avoid the need for reconsideration.

*9. OLC should strive to maintain good working relationships with its client agencies, and especially the White House Counsel's Office, to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.*

Although OLC's legal determinations should not seek simply to legitimize the policy preferences of the administration of which it is a part, OLC must take account of the administration's goals and assist their accomplishment within the law. To operate effectively, OLC must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist. Thus, when OLC concludes that an administration proposal is impermissible, it is appropriate for OLC to go on to suggest modifications that would cure the defect, and OLC should stand ready to work with the administration to craft lawful alternatives. Executive branch officials nonetheless may be tempted to avoid bringing to OLC's attention strongly desired policies of questionable legality. Structures, routines and expectations should ensure that OLC is consulted on all major executive branch initiatives and activities that raise significant legal questions. Public attention to when and how OLC generally functions within a particular administration also can help ensure appropriate OLC involvement.

10. OLC should be clear whenever it intends its advice to fall outside of OLC's typical role as the source of legal determinations that are binding within the executive branch.

OLC sometimes provides legal advice that is not intended to inform the formulation of executive branch policy or action, and in some such circumstances an advocacy model may be appropriate. One common example: OLC sometimes assists the Solicitor General and the litigating components of the Department of Justice in developing arguments for presentation to a court, including in the defense of congressional statutes. The Department of Justice typically follows a practice of defending an act of Congress against constitutional challenge as long as a reasonable argument can be made in its defense (even if that argument is not the best view of the law). In this context, OLC appropriately may employ advocacy-based modes of analysis. OLC should ensure, however, that all involved understand whenever OLC is acting outside of its typical stance, and that its views in such cases should not be taken as authoritative, binding advice as to the executive branch's legal obligations. Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.

The following former Office of Legal Counsel attorneys prepared and endorse this document:

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OPENING STATEMENT OF CHAIRMAN PATRICK LEAHY  
HEARING ON THE NOMINATION OF MICHAEL B. MUKASEY  
TO BE ATTORNEY GENERAL OF THE UNITED STATES  
SENATE JUDICIARY COMMITTEE  
OCTOBER 17, 2007

Early this year, as we began our consideration of the United States Attorney firing scandal, I observed that we faced the most serious threat to the effectiveness and professionalism of the United States Department of Justice since the days of the Saturday Night Massacre, when President Nixon forced the firing of special prosecutor Archibald Cox. I noted that unlike during Watergate, this time there was no Elliot Richardson or William Ruckelshaus around to defend the independence of federal prosecutors. Instead, high officials at the Department and their staffs were complicit with White House political operatives. Now, the entire senior leadership and their staffs have resigned, as have Karl Rove and his two top aides at the White House.

The crisis of leadership that led to these resignations has taken a heavy toll on the tradition of independence that had long guided the Department of Justice and protected it from political influence. The firing of the U.S. Attorneys, who are the chief federal law enforcement officers in their districts, sent a message to all U.S. Attorneys and the career prosecutors working in those offices that only “loyal Bushies” would keep their jobs or advance in their careers. This crisis has taken a heavy toll in morale at the Department and in confidence among the American people. As a former prosecutor I know that the dismay runs deep, from the career attorneys at Justice and in our U.S. Attorney offices, straight down to the cops on the beat.

I start this hearing as I did the hearing this Committee held on the last Attorney General nomination, hoping to be able to support the nominee. After that hearing in 2005, I decided that I could not vote for the confirmation of Alberto Gonzales. I did so noting, as Justice James Iredell had in 1792, that the person who serves as Attorney General “is not called Attorney General of the President, but Attorney General of the United States.” There is good reason why the rule of law requires that we have an Attorney General and not merely a Secretary of the Department of Justice. This is a different kind of Cabinet position, distinct from all the others, and it requires greater independence. The departing Attorney General never understood this. Instead, he saw his role as a facilitator for this White House’s overreaching policies and partisan politics.

Restoring the Department of Justice begins by restoring integrity and independence to the position of Attorney General of the United States. The Attorney General’s duty is to uphold the Constitution and the rule of law — not to work to circumvent it. Both the President and the Nation are best served by an Attorney General who gives sound advice and takes responsible action, without regard to political considerations — not one who develops legalistic loopholes to serve the ends of a particular administration. The Attorney General cannot interpret our laws to mean whatever the current President wants them to mean. The Attorney General is supposed to represent all of the American people, not just one of them.

Regrettably, the former Attorney General enabled this Administration to continue policies that are in fundamental conflict with American values, decades of law, sound military practice, international law, and human rights. We see it demonstrated, yet again, in the recent revelation that even after waging and losing a public battle to resist congressional efforts to outlaw torture and honor our obligations, this Administration, enabled by the Justice Department, apparently secretly doubled back to redefine “torture” and “cruel, inhuman and degrading treatment” to

allow the very conduct Congress had outlawed.

We have seen departures from this country's honorable traditions, practices, and established law in connection with interrogation methods that we condemn when they are used by others. Likewise, we have seen political influence corrupt the Department of Justice when it has departed from its longstanding practices and tradition, practices that historically serve to insulate it from partisanship in law enforcement. This lawlessness led to Abu Ghraib, Haditha, and Blackwater. And valuing loyalty over competence and accountability led to the bumbling aftermath of Hurricane Katrina, the failure to care for wounded veterans at Walter Reed, and the purge among U.S. Attorneys.

There is much that has gone wrong that this Administration has stubbornly refused to admit or correct. When President Bush ascribed Attorney General Gonzales' resignation to supposed "unfair treatment" and having "his good name . . . dragged through the mud for political reasons," he mischaracterized the clear facts about a U.S. Attorney firing scandal that has decimated morale at the Department of Justice. To reclaim our moral leadership, we need to acknowledge wrongdoing. These hearings are about a nomination, but these hearings are also about accountability.

We need a new Attorney General. We need someone who understands that the responsibilities and duties of that office are not to act as a mouthpiece or validator for the Administration, or as the chief defense lawyer for the White House. We are reminded by the examples of Elliot Richardson and William Ruckelshaus from the Watergate era -- and more recently the examples of James Comey, Jack Goldsmith, and Alberto Mora -- that law enforcement officials must enforce the law without fear or favor to their benefactors at the White House or their political party. We have now seen what happens when the rule of law plays second fiddle to a President's policy agenda and the partisan desires of political operatives.

We are the most powerful Nation on earth, the most powerful Nation the world has ever known, a country that cherishes liberty and human rights, a Nation that has been a beacon of hope and freedom to the world. We face vicious enemies, and we need the confidence and the resolve to understand that we can and must defeat them without sacrificing our values and stooping to their level.

This is a job interview for a big job that has become even bigger. Along with helping keep Americans safe, protecting their rights, combating crime and enforcing the law, and managing more than 100,000 employees and a budget extending into the tens of billions of dollars, the next Attorney General must regain public trust and begin the process of repair and restoration.

This nomination can begin the repair process. I hope all Members of the Judiciary Committee, Democrats and Republicans alike, will join to restore the constitutional checks and balances that have been systematically eroded by this Administration, and I hope that we can begin that process this week. I welcome the nominee and urge him to answer our questions so that we can join together in restoring the Department of Justice to be worthy of its name. The American people expect - and deserve - no less.

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Statement  
*United States Senate Committee on the Judiciary*  
**Continuation of Executive Nomination**  
 October 18, 2007

**The Honorable Patrick Leahy**  
 United States Senator, Vermont

Closing Remarks Of Sen. Patrick Leahy,  
 Chairman, Senate Judiciary Committee,  
 At The Conclusion Of Attorney General Nominee Michael Mukasey's Testimony  
 October 18, 2007

I hope that these hearings turn out to be a step on the road to restoring the Department of Justice. It needs it desperately.

I have talked to you privately about the fact that I hope that you put back a Department of Justice that can be in good hands for whoever your successor might be, as the 82nd attorney general.

That might be in a year. It might be in several years. I have no way of knowing. I have no way of knowing whether we're going to have a president of my party or a president of your party. But I think we can both agree, no matter what party you belong to, you need a strong, independent attorney general and Department of Justice.

Now, I think we face the most serious threat to the effectiveness and professionalism of the United States Department of Justice since Watergate and the Saturday Night Massacre.

After Richard Nixon became the only American President to resign from office, President Ford appointed Edward Levi and former Judge Harold Tyler, someone both you and I admire, to begin the process of restoring the Department of Justice. It's too important an institution in our country to remain dysfunctional.

I might say, I hope that a Judge Mukasey, like Judge Harold Tyler with whom you worked, will begin to restore the department's integrity. You've testified that the Department must stand for the rule of law. I would also add to its mandate that: it must stand for justice.

Nothing's more fundamental to our constitutional democracy than the precept that nobody's above the law, neither you nor I nor a president. I believe this Administration has undereut that precept time and time again. The President's commutation – I realize he has a power to do this, but a commutation of the sentence given to Scooter Libby, the former chief of staff to the Vice President, who was convicted after a fair jury trial of lying to the FBI and to a grand jury, and of obstructing justice. We see them promoting immunity over accountability, certainly secrecy over congressional oversight, and unilateral power over the checks and balances that have defined this Nation. Actually, I might say those checks and balances not only define the Nation, they've protected your liberties and mine for over two centuries.

And I don't believe that the President is above the law, even though many in the Administration seem to feel he is. And a view that may override the laws he chooses is an extreme abuse of executive power as I've witnessed. I think it's dead wrong. But I think it's extremely dangerous to our democracy. The cost to American liberty, our standing in the world, and to the security of our soldiers and citizens can be staggering if we allow the president to be above the law; even more staggering

[http://judiciary.senate.gov/print\\_member\\_statement.cfm?id=3001&wit\\_id=2629](http://judiciary.senate.gov/print_member_statement.cfm?id=3001&wit_id=2629)

8/28/2008

than the trillion dollar cost of the war in Iraq. And I think when the Administration compounds its lawlessness by cloaking its policies and miscalculations under a veil of secrecy, that leaves the Congress and the American people in the dark about what it's doing.

I've not known any administration, Republican or Democratic who hasn't been helped in the long run by having a real searching oversight, and having to admit, publicly, mistakes. Now, you and I have had some talk. We've had private meetings, and we've had open meetings here. I've been here for virtually all your testimony and listened to it. I do worry that there has been a retreat today from the clearer statements on the rule of law and the President not being above the law made yesterday. That's why I'll follow up with some very specific letters. If you have questions about what I have, just call me, and we'll sit down and go over them.

I don't want to see you appearing to posit a system where a president's overbroad and invalid claims of executive privilege can't be tested. So we'll continue to meet on that. I know that Senator Specter and others will want to.

The Attorney General has to uphold the Constitution and the law. He can't bend the law to fit whoever the president is. And I'll say that no matter who the president might be. We can't define torture down in secret and in fundamental conflict with American values and law. I agree with what you said in your opening statement, which I thought was very good. You spoke of "protecting civil liberties and people's confidence that those liberties are protected is part of protecting national security." I agree with that and also add they're a fundamental American strength and American value: one of the things I'm sure that appealed to your father when he came to this country. It certainly did to my grandparents and my great grandparents when they came to this country.

