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,

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 Congresso, 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 Comission, 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 suffered 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.[1]

- 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."

---

[1] 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 solider, 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.

- 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.

- 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.

- 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.
  - 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 rational.
    - 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.

- 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 "harshest 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 again 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 Rubenfeld, 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. Rubenfeld'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 <u>any</u> 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 dignity and not later accused of being incompetent when it simply isn't true. Please comment on the following specific grounds for firing.

a. Would it be appropriate to fire a U.S. Attorney for not prosecuting enough immigration cases, if no notice is ever given that the administration found inadequate the number of immigration cases that were pursued by that U.S. Attorney?

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 Rubenfeld 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 that 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 monopsonistic and monopolistic 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 identity, 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 21st 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 21st 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.