So the hearing's going to be the start of a new chapter. American laws and our values are no longer undercut in secret. The question in this hearing is not whether you'll be confirmed. The real test is going to be what kind of Attorney General you'll be. That's a test, but it's also a legacy you want to be able to leave this office, as we all do, in ours, with your head high.

The oversight process, and an Attorney General's cooperation with that process, can forge a working partnership. To paraphrase Ronald Reagan, a confirmation in part is an act of trust. Oversight helps us verify. And this committee and both parties are ready and willing to work with you. I think we've already begun.

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CARL LEVIN, MICHIGAN, CHAIRMAN

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**United States Senate**  
COMMITTEE ON ARMED SERVICES  
WASHINGTON, DC 20510-6050

October 5, 2007

Honorable Michael B. Mukasey  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036

Dear Judge Mukasey:

For more than three years, the Senate Armed Services Committee has sought a March 14, 2003, Office of Legal Counsel (OLC) legal opinion, written by Deputy Assistant Attorney General John Yoo for Department of Defense General Counsel William J. Haynes, entitled "Military Interrogation of Alien Unlawful Combatants Held Outside the United States." According to the report of Vice Admiral Church, this OLC opinion served as the controlling authority on all legal issues for the Defense Department's Detainee Interrogation Working Group.

Efforts by the Armed Services Committee to obtain this memorandum from the Department of Justice have been unsuccessful. On August 17, 2005, the Department of Justice (DoJ) rejected my July 1, 2005 request of Attorney General Alberto Gonzales for the Yoo memorandum.

I am deeply troubled by the Department of Justice's position on this matter as it has prevented the Armed Services Committee from understanding the U.S. Government's interpretation of relevant domestic and international laws as they apply to the treatment of detainees in U.S. custody. In denying the Committee the requested document, DoJ did not cite a recognized privilege but relied on a "longstanding policy . . . that we do not disclose non-public OLC opinions and memoranda outside the Executive Branch." Notwithstanding the fact that the policy itself is unacceptable, DoJ's application of that policy is inconsistent. A February 1, 2005 DoJ letter to then-Senate Judiciary Committee Chairman Arlen Specter stated that "advice [contained in another non-public OLC memorandum relating to interrogation practices] has been appropriately provided by the client agency in a classified setting to the relevant oversight committee." With respect to the March 14, 2003 Yoo memorandum, the Armed Services Committee is the relevant oversight committee. I am aware of no legitimate basis for DoJ's withholding the March 14, 2003 Yoo memo from the Committee.

Also, earlier this week, the White House confirmed the existence of previously undisclosed OLC legal opinions governing the treatment of detainees in U.S. custody. I am troubled that the Administration apparently failed to even inform the Congress of the existence of these opinions. Such failures and the repeated refusal of DoJ to provide Congress with such documents has prevented the Congress from fulfilling its Constitutional responsibilities to conduct oversight.

Please advise me as to whether, if confirmed, you will provide the Senate Armed Services Committee with the Yoo memorandum of March 14, 2003 and any other OLC opinions that govern the treatment of detainees in U.S. custody or control.

Thank you, in advance, for your prompt response.

Sincerely,



Carl Levin  
Chairman

cc: Honorable John McCain, Ranking Member, Senate Armed Services Committee  
Honorable Patrick Leahy, Chairman, Senate Judiciary Committee  
Honorable Arlen Specter, Ranking Member, Senate Judiciary Committee

Statement of John S. Martin.  
Before the Committee on the Judiciary  
of the United States Senate

Mr. Chairman and members of the Committee, I am honored to be here and to have the opportunity to express publicly my high regard and affection for the nominee for Attorney General, the Honorable Michael B. Mukasey. I have known Judge Mukasey for over 30 years. However, I came to know him best during the period when we served together on the United States District Court for the Southern District of New York, particularly after he became the Chief Judge of our court. During that time I served as the chair of our Committee on the Clerk's Office and we had occasion to work closely together on personnel matters as well as the complex problem of preparing our court for the migration to an electronic filing system.

At the outset, I should point out that Judge Mukasey and I are of different faiths. He was recommended for his judgeship by Senator D'Amato whereas I was recommended by Senator Moynihan. Other than the fact that I'm sure we both voted for Senator Schumer, I doubt that Judge Mukasey and I have voted often for the same political candidate. But these political differences do not cause me to hesitate for a moment in recommending him to you as a highly qualified candidate for the office of Attorney General.

Michael Mukasey is one of the most decent human being I know and he possesses the qualities of intellect and humanity that we should want in someone who holds that important office. When we worked together on the problems of our clerk's office, I saw firsthand his compassion and his leadership. During that period our Clerk of Court died after a long battle with cancer. No one could have been more caring than Judge Mukasey was in that situation. In addition, he was an able leader, who sought advice and who inspired those around him to do their best. He also had the unenviable task of trying to organize and lead more than 40 United States District Judges, each of whom enjoyed life tenure. Judge Mukasey handled this task with grace and, when he stepped down as Chief Judge, he left with a respect and admiration of all of his colleagues.

To some extent no one individual is qualified to be Attorney General. The same can be said of a United States District Judge. In both cases one becomes responsible for dealing with important questions of law in areas in which he has had no prior experience. The Attorney General must preside over the Department of Justice and decide policy in areas as diverse as antitrust, terrorism, land utilization, immigration and treaty rights of native Americans. A United States District Judge must decide cases involving all of these issues and even the more arcane areas of law such as admiralty and bankruptcy. Serving as a District Judge you learn how to listen to those who are expert in the field and to judge the merits of their argument. Most important, for someone who would become the Attorney General, you learn that the law is above politics and that your personal political views have no place in the administration of justice.

Michael B. Mukasey was a superb United States District Judge and I do not doubt that, if confirmed, he will be a superb Attorney General. He possesses both an intellectual ability and an openness of mind that will serve him well in formulating the policies to be carried out by the attorneys in the Department of Justice. While I never had the pleasure of appearing in Judge Mukasey's court, I have had the pleasure of reading his opinions. He was a thoughtful and intelligent jurist. I also had one experience with him that demonstrates one of the most important qualities a judge or Attorney General should have—the willingness to rethink a position. Several years ago I had a case which raised an issue that I cannot recall, but the only opinion on point was written by Judge Mukasey. In my case I disagreed with him and wrote an opinion in which I said that, while I have great respect for Judge Mukasey, on this issue we disagree. Sometime later Judge Mukasey sent me a copy of an opinion he wrote in a new case raising the same issue. In that opinion he referred to his prior opinion and my opinion and said that he had persuaded that his original decision was wrong. I know few judges who would have had the self-confidence or the humility to admit publicly that they were changing a prior position. Yet, that is the type of openness of mind that is most needed in those whose decisions can affect the lives of many of their fellow citizens.

Finally, as you might expect, Judge Mukasey's nomination has been the subject of considerable comment in the New York legal community. The unanimous view of those with whom I have spoken, friends of Judge Mukasey, his former colleagues and lawyers who had the pleasure of appearing before him, is that the President made an excellent selection when he chose to nominate Michael B. Mukasey and that he will provide the type of leadership necessary to ensure that the American people have confidence that justice is being administered fairly and with integrity.

. Again I thank you for the opportunity to appear before you and I am, of course, happy to answer any questions you might have.

**Opening Statement of Judge Michael Mukasey  
before the Senate Judiciary Committee  
October 17, 2007**

**Good morning Chairman Leahy, Ranking Member Specter, and Members of the Committee; thank you for the opportunity to be here today.**

**When my nomination to be the 81<sup>st</sup> Attorney General of the United States was announced, I expressed to President Bush my gratitude and deep sense of honor. Since then, I have had the benefit of your graciousness in taking the time to meet with me privately, to express your views and concerns, and to hear my views. I am grateful to each of you for that, as I am to Senators Schumer and Lieberman for their generous remarks in introducing me this morning.**

**And of course, I am grateful to my family – my wife Susan and my children, Marc and Jessica, who have been a part of whatever I have done that is worthwhile.**

**But what comes most strongly to mind as I deliver these brief remarks is that this isn't about me, or even about my gratitude to the many people who helped me get here; this is about the more than 100,000 men and women of the Department of Justice, who bear the responsibility to pursue justice through the rule of law, in U.S. Attorney's offices, in investigative field divisions, in federal prisons and other facilities, all over this country and around the world.**

**There are in a sense many cultures in those different offices and divisions, and there are differences as well between the culture of the Department as it may appear in the building that occupies a square block here in Washington, and as it may appear in each of the 93 United States Attorneys' offices**

**around the country. But all those apparently different cultures are united by shared values and standards. Legal decisions and the progress of cases are decided by facts and law, not by interests and motives.**

**So too, the Justice Department's mission includes advising the other departments and agencies of government, including the President, on what choices they are free to make and what limits they face. Here too, the governing standard is what the law and Constitution permit and require.**

**I am here in the first instance to tell you, but also to tell the men and women of the Department of Justice, that those are the standards that guided the Department when I was privileged to serve 35 years ago, and those are the standards I intend to help them uphold if I am confirmed.**

**Because of the times in which we live, it was to be expected – as in fact happened – that many of you would discuss with me weighty and serious issues that sometimes seem to raise a conflict between liberty and security. A great Attorney General, perhaps the greatest to serve in the modern era, Robert Jackson, said that the issue between authority and liberty is not between a right and a wrong – that never presents a dilemma. The dilemma is because the conflict is between two rights, each in its own way important. That is why I have told you during those discussions, and may have occasion to repeat again here today, that protecting civil liberties, and people's confidence that those liberties are protected, is a part of protecting national security, just as is the gathering of intelligence to defend us from those who believe it is their duty to make war on us. We have to succeed at both. It is the honor and the privilege of the men and women of the Justice Department to help us do that, and**

**if I am confirmed it will be my honor and privilege to try to help them help us.**

**As I mentioned a moment ago, you have been generous with your time and your advice in the past couple of weeks. I believe that the Department's relationship with this Committee and with Congress is vital to fulfilling its mission. I want to assure you that, if confirmed, I will always appreciate and welcome your advice, as I have since my nomination, and that I and others in the Department will try to be available to you. In that spirit, I am ready to answer the questions you have for me today.**

**Thank you.**

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**Testimony of Theodore M. Shaw**

**United States Senate  
Committee on the Judiciary**

**Hearing on the  
Nomination of Michael B. Mukasey to be  
Attorney General of the United States**

**Hart Senate Office Building  
Room 216**

**October 17, 2007  
10:00 a.m.**

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.



My name is Theodore M. Shaw. I am the Director-Counsel and President of the NAACP Legal Defense & Educational Fund, Inc. Founded under the direction of Thurgood Marshall, the Legal Defense Fund is the nation's oldest civil rights law firm. We have served as legal counsel for African Americans in most of the country's major racial discrimination cases.

I am pleased to testify on the important issues facing the Senate as it considers the nomination of Judge Mukasey for Attorney General. My testimony will not address Judge Mukasey's personal qualifications for the position, but rather the pervasive problems within the Justice Department affecting civil rights that, unless immediately remedied, will further derail proper government enforcement of civil rights laws and cast a long shadow on Judge Mukasey's tenure if he is confirmed. Judge Mukasey should be required—as a condition to Senate confirmation—to commit to restoring the integrity of the Civil Rights Division and to taking tangible steps to ensure that the Division's vast enforcement powers are utilized in a manner that vindicates the rights of all persons falling within the protection of our civil rights laws.

There are, however, certain aspects of Judge Mukasey's record on civil rights and civil liberties issues that warrant comment. Judge Mukasey has published a number of troubling civil rights rulings involving discrimination in jury selection and employment discrimination, some of which were reversed by the Second Circuit.<sup>1</sup> We also note Judge Mukasey's long record of granting very broad deference to the federal government on civil liberties issues. We hope that, if confirmed to be the nation's chief law enforcement officer, Judge Mukasey would aggressively prosecute civil rights cases to the full extent of the law, and further ensure that criminal prosecutions are conducted with all available legal protections. We hope that the Senate will fully explore these aspects of his record before moving forward on the nomination.

The Department of Justice has long stood as a beacon for equality and justice. It represents our nation's collective commitment to fair enforcement of the rule of law, and to ensuring equal opportunity in every facet of society. The Attorney General must be committed to protecting the civil and human rights of all Americans, and to acting independently of political or partisan pressure.

Within the Justice Department, the Civil Rights Division has always provided the best hope for racial and ethnic minorities in their elusive quest for equal justice. Just last

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<sup>1</sup> *Jordan v. Lefevre*, 206 F.3d 196 (2d Cir. 2000) (granting habeas relief because Judge Mukasey did not properly determine whether purposeful discrimination in jury selection was established, and writing that “[t]he trial judge in this case made no effort to comply with the letter, much less the spirit, of [*Batson v. Kentucky*]”); *Sorlucco v. N.Y. City Police Dep't*, 971 F.2d 864 (2d Cir. 1992) (reversing Judge Mukasey's decision to overturn jury verdict for female police officer on gender discrimination claims that she was transferred and then terminated after complaining of rape by another officer); *Rosen v. Thornburgh*, 928 F.2d 528 (2d Cir. 1991) (reversing Judge Mukasey's dismissal of case claiming religious discrimination); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157 (2d Cir. 1991) (Judge Mukasey sitting by designation and ruling that plaintiff claiming race and national origin discrimination in employment did not make prima facie case).

month, the Division celebrated its 50th Anniversary, having been created in the wake of the Supreme Court's landmark decision in *Brown v. Board of Education*, and as part of the first civil rights law since Reconstruction. Its courageous and aggressive enforcement of the new civil rights statutes passed in the 1950's and 1960's opened countless doors for African Americans and other racial minorities. While national civil rights organizations such as the Legal Defense Fund certainly bring many civil rights cases, it is the Civil Rights Division that is the premier enforcer of our nation's civil rights laws, second to none in terms of the capacity, staff and resources it can devote to civil rights cases.

As the Senate considers whether to confirm Judge Mukasey, it is important to review the Civil Rights Division's recent downward turn in civil rights enforcement as measured against the original promise of the Civil Rights Division and the important role it has played in our history for the past fifty years. Sadly, while racial divisions continue to haunt our country, the Civil Rights Division has sharply deviated from its original mission in a host of areas. It is imperative that the Senate use this opportunity to demand dramatic changes under the new leadership of the Justice Department, which Judge Mukasey's nomination now offers.

My testimony today is informed both by my experience as a civil rights litigator with the NAACP Legal Defense Fund and as a former employee of the Justice Department. I began the practice of law as a line attorney in the Civil Rights Division. I joined the Division through the Honors Program in the fall of 1979, and was assigned to the General Litigation Section, which had responsibility for school desegregation, housing and credit discrimination cases.<sup>2</sup>

When I enrolled in law school, I had two dream jobs. One was to work as an attorney for the Civil Rights Division of the Department of Justice. The other was to work for the NAACP Legal Defense Fund. Neither job was easy to obtain. The Civil Rights Division was a storied position from which to do civil rights work. Its reputation had been firmly established during the halcyon days of the Civil Rights Movement, when Assistant Attorney General John Doar was a constant presence who identified himself as a Justice Department lawyer before a mob that was threatening violence to civil rights demonstrators seeking to vindicate the right to vote. At least since the days when Attorney General Robert F. Kennedy wrestled with the Justice Department's role in vindicating the rights of black Americans, the Civil Rights Division had built a staff of career attorneys who were dedicated to civil rights enforcement. To be clear, these attorneys fully understood that their role was to represent the United States, and not any individual or any

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<sup>2</sup> The General Litigation Section was created during the Carter Administration in recognition of the link between school and housing discrimination, as well as the link between housing and credit discrimination. In 1980, the Justice Department filed suit against the city of Yonkers, New York, alleging both school and housing discrimination. The suit was reviewed by the Reagan appointees to the Justice Department to determine whether it was "improperly filed." After the basis of that review was reported publicly in the press, the case was allowed to continue. However, the Civil Rights Division was reorganized and the General Litigation Section was disbanded. I was one of the attorneys who investigated housing and school segregation in Yonkers and who worked on the original complaint and initial discovery.

group of individuals. But in representing our federal government, the Justice Department at long last had the authority and the inclination to vindicate the rights of individuals who were discriminated against because of their race, color, or membership in a subordinated group. The history and condition of black Americans were the impetus for the Civil Rights Division's creation and much of its work, but its mission extended to all Americans. Career attorneys were the backbone of the Civil Rights Division.

To be sure, each Administration has the prerogative to make political appointees to the Justice Department and by extension, to its Civil Rights Division. Career attorneys understood that policies and practices might shift as administrations came and went, but there was also a limit on the politicization of the Justice Department. The core mission of the Civil Rights Division was inviolate, and career attorneys' work on cases filed by the Department was insulated from crass political influence. Under multiple administrations, Republicans and Democrats, the Civil Rights Division had pursued enforcement of our nation's anti-discrimination laws and its career attorneys had continued their course.

My training and experience as a young lawyer in the Civil Rights Division were the best anyone could hope for. I had superb mentors. I appeared in court often, and was given weighty responsibilities. It was a corps of lawyers who were among the best in the nation. We stood up in court to represent the United States of America in support of the civil rights of those who had long been deprived of the equal protection of the law.

Today, I believe that the Justice Department's Civil Rights Division is a very different place. Severe institutional problems have come to light, affecting both the performance and morale of the Division, with devastating consequences on the enforcement of civil rights laws. These issues appropriately have been, and continue to be, the subject of oversight hearings before this Committee and before the House Judiciary Committee. It pains me to note that the most controversial area within the Department of Justice is now the Civil Rights Division. The nominee for Attorney General must commit to redressing these problems in an exhaustive and effective manner before the Senate can place its imprimatur on his nomination.

The first issue concerns the lifeblood of the Civil Rights Division—its lawyers. While the Division still retains some of the career attorneys whose expertise over the years has served Republican and Democratic administrations alike, in recent years too many of those career attorneys have left or been driven out by political appointees with ideological agendas that are directly at odds with the traditional mission of the Civil Rights Division, namely, the protection and vindication of the rights of members of racial minority groups, especially black and brown people. Like many others in the civil rights community, we have recoiled at recent disclosures about the personnel practices within the Division, including the hiring of attorneys based on ideological or partisan reasons; the politicization of the Honors Program; and top officials' making personnel changes in order to "make room for some good Americans."<sup>3</sup> The work of the Division is drastically undermined

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<sup>3</sup> *Political Hiring in Justice Division Probed*, WASH. POST, June 21, 2007.

when the hiring, transferring, and firing of its lawyers is said to be motivated primarily by politics, instead of experience in civil rights litigation. The people of the United States—whom the Division represents—need to be assured that their interests in seeking justice will always be paramount. Similarly, it is important for the Division to ensure that it retains career lawyers and analysts with expertise and institutional knowledge throughout the various enforcement areas.

The second and related concern involves decisions by these increasingly emboldened political appointees that promote politics over substance, again at the expense of civil rights enforcement. In order to maintain its historic stature, it is critical that the work of the Civil Rights Division not be subjected to the vagaries of politics. While every administration has the right to establish its priorities, we, like many others, are deeply concerned that the current Division is unduly influenced by political considerations. We believe that this trend is not good for the Division, the Justice Department, civil rights enforcement generally, or indeed the country. As the nation's top enforcer of civil rights laws, the Attorney General must inspire confidence that the actions of the Civil Rights Division are based on the law and the facts.

The recent disclosures about political appointees overriding well-founded recommendations of career attorneys in the Voting Section, concerning Section 5 enforcement matters in Georgia and Texas, have undermined the credibility and reputation of a Division that has long been held in high esteem.

Career attorneys strongly objected to preclearing a Georgia voting statute requiring voters to produce photo identification at the polls, after conducting a thorough examination of the law and determining that the identification requirement would likely worsen the position of African-American voters.<sup>4</sup> The very next day, political appointees at the Division overrode the recommendation, disregarded the evidence and analysis underlying that recommendation, and precleared the retrogressive voting change.<sup>5</sup> Although a number of federal and state courts enjoined earlier iterations of the Georgia law,<sup>6</sup> most recently, a federal court upheld the Georgia voter identification requirement after the legislature made a number of changes that purport to address voter access concerns.<sup>7</sup> Although serious questions remain regarding the law's impact, the upcoming November 6, 2007 general election will provide the first opportunity to gauge the impact that the state's restrictive

<sup>4</sup> *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005.

<sup>5</sup> The Legal Defense Fund signaled its concerns regarding the law in a Comment Letter submitted to the Justice Department. See Comment Letter from Theodore M. Shaw to John Tanner, Chief, Voting Section, Aug. 3, 2005.

<sup>6</sup> Although the specific legal rationales have varied, five court rulings in total—three by federal courts and two by state courts—subsequently enjoined two iterations of the Georgia law on constitutional, among other grounds. *Common Cause/Georgia v. Billups*, Civ. A. No. 4:05-CV-0201-HLM (N.D. Ga. Sept. 15, 2006); *Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294 (N.D. Ga. 2006); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (comparing the law to a poll tax from the Jim Crow era); see also *Lake v. Perdue*, 2006-CV-119207 (Ga. Super. Ct., Sept. 19, 2006); *Lake v. Perdue*, 2006-CV-119207 (Ga. Super. Ct., July 7, 2006).

<sup>7</sup> *Common Cause/Georgia v. Billups*, \_\_\_ F. Supp. 2d \_\_\_, 2007 WL 2601438 (N.D. Ga. Sept. 6, 2007).

identification requirements will have on voters throughout the State of Georgia.<sup>8</sup> It is worth noting that the Supreme Court will soon examine issues concerning voter identification requirements when it reviews an Indiana voter identification requirement in *Crawford v. Marion County Democratic Party*.<sup>9</sup> It is important that the Department not adopt any blanket rule endorsing voter identification requirements, wherever they emerge. Rather, the Department must undertake a rigorous and searching examination of these laws to determine what impact these restrictions may have on minority voter access while scrutinizing the justifications proffered by officials who endorse these measures.

In another closely watched case, six career lawyers (including the head of the Voting Rights section) and two analysts reviewed a controversial redistricting plan in Texas, and concluded that the state had “not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect.”<sup>10</sup> The team of career lawyers and analysts therefore unanimously recommended that the Division interpose an objection under Section 5. Despite this recommendation, the Division precleared the plan. The Supreme Court subsequently held that the Texas redistricting plan violated Section 2 of the Voting Rights Act by diminishing the opportunity of Latino voters to participate effectively in the political process, and further held that the plan “bears the mark of intentional discrimination.”<sup>11</sup> The holding of the Court effectively shows that the plan worsened the position of Texas’ minority voters and that its passage raised serious questions of purposeful discrimination. Either of these rationales should have been enough to ensure that the plan was denied preclearance under Section 5 review.

These examples illustrate the problems with the Division’s recent civil rights enforcement. First, the role of the career staff is being diminished in favor of political appointees; and second, that shift is leading to outcomes that provide less vigorous civil rights protection for our nation. Indeed, it appears that the extremely low number of objections interposed to voting changes over recent years is attributable, at least in part, to the disregard of careful and thorough work performed by attorneys and analysts, many of whom have significant experience with the preclearance provisions of Section 5.

There are good reasons for respecting the role of the career attorneys. Because the Section 5 process calls for a fact-intensive examination of a particular voting change (with more complicated voting changes taking up to 60 days to complete), the analysis performed by Section attorneys and analysts should be given tremendous deference, as it has been in the past.

<sup>8</sup> The new voter identification requirement was also in place for a recent September 18, 2007 special election.

<sup>9</sup> *Crawford v. Marion County Election Bd.*, 484 F. 3d 436 (7<sup>th</sup> Cir. 2007), cert. granted *Crawford v. Marion County Election Bd.*, \_\_\_ S.Ct. \_\_\_, 2007 WL 1999941 (U.S. Sep. 25, 2007) (No. 07-21) and *Indiana Democratic Party v. Rokita*, \_\_\_ S.Ct. \_\_\_, 2007 WL 1999963 (U.S. Sep. 25, 2007) (No. 07-25). Indiana officials claim that the identification requirement is aimed at combating fraud. However, state officials have also admitted they are unaware of any incidents of persons attempting to vote with false identification.

<sup>10</sup> *Justice Staff Saw Texas Districting as Illegal*, WASH. POST, Dec. 2, 2005.

<sup>11</sup> *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2622 (2006).

Other actions by the Justice Department in civil rights cases are equally alarming. On behalf of the federal government, the Department has taken positions which have not only abandoned its traditional role, but which have turned it in the opposite direction. Nowhere has this been more apparent than in the recent Supreme Court consideration of the voluntary school integration cases out of Louisville, Kentucky (*Meredith v. Jefferson County Public Schools*) and Seattle, Washington (*Parents Involved in Community Schools v. Seattle School Districts*). Since the *Brown v. Board of Education* cases, in which Justice argued in support of those challenging school segregation laws, the federal government has played a central role in school desegregation cases. Either the Justice Department or the NAACP Legal Defense Fund or both, has been involved in nearly all school desegregation cases litigated since *Brown*. The Justice Department argued in opposition to voluntary school desegregation in the Seattle and Louisville cases,<sup>12</sup> as it did against the University of Michigan's efforts to pursue diversity in student enrollment.<sup>13</sup> One can argue the merits of color-blindness versus race-conscious attempts to achieve diversity or integration, but this fact remains: for the first time in fifty-three years, the Justice Department has argued a case in the Supreme Court against public school desegregation. Fortunately, the Supreme Court in these cases did not adopt the arguments advanced by the Department, and permitted our educational institutions to continue to rely on certain race-conscious methods to pursue diversity and/or avoid racial isolation in schools.<sup>14</sup>

There are other troubling examples of the Department's changes in legal positions, to the detriment of victims of discrimination. In *Burlington Northern and Santa Fe Railway Co. v. White*, decided during the 2005-06 Supreme Court Term, the Department sided with the employer in an employment discrimination case and urged an exceedingly narrow interpretation of Title VII's anti-retaliation provision.<sup>15</sup> The Department's position contradicted longstanding policy of the Equal Employment Opportunity Commission (EEOC). Eight Justices of the Supreme Court ultimately rejected the Department's position as inconsistent with both Title VII's plain language and its underlying purpose—to provide broad protection to employees who participate in Title VII enforcement.<sup>16</sup>

During the 2006-07 Supreme Court Term, the Department joined an employer again in the case *Ledbetter v. Goodyear*, arguing against EEOC policy involving the statute of limitations for discrimination in pay. The Department filed an amicus brief rejecting the EEOC's position which supported a female employee who had received lower pay over a long period of time on the basis of her sex in violation of Title VII. Asserting that the EEOC's reading that her claim was timely filed "lacks persuasive force and is not entitled

<sup>12</sup> Brief for the United States As Amicus Curiae Supporting Petitioner, *Meredith v. Jefferson Co. Bd. of Educ.*, No. 05-915.

<sup>13</sup> Brief for the United States As Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, No. 02-241.

<sup>14</sup> *Meredith v. Jefferson Co. Bd. of Educ.*, 127 S. Ct. 2738 (2007).

<sup>15</sup> Brief for the United States As Amicus Curiae Supporting Respondent, *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259.

<sup>16</sup> 126 S. Ct. 2405 (2006).

to deference,”<sup>17</sup> the Department instead argued that the plaintiff had lost her right to challenge pay discrimination because she had not done so within 180 days of the pay-setting decision, even if she continued to receive unequal pay for years thereafter. The Court agreed with the Department in a 5-4 decision,<sup>18</sup> with Justice Ginsburg noting in her dissent that this interpretation constitutes a “cramped interpretation of Title VII, incompatible with the statute’s broad remedial purpose.”<sup>19</sup> Though members of Congress have already introduced legislation to reverse this interpretation, the Department’s willing abandonment of the EEOC’s well-established position remains deeply troubling.

The fourth area of concern involves the docket of the Civil Rights Division. Enforcement of our nation’s civil rights laws by the Division must be rigorous, and it must be constant. Enforcement by the Division should also be as even as possible, in order to represent all persons falling within the ambit of its protection. Regretfully, over the past six and one-half years, the Division has neglected its commitment to fair and aggressive enforcement of our nation’s civil rights laws.

For example, during this period, the Civil Rights Division has filed only a handful of cases addressing employment discrimination against African Americans.<sup>20</sup> Remarkably, it was not until 2006 – just last year – that the Division brought a case alleging that employment practices had a discriminatory impact on African Americans.<sup>21</sup>

Unfortunately, this coincides with a dramatic decrease in enforcement of Title VII generally. Despite its special obligation to enforce Title VII, the Employment Litigation Section’s level of activity has declined markedly. Since January 20, 2001, the Section has filed only 46 Title VII complaints, or approximately seven per year.<sup>22</sup> By contrast, the Section initiated an average of eleven Title VII cases per year during the Clinton administration – a disparity over two presidential terms of 32 cases.<sup>23</sup> This disparity is more striking given that more attorneys have been assigned to the Employment Litigation Section during the current administration (35 to 36 on average) than during the previous administration (30 to 31 on average).<sup>24</sup>

Even more worrisome than the reduction in the Division’s overall litigation efforts on behalf of victims of employment discrimination is the Division’s retreat from its longstanding commitment to eliminate racial discrimination against African Americans.

<sup>17</sup> Brief for the United States As Amicus Curiae Supporting Respondent, *Ledbetter v. Goodyear Tire & Rubber Co.*, No. 05-1074.

<sup>18</sup> 127 S. Ct. 2162 (2007).

<sup>19</sup> *Id.* at 2188 (Ginsburg, J., dissenting).

<sup>20</sup> See Complaints Filed, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, at <http://www.usdoj.gov/crt/emp/papers.html>.

<sup>21</sup> *Id.*

<sup>22</sup> See Complaints Filed, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, at <http://www.usdoj.gov/crt/emp/papers.html>.

<sup>23</sup> See *Civil Rights Division Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (June 21, 2007) (testimony of Helen Norton, Professor, University of Maryland School of Law).

<sup>24</sup> See *id.*

The entire Civil Rights Division has decreased the number of cases brought on behalf of African Americans and Latinos during the past six and one-half years of the Bush administration, and the Employment Litigation Section is no exception to that trend.<sup>25</sup> Of the Title VII claims that the Section has brought on behalf of individuals pursuant to Section 706 of the statute, only five included allegations of race discrimination against African-American victims, while three challenged “reverse discrimination” against whites.<sup>26</sup> The Section’s remaining resources have been devoted to largely non-racial discrimination—for example, nearly half of the employment cases filed in the last two years have addressed discrimination against uniformed service members.<sup>27</sup>

While all citizens are entitled to Title VII’s protections against job discrimination, the statute was enacted during the civil rights movement in direct response to the historic injustice experienced by African Americans and other racial minorities. Traditionally, the Division has recognized that employment discrimination burdens African Americans and other minorities more so than other groups, and has focused its resources accordingly.

We find these developments to be extremely troubling. The Division’s priorities do not reflect the unfortunate reality that race discrimination still pervades many of our social structures. While individual claims have a place on the Division’s docket, it is imperative that the Division continue its longstanding tradition of bringing pattern and practice cases that otherwise will likely not be prosecuted by the private bar or civil rights organizations with limited resources. Litigation of systemic discrimination claims is costly, complicated and protracted, but this is precisely the type of case in which the federal government should bring to bear its extraordinary resources. The reluctance on the part of the Division to bring systemic cases makes our job that much harder. Not only does the burden fall upon organizations and private attorneys to fill the void, but it signals to employers that they face reduced scrutiny of their practices and even gives fuel to the argument by some that certain forms of race discrimination may no longer exist.

We share similar concerns about the docket in the Voting Section. The Civil Rights Division was initially established as part of the 1957 voting rights statute, and the Division’s first lawyers prosecuted voting rights violations against African Americans. Throughout its history, securing the right to vote for African Americans and having that vote count have been important priorities for the Division. While the Division under the Bush Administration has brought a record number of cases involving language provisions

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<sup>25</sup> See *Oversight of the Civil Rights Division: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Nov. 16, 2006) (testimony of Theodore M. Shaw, Director-Counsel and President, NAACP Legal Defense & Educational Fund, Inc.).

<sup>26</sup> See Complaints Filed, U.S. Department of Justice, Civil Rights Division, Employment Litigation Section, at <http://www.usdoj.gov/crt/emp/papers.html>.

<sup>27</sup> See *id.*

of the Voting Rights Act, it has approved only one case alleging voting discrimination against African Americans under Section 2 of the Voting Rights Act, just last year.<sup>28</sup>

As an organization with a substantial voting rights docket, we know only too well that violations against African Americans continue to exist. The recent reauthorization of the Voting Rights Act made clear that racial minorities continue to be denied full participation in the political process. The Civil Rights Division must remain true to its original charter, and be a leader in prosecuting these cases to the fullest extent of the law. Any move by the Division to focus instead on criminal fraud by voters is misguided, not in keeping with the separation of responsibilities between the Civil Rights Division and other divisions within the Justice Department, and risks alienating and intimidating the very communities the Division is charged with protecting. And, while the Division continues to monitor elections, it is important for the Division to maintain strong community ties in these jurisdictions so that its monitoring efforts can be maximized.

As we approach the 2008 general election cycle, it is important that the Division use its resources to investigate complaints arising out of the jurisdictions covered under the Voting Rights Act. In our view, the legacy of past and present voting discrimination illustrates the continuing need for the federal observer provisions of the Voting Rights Act. So long as voting discrimination persists, there remains the potential for harassment and intimidation to emerge during the course of an election. The Justice Department's federal observer program provides an effective oversight mechanism to protect minority voters' access to the ballot box. We think it is important that the Justice Department take seriously and investigate thoroughly complaints concerning racial tension and harassment that may precede this election cycle, with a particular focus on those jurisdictions certified for federal observer coverage under the Act. In addition, it is important for the Justice Department to focus on schemes used to discourage minority voter participation during elections including, but not limited to, aggressive challenges mounted by groups and/or individuals inside polling places, uneven application of voting rules, and the misapplication of new restrictive voting measures such as the presentation of mandatory voter identification. Finally, the Justice Department should ensure that federal observers carry out their responsibilities in a fair, neutral and impartial manner.

We also add a cautionary note concerning the enforcement priorities of the Criminal Section of the Civil Rights Division. While the Section has a much-publicized new focus on prosecuting human trafficking cases, we hope that this does not come at the expense of resources allocated to cases fulfilling the core mission of the Section. Specifically, we urge the Civil Rights Division not to abandon its traditional emphasis on law enforcement misconduct and racial bias crimes. As the events in Jena, Louisiana have just vividly demonstrated, racial equality in the criminal justice system remains elusive. The Division, as well as the entire Justice Department, must use its full resources to

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<sup>28</sup> Litigation Brought by the Voting Section, U.S. Department of Justice, Civil Rights Division, Voting Section Home Page, *available at* <http://www.usdoj.gov/crt/voting/litigation/caselist.html>.

address these problems aggressively. We must all remain vigilant in order to bring about a fair and just legal system.

The new Attorney General must ensure that the Civil Rights Division maintains its continuity and steadfastness of mission. Priorities can be discharged without abdicating core responsibilities. Civil rights enforcement is not, and cannot be, a zero-sum game in our complex and increasingly diverse society. Protecting African Americans is not inconsistent with protecting Latinos, protecting disabled persons is not inconsistent with protecting women, and protecting citizens who are being discriminated against because of their religious beliefs need not be in tension with doing the same for those whose national origin has subjected them to discrimination. Priorities obviously can and will change from administration to administration but the role of the Division as a protector of marginalized citizens and minorities is its core charge. Taking account of new priorities, and of new or intensified discrimination faced by various groups is appropriate but need not be achieved through the wholesale abandonment of longstanding priorities.

Because discrimination in the nation has proven to be hard to overcome and virtually impossible to eradicate completely in many circumstances in education, voting, housing, employment, and criminal justice, among others, having a department of the federal government that is focused on discharging this mission is critical to effective civil rights enforcement, and also has tremendous symbolic and practical significance. As I have mentioned previously, the Civil Rights Division is second to none in terms of the time and resources it can devote to systemic litigation to address race discrimination. Very often a case brought by the Division reverberates and can have industry-wide impact in terms of deterrence and reform. The broad-based injunctive relief that the Division can pursue simply cannot be matched through the efforts of individual or private lawsuits alone.

In conclusion, we urge the Senate to use this opportunity presented by the nomination of Judge Mukasey to explore fully the critical problems within the Civil Rights Division that we and others have identified, and to use the confirmation process to bring about dramatic changes in the direction and leadership of the Justice Department. Nothing less than the future of justice and equality in our country is at stake.

Thank you for the opportunity to testify. I would be happy to answer any questions.

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

Honorable Michael B. Mukasey  
 1133 Avenue of the Americas  
 Suite 2200  
 New York, NY 10036-6710

Dear Judge Mukasey:

Unfortunately, as your nomination for Attorney General will not be on the agenda for the executive session of the Judiciary Committee this week, I think it would be useful in the intervening time for you to clarify your position on some key issues.

A question has been raised on your response to whether the President may legally authorize wiretaps which violate the Foreign Intelligence Surveillance Act, when you stated: "That would have to depend on whether what goes on outside the statute nonetheless lies within the authority of the President to defend the country."

Would you please specify your views on the scope of the President's Article II powers to disregard an explicit statutory requirement. If you believe the President can act outside the law, how do you square that belief with your statement at the hearing that "The President doesn't stand above the law[?]" How do you deal with the public concern that the rule of law is supreme and the President at times appears to put himself above the law?

In addition, I believe it is necessary for you to respond in detail as to your views on the legality and propriety of water-boarding and the appropriate scope of interrogation under U.S. law and the Geneva Convention.

As you will recall, in the hearing I commented at some length about signing statements. Would you please state what advice you would give the President when he issues a signing statement at variance with the bill presented by Congress in situations like the Patriot Act and the statutory prohibition against "cruel, inhuman, or degrading treatment or punishment" after both of these matters were negotiated between the Congress and the White House prior to the conference report being sent to the President for his signature.

Sincerely



Arlen Specter

October 31, 2007

Senator Arlen Specter  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Senator Specter:

Thank you again for the graciousness that you showed me throughout the hearing. Thank you also for the letter of October 24, which gives me an additional opportunity to discuss several issues that arose during my testimony.

Your letter asks me first to explain my views on the scope of the President's authority under the Constitution. In our constitutional system, no person, including the President, stands above the law. Indeed, the President has a specific obligation under the Constitution to faithfully execute the laws that Congress has passed. That obligation, of course, extends to executing our highest law, the Constitution. As I stated during the hearing, the Constitution confers upon each branch a sphere of authority that is exclusive to that branch. For example, the President has the exclusive authority to nominate members of his Cabinet or Article III judges, and Congress has the exclusive authority to confirm or not to confirm such officers.

From time to time, difficult separation of powers questions may arise when Congress legislates in an area where the Constitution confers authority upon the President. I understand that such an issue has arisen recently with respect to the Foreign Intelligence Surveillance Act ("FISA"). The courts have recognized that the President has the constitutional authority to conduct warrantless surveillance for the collection of foreign intelligence. *See, e.g., United States v. Truong Dinh Hung*, 629 F.2d 908 (4<sup>th</sup> Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (en banc) (3d Cir. 1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973); *see also In re Sealed Case*, 310 F. 3d 717, 742 (FIS Court of Review 2002). As Attorney General Griffin Bell explained at the time that FISA was enacted, FISA's surveillance procedures may not reach the limits of the President's authority under the Constitution. Therefore, a separation of powers question can arise if, during wartime, the President sought to rely upon his constitutional authority to collect foreign intelligence in a manner that was arguably inconsistent with FISA's procedures.

As I tried to stress during the hearing, government works best, and with the greatest legitimacy, when the branches act cooperatively, each with respect for the other's constitutional prerogatives. I agreed more than once that consultation between the Committee and the Department often can prevent issues from evolving into controversies. I am not of the view that the President's constitutional authority to conduct the foreign affairs of the United States, including protecting our national security, is inevitably in tension with Congress's power to legislate. To the contrary, if confirmed, I would be a strong advocate for a cooperative approach to Congress in matters of national security. There is no reason to provoke a constitutional controversy over a process that works well

most of the time, that can be fixed where it does not work, and that involves the security of the American people.

Your letter asks also for my views on the legality and propriety of water-boarding, as well as the appropriate scope of interrogation under United States law, which includes the Geneva Conventions. I well understand the concern that this Country remain true to its ideals, and that includes how we treat even the most brutal terrorists in U.S. custody. I understand also the importance of the United States remaining a nation of laws and setting a high standard of respect for human rights. Indeed, I said at the hearing that torture violates the law and the Constitution, and the President may not authorize it as he is no less bound by constitutional restrictions than any other government official.

I was asked at the hearing and in your letter questions about the hypothetical use of certain coercive interrogation techniques. As described at the hearing, these techniques seem over the line or, on a personal basis, repugnant to me, and would probably seem the same to many Americans. But hypotheticals are different from real life, and in any legal opinion the actual facts and circumstances are critical. As a judge, I tried to be objective in my decision-making and to put aside even strongly held personal beliefs when assessing a legal question because legal questions must be answered based solely on the actual facts, circumstances, and legal standards presented. A legal opinion based on hypothetical facts and circumstances may be of some limited academic appeal but has scant practical effect or value.

I have said repeatedly, and reiterate here, that no one, including a President, is above the law, and that I would leave office sooner than participate in a violation of law. If confirmed, any legal opinions I offer will reflect that I appreciate the need for the United States to remain a nation of laws and to set the highest standards. I will be mindful also of our shared obligation to ensure that our Nation has the tools it needs, within the law, to protect the American people.

As I testified, any discussion of coercive interrogation techniques necessarily involves a discussion of and a choice among bad alternatives. I was and remain loath to discuss and opine on any of those alternatives at this stage for the following three principal reasons: First, I have not been made aware of the details of any interrogation program to the extent that any such program may be classified, and thus do not know what techniques may be involved in any such program that some may find analogous or comparable to the coercive techniques presented to me at the hearing and in your letter. Second, I would not want any uninformed statement of mine to present our own professional interrogators in the field, who must perform their duty under the most stressful conditions, or those charged with reviewing their conduct, with a perceived threat that any conduct of theirs, past or present, that was based on authorizations supported by the Department of Justice could place them in personal legal jeopardy. Third, for the reasons that I believe our intelligence community has explained in detail, I would not want any statement of mine to provide our enemies with a window into the limits or contours of any interrogation program we may have in place and thereby assist them in training to resist the techniques we actually may use.

I do know, however, that "waterboarding" cannot be used by the United States military because its use by the military would be a clear violation of the Detainee

Treatment Act (“DTA”). That is because “waterboarding” and certain other coercive interrogation techniques are expressly prohibited by the Army Field Manual on Intelligence Interrogation, and Congress specifically legislated in the DTA that no person in the custody or control of the Department of Defense (“DOD”) or held in a DOD facility may be subject to any interrogation techniques not authorized and listed in the Manual.

In the absence of legislation expressly banning certain interrogation techniques in all circumstances, one must consider whether a particular technique complies with relevant legal standards. Below, I provide a summary of the type of analysis that I would undertake, were I presented as Attorney General with the question of whether coercive interrogation techniques, including “waterboarding” as described in your letter, would constitute torture, cruel, inhuman or degrading treatment, or a violation of Common Article 3 of the Geneva Conventions.

The statutory elements of torture are set forth in 18 U.S.C. § 2340. By the terms of the statute, whether a particular technique is torture would turn principally on whether it is specifically intended to cause (a) severe physical pain or suffering or (b) prolonged mental harm resulting from certain specified threats or acts. If, after being briefed, I determine that a particular technique satisfies the elements of section 2340, I would conclude that the technique violated the law.

Even if a particular technique did not constitute torture under 18 U.S.C. § 2340, I would have to consider also whether it nevertheless would be prohibited as “cruel, inhuman or degrading treatment” as set forth in the DTA and the MCA—enacted after the Department of Justice’s December 30, 2004 memorandum to Mr. Comey—which extended the Convention Against Torture’s prohibition on “cruel, inhuman or degrading treatment” to individuals in United States custody regardless of location or nationality. Congress specified in those statutes, as the Senate had in consenting to the ratification of the Convention Against Torture, that the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution would control our interpretation of the phrase “cruel, inhuman or degrading treatment.”

The Fifth Amendment is likely most relevant to an inquiry under the DTA and MCA into the lawfulness of an interrogation technique used against alien enemy combatants held abroad, and the Supreme Court has established the well-known “shocks the conscience” test in determining whether particular government conduct is consistent with the Fifth Amendment’s due process guarantees. See *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Rochin v. California*, 342 U.S. 165, 174 (1952). A legal opinion on whether any interrogation technique shocks the conscience such that it constitutes cruel, inhuman or degrading treatment requires an understanding of the relevant facts and circumstances of the technique’s past or proposed use. This is the test mandated by the Supreme Court itself in *County of Sacramento v. Lewis* in which it wrote that “our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking.” 523 U.S. 833, 850 (1998) (emphasis added). As the Supreme Court has explained, a court first considers whether the conduct is “arbitrary in the constitutional sense,” a test that asks whether the conduct is proportionate to the governmental interests involved. *Id.* at 847. In addition, the court must conduct an

objective inquiry into whether the conduct at issue is “egregious” or “outrageous” in light of “traditional executive behavior and contemporary practices.” *Id.* at 847 n.8. This inquiry requires a review of executive practice so as to determine what the United States has traditionally considered to be out of bounds, and it makes clear that there are some acts that would be prohibited regardless of the surrounding circumstances.

I would have to ensure also that any technique complies with our Nation’s obligations under the Geneva Conventions, including those acts, such as murder, mutilation, rape, and cruel or inhuman treatment, that Congress has forbidden as grave breaches of Common Article 3 under the War Crimes Act. With respect to any coercive interrogation technique, the prohibition on “cruel or inhuman treatment” would be of particular relevance. That statute, similar in structure to 18 U.S.C. § 2340, prohibits acts intended (a) to cause serious physical pain or suffering, or (b) serious and non-transitory mental harm resulting from certain specific threats or acts. Also, I would have to consider whether there would be a violation of the additional prohibitions imposed by Executive Order 13440, which includes a prohibition of willful and outrageous personal abuse inflicted for the purpose of humiliating and degrading the detainee.

As I testified, if confirmed I will review any coercive interrogation techniques currently used by the United States government and the legal analysis authorizing their use to assess whether such techniques comply with the law. If, after such a review, I determine that any technique is unlawful, I will not hesitate to so advise the President and will rescind or correct any legal opinion of the Department of Justice that supports use of the technique.

With respect to your question about signing statements, I emphasize again that our system of government works best when Congress and the Executive Branch act in a spirit of mutual accommodation and cooperation. The practice of presidential signing statements is not new, and I do not believe that it must be controversial. The President may express his views about the laws that he signs, and if he believes that a particular provision of the bill is constitutionally problematic, the President may appropriately identify that problem. That said, I agree with you that presidential signing statements should not be the vehicle for creating unnecessary confrontation between the branches, particularly in cases where the laws themselves reflect productive collaboration between the branches. If confirmed, I will ensure that the Department of Justice provides advice on the issue of signing statements with this spirit in mind.

Yours sincerely,



Michael B. Mukasey

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MICHAEL O. NELSON, Chief Counsel and Staff Director  
 BRUCE A. COHEN, Democratic Chief Counsel and Staff Director

## United States Senate

COMMITTEE ON THE JUDICIARY  
 WASHINGTON, DC 20510-6275

June 7, 2006

The Honorable Richard B. Cheney  
 The Vice President  
 Washington, DC

Dear Mr. Vice President:

I am taking this unusual step in writing to you to establish a public record. It is neither pleasant nor easy to raise these issues with the Administration of my own party, but I do so because of their importance.

No one has been more supportive of a strong national defense and tough action against terrorism than I. However, the Administration's continuing position on the NSA electronic surveillance program rejects the historical constitutional practice of judicial approval of warrants before wiretapping and denigrates the constitutional authority and responsibility of the Congress and specifically the Judiciary Committee to conduct oversight on constitutional issues.

On March 16, 2006, I introduced legislation to authorize the Foreign Intelligence Surveillance Court to rule on the constitutionality of the Administration's electronic surveillance program. Expert witnesses, including four former judges of the FISA Court, supported the legislation as an effective way to preserve the secrecy of the program and protect civil rights. The FISA Court has an unblemished record for keeping secrets and it has the obvious expertise to rule on the issue. The FISA Court judges and other experts concluded that the legislation satisfied the case-in-controversy requirement and was not a prohibited advisory opinion. Notwithstanding my repeated efforts to get the Administration's position on this legislation, I have been unable to get any response, including a "no".

The Administration's obligation to provide sufficient information to the Judiciary Committee to allow the Committee to perform its constitutional oversight is not satisfied by the briefings to the Congressional Intelligence Committees. On that subject, it should be noted that this Administration, as well as previous Administrations, has failed to comply with the requirements of the National Security Act of 1947 to keep the House and Senate Intelligence Committees fully informed. That statute has been ignored for decades when Presidents have only informed the so-called "Gang of Eight," the Leaders of both Houses and the Chairmen and Ranking on the Intelligence Committees. From my experience as a member of the "Gang of Eight" when I chaired the Intelligence Committee of the 104<sup>th</sup> Congress, even that group gets very little information. It was only in the face of pressure from the Senate Judiciary Committee that the Administration reluctantly informed subcommittees of the House and Senate Intelligence

Committees and then agreed to inform the full Intelligence Committee members in order to get General Hayden confirmed.

When there were public disclosures about the telephone companies turning over millions of customer records involving allegedly billions of telephone calls, the Judiciary Committee scheduled a hearing of the chief executive officers of the four telephone companies involved. When some of the companies requested subpoenas so they would not be volunteers, we responded that we would honor that request. Later, the companies indicated that if the hearing were closed to the public, they would not need subpoenas.

I then sought Committee approval, which is necessary under our rules, to have a closed session to protect the confidentiality of any classified information and scheduled a Judiciary Committee Executive Session for 2:30 P.M. yesterday to get that approval.

I was advised yesterday that you had called Republican members of the Judiciary Committee lobbying them to oppose any Judiciary Committee hearing, even a closed one, with the telephone companies. I was further advised that you told those Republican members that the telephone companies had been instructed not to provide any information to the Committee as they were prohibited from disclosing classified information.

I was surprised, to say the least, that you sought to influence, really determine, the action of the Committee without calling me first, or at least calling me at some point. This was especially perplexing since we both attended the Republican Senators caucus lunch yesterday and I walked directly in front of you on at least two occasions enroute from the buffet to my table.

At the request of Republican Committee members, I scheduled a Republican members meeting at 2:00 P.M. yesterday in advance of the 2:30 P.M. full Committee meeting. At that time, I announced my plan to proceed with the hearing and to invite the chief executive officers of the telephone companies who would not be subject to the embarrassment of being subpoenaed because that was no longer needed. I emphasized my preference to have a closed hearing providing a majority of the Committee agreed.

Senator Hatch then urged me to defer action on the telephone companies hearing, saying that he would get Administration support for my bill which he had long supported. In the context of the doubt as to whether there were the votes necessary for a closed hearing or to proceed in any manner as to the telephone companies, I agreed to Senator Hatch's proposal for a brief delay on the telephone companies hearing to give him an opportunity to secure the Administration's approval of the bill which he thought could be done. When I announced this course of action at the full Committee Executive Session, there was a very contentious discussion which is available on the public record.

It has been my hope that there could be an accommodation between Congress's Article I authority on oversight and the President's constitutional authority under Article II. There is no doubt that the NSA program violates the Foreign Intelligence Surveillance Act which sets forth the exclusive procedure for domestic wiretaps which requires the approval of the FISA Court. It may be that the President has inherent authority under Article II to trump that statute but the President does not have a blank check and the determination on whether the President has such Article II power calls for a balancing test which requires knowing what the surveillance program constitutes.

If an accommodation cannot be reached with the Administration, the Judiciary Committee will consider confronting the issue with subpoenas and enforcement of that compulsory process if it appears that a majority vote will be forthcoming. The Committee would obviously have a much easier time making our case for enforcement of subpoenas against the telephone companies which do not have the plea of executive privilege. That may ultimately be the course of least resistance.

We press this issue in the context of repeated stances by the Administration on expansion of Article II power, frequently at the expense of Congress's Article I authority. There are the Presidential signing statements where the President seeks to cherry-pick which parts of the statute he will follow. There has been the refusal of the Department of Justice to provide the necessary clearances to permit its Office of Professional Responsibility to determine the propriety of the legal advice given by the Department of Justice on the electronic surveillance program. There is the recent Executive Branch search and seizure of Congressman Jefferson's office. There are recent and repeated assertions by the Department of Justice that it has the authority to criminally prosecute newspapers and reporters under highly questionable criminal statutes.

All of this is occurring in the context where the Administration is continuing warrantless wiretaps in violation of the Foreign Intelligence Surveillance Act and is preventing the Senate Judiciary Committee from carrying out its constitutional responsibility for Congressional oversight on constitutional issues. I am available to try to work this out with the Administration without the necessity of a constitutional confrontation between Congress and the President.

Sincerely



Arlen Specter

AS/ph

*Via Facsimile*

cc: Senate Leadership  
Judiciary Committee Members



THE VICE PRESIDENT  
WASHINGTON

June 8, 2006

The Honorable Arlen Specter  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20540-6275

Dear Mr. Chairman:

This is in response to your letter of June 7, 2006 concerning the Terrorist Surveillance Program (TSP) the Administration has described. The commitment in your letter to work with the Administration in a non-confrontational manner is most welcome and will, of course, be reciprocated.

As recently as Tuesday of this week, I reiterated that, as the Administration has said before, while there is no need for any legislation to carry out the Terrorist Surveillance Program, the Administration will listen to the ideas of legislators about terrorist surveillance legislation and work with them in good faith. Needless to say, that includes you, Senator DeWine and others who have ideas for such legislation. The President ultimately will have to make a decision whether any particular legislation would strengthen the ability of the Government to protect Americans against terrorists, while protecting the rights of Americans, but we believe the Congress and the Administration working together can produce legislation to achieve that objective, if that is the will of the Congress.

Having served in the executive branch as chief of staff for one President and as Secretary of Defense for another, having served in the legislative branch as a Representative from Wyoming for a decade, and serving now in a unique position under the Constitution with both executive functions and legislative functions, I fully understand and respect the separate constitutional roles of the Congress and the Presidency. Under our constitutional separation between the legislative powers granted to Congress and the executive power vested exclusively in the Presidency, differences of view may occur from time to time between the branches, but the Government generally functions best when the legislative branch and the executive branch work together. And I believe that both branches agree that they should work together as Congress decides whether and how to pursue further terrorist surveillance legislation.

Your letter addressed four basic subjects: (1) the legal basis for the TSP; (2) the Administration position on legislation prepared by you relating to the TSP; (3) provision of information to Congress about the TSP; and (4) communications with Senators on the Judiciary Committee about the TSP.

The executive branch has conducted the TSP, from its inception on October 4, 2001 to the present, with great care to operate within the law, with approval as to legality of Presidential authorizations every 45 days or so by senior Government attorneys. The Department of Justice has set forth in detail in writing the constitutional and statutory bases, and related judicial precedents, for warrantless electronic surveillance under the TSP to protect against terrorism, and that information has been made available to your Committee and to the public.

Your letter indicated that you have repeatedly requested an Administration position on legislation prepared by you relating to the TSP program. If you would like a formal Administration position on draft legislation, you may at any time submit it to the Attorney General, the Director of National Intelligence, or the Director of the Office of Management and Budget (OMB) for processing, which will produce a formal Administration position. Before you do so, however, it might be more productive for executive branch experts to meet with you, and perhaps Senator DeWine or other Senators as appropriate, to review the various bills that have been introduced and to share the Administration's thoughts on terrorist surveillance legislation. Attorney General Alberto R. Gonzales and Acting Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury are key experts upon whom the executive branch would rely for this purpose. I will ask them to contact you promptly so that the cooperative effort can proceed apace.

Since the earliest days of the TSP, the executive branch has ensured that, consistent with the protection of the sensitive intelligence sources, methods and activities involved, appropriate members of Congress were briefed periodically on the program. The executive branch kept principally the chairman and ranking members of the congressional intelligence committees informed and later included the congressional leadership. Today, the full membership of both the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (including four Senators on that Committee who also serve on your Judiciary Committee) are fully briefed on the program. As a matter of inter-branch comity and good executive-legislative practice, and recognizing the vital importance of protecting U.S. intelligence sources, methods and activities, we believe that the country as a whole, and the Senate and the House respectively, are best served by concentrating the congressional handling of intelligence matters within the intelligence committees of the Congress. The internal organization of the two Houses is, of course, a matter for the respective Houses. Recognizing the wisdom of the concentration within the intelligence committees, the rules of the Senate (S. Res. 400 of the 94<sup>th</sup> Congress) and the House (Rule X, cl. 11) creating the intelligence committees mandated that the intelligence committees have cross-over members who also serve on the judiciary, foreign/international relations, armed services, and appropriations committees.

Both in performing the legislative functions of the Vice Presidency as President of the Senate and in performing executive functions in support of the President, I have frequent contact with Senators, both at their initiative and mine. We have found such contacts helpful in maintaining good relations between the executive and legislative branches and in advancing legislation that serves the interests of the American people. The respectful and candid exchange of views is something to be encouraged rather than avoided. Indeed, recognizing the importance of such communication, the first step the Administration took, when it learned that you might pursue use

of compulsory process in an attempt to force testimony that may involve extremely sensitive classified information, was to have one of the Administration's most senior officials, the Chief of Staff to the President of the United States, contact you to discuss the matter. Thereafter, I spoke with a number of other Members of the Senate Leadership and the Judiciary Committee. These communications are not unusual – they are the Government at work.

While there may continue to be areas of disagreement from time to time, we should proceed in a practical way to build on the areas of agreement. I believe that other Senators and you, working with the executive branch, can find the way forward to enactment of legislation that would strengthen the ability of the Government to protect Americans against terrorists, while continuing to protect the rights of Americans, if it is the judgment of Congress that such legislation should be enacted. We look forward to working with you, knowing of the good faith on all sides.

Sincerely,

A handwritten signature in black ink, appearing to read "Dick", with a large, stylized initial "D" and a horizontal flourish extending to the right.

TOTAL P.04

**Testimony of Dick Thornburgh  
Counsel, Kirkpatrick & Lockhart Preston Gates Ellis LLP  
Former Attorney General of the United States**

**Before the**

**Committee on the Judiciary  
United States Senate**

**Regarding**

**The Nomination of Judge Michael Mukasey  
to be Attorney General of the United States**

**October 18, 2007**

Chairman Leahy, Ranking Member Specter, and Members of the Committee on the Judiciary, it is an honor to appear before you today to offer you my views on the United States Department of Justice at this important juncture in its history and to tell you why I support President Bush's nomination of Michael Mukasey to be the 81<sup>st</sup> Attorney General of the United States.

The current situation at the Justice Department is not unlike the one that I encountered when I became the 76<sup>th</sup> Attorney General in August, 1988. Two senior Justice Department officials, the Deputy Attorney General, Arnold Burns, and the Assistant Attorney General in charge of the Criminal Division, William Weld, resigned their positions in March, 1988, because of their concerns about the ability of my predecessor as Attorney General, Edwin Meese III, to lead the Department while he was under investigation by an Independent Counsel. These resignations reflected some degree of turmoil within the Department. Although the Independent Counsel did not seek

to prosecute Attorney General Meese, his report, which was issued in July, 1988, was quite critical of him and General Meese resigned from office early in August, 1988. I was sworn into office shortly thereafter, having been unanimously confirmed by the Senate.

Upon taking office as Attorney General, I established as a major priority the restoring of morale within the Department of Justice in the wake of the recent turmoil at its very top ranks. I considered it to be a unique honor and privilege to return to this great institution that I loved and still love. I had previously served as the United States Attorney for the Western District of Pennsylvania and as the Assistant Attorney General in charge of the Criminal Division under President Ford during the immediate post-Watergate era. Those experiences heightened the most profound respect I held for the Department, for its critically important and unique role in our Federal Government, and for the legal abilities, professionalism and integrity of the career civil servants who carry out its vital missions. Early in my service as Attorney General, I believe that I was able to help restore the morale of the Justice Department and, with the indispensable assistance of that distinguished cadre of career employees to whom I referred, to lead the Department in the successful execution of its law enforcement functions and in its vitally important role in the administration of justice.

Today the Department of Justice is enduring another unfortunate period of turmoil at the top. There is no confirmed Attorney General, no confirmed Deputy Attorney General, and no confirmed Associate Attorney General. There are no less than

six vacancies among the Assistant Attorneys General and more than twenty vacancies among the United States Attorneys. Although I strongly commend the job that the Acting Attorney General, Peter Keisler, and the Solicitor General, Paul Clement, are doing under difficult circumstances, the Department simply cannot function at the very highest level of efficiency and effectiveness that it should with so many major vacancies in its top leadership corps.

Let me comment in particular on the importance of the Justice Department's enforcement of our Nation's criminal laws. The prosecutorial function is the unique responsibility of the Department of Justice in our Federal Government. Although I am not passing judgment on the recent controversy over the dismissal of certain United States Attorneys, I will say that it is absolutely essential that the unique prosecutorial function of the Justice Department must be carried out in a strictly non-partisan, unquestionably fair, and even-handed manner—both in fact and in appearance. In other words, Federal prosecutors must follow the evidence where it leads—without fear or favor. Nothing could be more important. The Department of Justice simply must retain its unique degree of independence because the Department, alone among the agencies of the Federal government, has the power of criminal prosecution.

I understand that a very distinguished former United States Attorney, Mary Jo White, will be testifying about the personal qualifications of Judge Michael Mukasey to be the Nation's 81<sup>st</sup> Attorney General. I do not know Judge Mukasey personally, but I, like many others, admire his record. He spent four years as a career Federal prosecutor in

a very important U.S. Attorney's office, that of the Southern District of New York. It is a testament to his record of accomplishment in that role that President Ronald Reagan nominated and, by and with the advice and consent of the Senate, appointed Michael Mukasey to be a Judge of the United States District Court for that same District. In his eighteen years on the Federal bench, Judge Mukasey served with distinction, earning, in particular, a well-deserved reputation for the manner in which he conducted the proceedings of his trial court in major cases of importance to the national security of the United States.

Just as the role of Federal prosecutor is a unique, independent, and non-partisan one, so the job of United States District Judge is one that must be conducted in exactly that same manner. Judge Mukasey has a strong reputation for having done precisely that. At this critically important time for the Department of Justice, in Judge Mukasey, the salient qualities of the person and the critical needs of the moment are well matched. There is no question in my mind that Michael Mukasey is the right person at this time to fill the supremely important, singularly unique role of chief law enforcement officer of the United States.

In closing, Mr. Chairman, let me recall one of the most moving and memorable experiences of my service as Attorney General. In 1989, it was my privilege to lead the Department of Justice during the celebration of the 200<sup>th</sup> anniversary of the creation of the position of Attorney General of the United States. Nearly all of the living Attorneys General—stretching all the way back to President Eisenhower's first Attorney General,

Herbert Brownell—returned to the Department of Justice for an historic commemoration of that milestone. We were also honored to have Ethel Kennedy, the widow of the 64<sup>th</sup> Attorney General of the United States, Robert F. Kennedy, in whose honor the Main Justice Department building is now appropriately named, with us that day. The group included distinguished Attorneys General appointed by Presidents of both parties, including William Rogers, Elliot Richardson, Edward Levi and Griffin Bell. I am confident that when Michael Mukasey takes office as our Nation's 81<sup>st</sup> Attorney General, the Department of Justice can and will embark on a time of healing, renewal and exemplary leadership. I am equally confident that ultimately, when he leaves office, Judge Mukasey will have earned his place among the very top ranks of our Nation's finest Attorneys General.

Thank you, Mr. Chairman. I would be pleased to answer any questions that you or the other members of the Committee may have for me.

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# The Washington Post

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The Washington Post

October 12, 2007 Friday  
Regional Edition

### In Defense of the Office of Legal Counsel

**SECTION:** EDITORIAL COPY; Pg. A16**LENGTH:** 200 words

We write on behalf of all nine deputy assistant attorneys general who currently work or formerly worked for Steven G. Bradbury during his tenure as acting head of the Office of Legal Counsel.

One or more of us have worked with him on virtually every issue that has gone through the office, and each of us is intimately familiar with how the office has treated the legal issues that have come before it.

The summary assertion in the Oct. 7 editorial "More Torture Memos," that in recent years the office's professionalism has been compromised, was not only deeply unfair to Mr. Bradbury and the rest of OLC's staff but was also remarkably ill-informed. Mr. Bradbury is a careful lawyer of unimpeachable integrity and sound judgment. He always strives to get the law right and always demands the same from us. Under Mr. Bradbury's leadership, the office has never hesitated to say no.

Under Mr. Bradbury, the office has also played a critical role in bringing greater transparency to the legal basis for the administration's policies.

JOHN A. EISENBERG

Deputy Assistant Attorney General

HOWARD C. NIELSON JR.

Former Deputy Assistant Attorney General

Office of Legal Counsel

U.S. Department of Justice

Washington

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**STATEMENT OF MARY JO WHITE**

(Partner, Debevoise & Plimpton LLP  
Former United States Attorney  
for the Southern District of New York)

**On the Nomination of Judge Michael B. Mukasey  
To Be the Attorney General of the United States**

**before the**

**United States Senate  
Committee on the Judiciary**

**October 17, 2007**

**Statement of Mary Jo White**

**On the Nomination of Judge Michael B. Mukasey  
To Be the Attorney General of the United States**

Senator Leahy, Senator Specter, Members of the Committee, my name is Mary Jo White. I am currently the Chair of the Litigation Group at the law firm of Debevoise & Plimpton LLP. I am honored to have been invited to appear before you today.

It is my privilege to speak on behalf of the nomination of Judge Michael B. Mukasey to become the next Attorney General of the United States. Judge Mukasey is a man of great intellect and integrity with an unswerving commitment to the rule of law. He is independent, fair-minded and has a wealth of relevant experience from his years of service on the federal bench, in the private sector and as an Assistant United States Attorney. There could not be, in my view, a stronger or better nominee to head the Department of Justice, particularly at this time when the Department is in need of a strong and respected leader as our country faces one of the greatest challenges in its history--to secure the nation against the threat from al-Qaeda and related terrorist networks, and to do so consistently with the law and our principles as a free and democratic society. I have no doubt that Judge Mukasey, if confirmed as Attorney General, will meet that challenge, on behalf of the Department of Justice, effectively, intelligently and with sensitivity to all of the complex issues that are inherent in this challenge to which there are no easy or obvious solutions. I am equally confident that Judge Mukasey will be a superb leader of the Department in carrying out its many other important responsibilities and priorities that are vital to the safety and well-being of our country and the American people.

By way of background, let me tell the Committee how I know Judge Mukasey. From June 1, 1993 until January 7, 2002, I served as the United States Attorney for the Southern District of New York, the judicial district in which Judge Mukasey served as a United States District Court Judge for over 18 years, and as its Chief Judge beginning in 2000 until he retired from the bench in 2006.\* As U.S. Attorney, I observed directly, and through the approximately 200 Assistant United States Attorneys whom I supervised, the outstanding work of Judge Mukasey, who day in and day out administered justice evenhandedly, with a deep knowledge of the law and with rigorous adherence to the rule of law. As a judge, he embodied all of those qualities of intelligence, temperament, preparedness and fairness that bring high credit and honor to our American system of justice. In each encounter I have had with Judge Mukasey, I have come away with deep

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\* A more detailed statement of my background is attached to this statement.

admiration for him as a person, a lawyer and as a public servant. I thus join with the many others who strongly support his nomination, including representatives of both the defense bar and prosecutors.

I have personally observed Judge Mukasey in his courtroom in the Southern District of New York preside over many challenging cases with unparalleled ability, fairness and dignity. Prominent among these cases was the complex and potentially volatile terrorism trial of the leader of the al-Gama'a terrorist organization, Sheik Omar Abdel Rahman, and nine of his co-defendants, who were charged with an horrific plot to blow up, in a single day, the tunnels connecting New York and New Jersey, the George Washington Bridge, the United Nations, and the FBI's headquarters in Manhattan. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). In this "Day of Terror" case, Judge Mukasey was called upon to deal with and decide novel and some of the most difficult issues ever faced by any court. And he did so, while constantly keeping his eye on the primary ball in any trial--to ensure a fair proceeding for all parties.

In affirming the convictions of the defendants, the Court of Appeals for the Second Circuit said this, in a rare statement of appellate praise:

"The ten defendants were accorded a full and fair jury trial. . . . The trial judge, the Honorable Michael B. Mukasey, presided with extraordinary skill and patience, assuring fairness to the prosecution and to each defendant and helpfulness to the jury. His was an outstanding achievement in the face of challenges far beyond those normally endured by a trial judge." *Id.* at 160.

What Judge Mukasey learned substantively and procedurally from this trial will, I believe, serve him very well as Attorney General as he shapes and guides the Department of Justice's role and policies in addressing the grave threat posed by radical Islamic terrorism.

In this regard, I would like to just briefly comment on two issues that have been debated since the attacks of September 11<sup>th</sup> and which have been discussed by some in connection with Judge Mukasey's nomination: how best to deal with individuals accused of committing terrorist acts against the United States and the propriety of using the federal material witness warrant statute, 18 U.S.C. § 3144, for witnesses believed to have material information relevant to an investigation by a federal grand jury of terrorist crimes, such as occurred with intensity in the Southern District of New York after the attacks of September 11<sup>th</sup>.

As I testified five years ago before the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence Joint Inquiry into the

September 11<sup>th</sup> Terrorist Attacks, while I was United States Attorney for the Southern District of New York, our Office was responsible for the investigations and successful prosecutions of most of the major international terrorist cases before September 11<sup>th</sup>, including the “Day of Terror” case, the bombing of the World Trade Center in 1993, the Manila Air Plot hatched by Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing and Khalid Sheik Mohammed, the mastermind of the September 11<sup>th</sup> attacks, and the bombing of our embassies in East Africa in 1998 for which Osama bin Laden and the entire al-Qaeda leadership were indicted. The prosecutors involved in those cases learned a great deal about the terrorist threat we face from Islamic fundamentalists and all of us, I believe, came to share the view that the civilian criminal justice system cannot be the or the primary means of effectively combating international terrorism.

This terrorist phenomenon and threat are different than and go beyond conventional crimes. And the civilian criminal justice system, as effective as it has been in a few individual cases, has significant limitations as to what it can accomplish and weaknesses, which I detailed in my prior testimony, when it is used to try terrorist crimes, which will necessarily involve disclosure of extremely sensitive intelligence and national security information that can be difficult, if not impossible, to manage successfully in our civilian criminal courts and under our rules of criminal procedure. Other, more optimal, but uncompromisingly lawful and fair alternatives or supplements to our civilian criminal justice system need to be explored and considered.

Since leaving the bench, Judge Mukasey has publicly expressed similar concerns and questions, and has urged that Congress and others give serious study to these issues which present excruciatingly difficult questions with no easy answers. We need our best and most open minds to apply themselves to them. We are indeed fortunate as a country to have someone of Judge Mukasey’s knowledge, experience, and thoughtfulness to be in a position to provide his input and leadership on these issues.

As to the material witness warrants issued after September 11<sup>th</sup>, I will comment very briefly. It was initially my decision, as United States Attorney, to use that statute in connection with the very intense investigation our United States Attorney’s Office and a federal grand jury sitting in Manhattan was conducting of al-Qaeda and the September 11<sup>th</sup> attacks. To my mind, doing so was a straightforward application of 18 U.S.C. § 3144, the federal material witness warrant statute, for situations where we had information that an individual likely had information material to that critical investigation and was a risk to flee before the grand jury could secure that information. Such warrants were sought based on the facts we had and our good faith belief that a material witness warrant was justified under the law.

Federal judges, including Judge Mukasey, were presented with applications for material witness warrants and were required to decide, based on the statute and the facts presented whether such warrants should issue. If the warrant was approved, the material

witness was brought before a federal judge, had counsel appointed, a bail hearing and the opportunity to argue that the warrant should be vacated. Although I am certainly aware of and understand the criticism that this procedure was used too frequently after September 11<sup>th</sup>, in my view, it would have been a dereliction of our duty as prosecutors not to use this established and lawful procedure to investigate al-Qaeda and the September 11<sup>th</sup> attacks.

Another daunting challenge any Attorney General has is to oversee and manage the over 100,000 employees of the Department of Justice, and its many programs and component parts. While Judge Mukasey, of course, has not been previously called upon to manage an organization of the kind and size of the Department of Justice, I believe he brings to that task both the right qualities and relevant experience. He is first and foremost a leader with credibility who, by example, motivates professionals to do the best work of which they are capable. He is organized, efficient, works extremely hard and has the ability and judgment to prioritize and delegate wisely.

As Chief Judge of the United States District Court in New York for six years, Judge Mukasey was called upon to manage our largest and oldest federal court, with over 40 active and senior United States District Judges, 15 United States Magistrate Judges, and 11 bankruptcy judges. The Southern District of New York federal court has one of the busiest and most complex dockets in the country. Typically, over 12,000 new cases (criminal and civil) are filed each year.

The Chief Judge of the Southern District of New York is ultimately responsible for, among other things, the budget, security issues, personnel, infrastructure, subcommittees on various issues affecting the court, litigants and juries, inter-agency communications and docket administration. In addition to having responsibility for these issues, Judge Mukasey, as Chief Judge, guided the federal court in the Southern District of New York from a paper filing system to the Electronic Case Filing System and put in place the first emergency preparedness program for a federal court. As it happened, Judge Mukasey was fortunately the Chief Judge of the Southern District of New York District Court on September 11<sup>th</sup>. His leadership during this time of extreme crisis has been accurately described by many as heroic.

The Southern District of New York's courthouses in Manhattan are located just a few blocks from where the World Trade Center stood. All of us working in the vicinity of the courthouse complex on September 11<sup>th</sup> personally witnessed the horror of that day and were required to respond to the physical and emotional issues of our staffs and then work to try to restore normal functioning in the aftermath of the most abnormal and jolting experience any of us had ever encountered. Judge Mukasey directed that the two Manhattan courthouses be closed for a week while he maintained an operational base for the court at the federal courthouse in White Plains, New York, some 30 miles north of Manhattan. He also ensured that the court processes remained available at all times for essential business and applications.

On Tuesday, September 18, 2001, because of Judge Mukasey's planning and leadership, the federal courts in Manhattan were able to reopen fully for business, despite badly disrupted or non-existent phone and computer services and significant transportation issues, not to mention the emotional stress of the court's employees. But as the District Executive, Clifford Kirsch, who works for the Chief Judge observed: "Almost everyone who worked at the courthouse...was back at their desk....[I]t was very important to come back downtown and to come back to work. Everyone wanted to be together to do our best to show that life would go on in New York...." For the Southern District of New York, Judge Mukasey and the District Executive staff he managed made that possible.

In sum, I believe that, however he is measured, Judge Mukasey will be a superb Attorney General. He will hit the ground running at the Department of Justice, and deal effectively with its full range of priorities and problems. He will lead and inspire the career lawyers at the Department and in the field, as well as the United States Attorneys. He will remain the person he has always been--a dedicated, hardworking public servant with the ability and humility to do an outstanding job of which we will all be proud. I urge that the Senate confirm him.

Thank you for inviting me to testify.

Mary Jo White

